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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

[Redacted]

DATE: JUN 11 2013

OFFICE: VERMONT SERVICE CENTER

FILE: [Redacted]

IN RE: Petitioner:
Beneficiary:

[Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director of the Vermont Service Center denied the nonimmigrant visa petition. Counsel for the petitioner appealed the denial to the Administrative Appeals Office (AAO). The AAO dismissed the appeal. The matter is again before the AAO on a joint motion to reopen and motion to reconsider filed by counsel for the petitioner. The joint motion will be dismissed.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on April 1, 2010.¹ On the Form I-129 visa petition, the petitioner describes itself as a business involved in investment and management services / research and publishing that was established in 1995. In order to continue to employ the beneficiary in what it designates as a publication manager position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the statutory and regulatory provisions. Thereafter, on November 15, 2010, counsel for the petitioner submitted a Notice of Appeal or Motion (Form I-290B), indicating that she was submitting an appeal of the director's denial of the petition to the AAO. The AAO reviewed the evidence and determined that the record of proceeding contained insufficient evidence to establish that the petitioner would employ the beneficiary in a specialty occupation position.² The AAO dismissed the appeal.

On May 27, 2011, counsel submitted another Form I-290B. As indicated by the check mark at Box F of Part 2 of the Form I-1290B, counsel filed a motion to reopen and motion to reconsider. In support of the joint motion, counsel submitted a brief and additional evidence.

The record of proceeding before the AAO contains: (1) the Form I-129 petition and supporting

¹ On the Form I-129 petition, the company or organization name is listed as [REDACTED]. The accompanying letter of support (dated January 26, 2010) is on [REDACTED] letterhead and states that [REDACTED] is a Virginia investment and management corporation" and that [REDACTED] wishes to continue to employ [the beneficiary] as a Publications Manager." In an undated brief submitted with the appeal, counsel states that: "The Petitioner, [REDACTED] is a Virginia corporation." Counsel continues by stating that "[a]mong its management and employment services, it is the agent for the [REDACTED]. She later references [REDACTED] as "a small, 12-person company." In a letter from [REDACTED] dated May 23, 2011 (submitted with the motion), Mr. [REDACTED] states that [REDACTED] are separate entities. Mr. [REDACTED] further states that "[a]lthough [REDACTED] is the entity that makes salary payments to [the beneficiary], he is employed by [REDACTED]. With the motion, counsel submitted a "Management Contract" dated January 1, 1996, which indicates that [REDACTED] is "a Pennsylvania non-profit corporation" and that [REDACTED] is "a Virginia corporation."

² In the dismissal of the appeal, the AAO addressed the director's finding that the proffered position did not qualify as a specialty occupation and the petitioner's failure to overcome the basis for the denial of the petition. In the interest of efficiency, the AAO is not required to address every ground of ineligibility that it identifies beyond the director's decision as any additional issues are moot.

documentation; (2) the director's request for evidence (RFE); (3) the response to the RFE; (4) the director's decision; (5) the Form I-290B appeal; (6) the AAO's decision dismissing the appeal; and (7) the Form I-290B motion to reopen and motion to reconsider. The AAO reviewed the record in its entirety before issuing its decision.

As a preliminary matter, the AAO notes that the petitioner failed to comply with the regulatory filing requirements for motions to reopen and motions to reconsider. Specifically, the regulation at 8 C.F.R. § 103.5(a)(1) states the following:

(iii) Filing Requirements—A motion shall be submitted on Form I-290B and may be accompanied by a brief. It must be:

* * *

(C) Accompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding;

In this matter, the submission constituting the joint motion does not contain a statement as to whether or not the unfavorable decision has been or is the subject of any judicial proceeding as required by 8 C.F.R. § 103.5(a)(1)(iii)(C). Moreover, if the decision has been or is the subject of any judicial proceeding, the petitioner failed to provide any information regarding "the court, nature, date, and status or result of the proceeding" as stipulated in the regulations. Thus, the petitioner and counsel failed to comply with the requirements as set by the regulation for properly filing a motion.

The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant joint motion does not meet the applicable filing requirement as stated at 8 C.F.R. §103.5(a)(1)(iii)(C), it must be dismissed.

Although the motion to reopen and motion to reconsider will be dismissed for the petitioner's failure to comply with the filing requirements, the AAO nonetheless reviewed the joint motion, and finds that even if the petitioner had complied with the requirements at 8 C.F.R. § 103.5(a)(1)(iii)(C), both the motion to reopen and the motion to reconsider must also be dismissed for the reasons discussed below.³

Counsel requests that the decision in the instant matter be reopened. The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in

³ The AAO notes that further discussion regarding the motion to reopen and motion to reconsider is provided to assist the petitioner and its counsel in understanding the deficiencies in the record of proceeding. It must be emphasized that the issues are moot as the joint motion does not satisfy the requirements of a motion. Therefore, the AAO's prior decision will not be disturbed.

the reopened proceeding and be supported by affidavits or other documentary evidence." Based upon the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.⁴ The new facts submitted on motion must be material and previously unavailable, and could not have been discovered earlier in the proceeding. *Cf.* 8 C.F.R. § 1003.23(b)(3).

On motion, counsel requests that the AAO reopen the decision based on the additional evidence filed with the motion. The AAO notes that in the instant case, the joint motion before the AAO contains the following documents: (1) a letter from Dr. [REDACTED] vice president of the [REDACTED] dated May 23, 2011; (2) a letter from Dr. [REDACTED] director of administration for [REDACTED], dated January 25, 2011; (3) a copy of the section of the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* entitled "Computer Software Engineers and Computer Programmers"; (4) a "Management Contract," dated January 1, 1996 between [REDACTED] and [REDACTED] (5) a statement from [REDACTED] the petitioner's accountant, dated January 5, 2011; (6) copies of Form W-2, Wage and Tax Statements, issued to the beneficiary by [REDACTED] for 2003 through 2009; and (7) printouts of e-mail correspondence between the beneficiary and various individuals.

The AAO reviewed all of the evidence submitted in support of the instant motion. Upon review of the submission, the AAO observes that the petitioner and counsel have not provided any "new facts" and that the instant motion to reopen does not contain any "new" evidence. More specifically, the AAO finds that the petitioner and counsel have failed to submit material evidence that was previously unavailable. Evidence that was available or discoverable by the petitioner in the previous proceeding cannot be considered "new" facts.

More specifically, in the instant case, counsel submitted a statement from Mr. [REDACTED] dated May 23, 2011. Mr. [REDACTED] attests to the educational requirements of the proffered position, the sufficiency of the previously submitted evidence, and the relationship between the petitioner and [REDACTED]. Although the letter is dated subsequent to the prior proceeding in this matter, the AAO notes that the content of the letter does not provide any new material facts. Thus, the letter cannot be considered new evidence.

The AAO further notes that the letters from Dr. [REDACTED] and Ms. [REDACTED] the petitioner's accountant, are both dated prior to the conclusion of the prior proceeding, and thus were previously available and discoverable. The AAO observes that even if the letters had been dated subsequent to

⁴ The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence>" WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

⁵ Mr. [REDACTED] references the "Management Contract" between [REDACTED] and the petitioner, which governs the services provided to [REDACTED] by the petitioner, including payroll services. As previously noted, the contract is dated January 1, 1996. The information provided in the contract was therefore available and discoverable during the prior proceeding in this matter.

the conclusion of the prior proceeding in this matter (which they were not), the content of the letters does not provide any new material facts. Dr. [REDACTED] letter "confirm[s] that [the beneficiary] has been performing the job duties of Publication Manager, as set forth in the H-1B petitions filed on his behalf by [REDACTED] since he began working in the position in June 2001." The letter further discusses these duties. Thus, the information contained in this letter was available and discoverable since June of 2001 and could have previously been submitted. The letter from Ms. [REDACTED] the petitioner's accountant, describes the payroll payments that the petitioner makes to [REDACTED] employees. It also confirms the beneficiary's employment with [REDACTED] since 2001. Ms. [REDACTED] writes that she has "provided accounting services to [the petitioner] since 1996 and [has] performed the payroll services for employees of [REDACTED] since that date." Thus, the information that she provides was available during the prior proceeding in this matter. Upon review of the letters, the AAO concludes that letters do not contain new material facts upon which to reopen the instant petition.

In addition, the AAO notes that on motion counsel submitted an excerpt from the *Handbook* regarding the occupational category "Computer Software Engineers and Computer Programmers." The AAO takes administrative notice that the *Handbook* has been published since 1949. Furthermore, the AAO notes that the *Handbook* (including the version submitted on motion) was available and discoverable during the prior proceeding in this matter.⁶ It does not constitute new material evidence.

With the motion, counsel also provided the beneficiary's Form W-2, Wage and Tax Statements, for 2003 through 2009. The AAO notes that the information that she provides was available during the prior proceeding in this matter and, in fact, many of the Form W-2 statements were previously provided by the petitioner in response to the director's RFE. Accordingly, the documentation does not provide new facts upon which to reopen the instant petition.

Finally, the AAO has reviewed the e-mail correspondence provided in support of the instant motion. According to counsel, the e-mail correspondence provided in support of the instant joint motion is "representative samples or [the beneficiary's] work and the duties he performs [in the proffered position] at [REDACTED] (*We note that these are current and are representative of his work since he began employment in June 2001*) [emphasis added]." The email correspondence is dated from 2008 to 2011. The AAO notes that the correspondence included in the submission is dated prior to the AAO's previous decision in this matter. Moreover, the content of the e-mails, in consideration of the purpose for which they were provided, was available and discoverable during the prior proceeding. Notably, counsel acknowledges that the content of the e-mails is not new, but rather "representative of his work since . . . 2001." There is no indication that the petitioner was unable to previously provide such samples. The petitioner could have provided any evidence it deemed appropriate to meet its burden of proof during the prior proceeding, and could have provided

⁶ Additionally, the AAO observes that the petitioner designated the proffered position under the occupational category "Editors." Counsel claims that the excerpt of the *Handbook* regarding "Computer Software Engineers and Computer Programmers" has been provided to explain that degrees in many different fields of study prepare an individual to perform the duties of a computer software engineer. The AAO observes that the requirements for computer software engineers are not relevant to the present matter.

samples of the beneficiary's work (in any format) had it so desired. The fact that the petitioner elected to provide this previously available and discoverable evidence on motion, does not render it "new" evidence or new facts for the purpose of the instant motion to reopen.

In the instant case, the petitioner and counsel have not submitted information or evidence that constitutes new facts for a motion to reopen. The AAO notes that motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden" of proof. *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden.

Upon review of the submission, the AAO notes that the petitioner and counsel have not provided any "new facts" and that the instant motion does not contain any "new" evidence. There is no indication that the evidence submitted was not available and could not have been discovered or presented in the previous proceeding.⁷ Thus, it fails to meet the requirements for a motion to reopen at 8 C.F.R. § 103.5(a)(2). Accordingly, the motion to reopen will be dismissed for this additional reason.

Turning to the petitioner's motion to reconsider, the AAO again notes that as the motion was not properly filed pursuant to 8 C.F.R. §103.5(a)(1)(iii)(C), it must be dismissed. Nevertheless, the AAO reviewed the entire record of proceeding prior to issuing this decision, and finds that even if the petitioner had complied with the filing requirements at 8 C.F.R. §103.5(a)(1)(iii)(C), the motion to reconsider must be dismissed for the reasons discussed below.

A motion to reconsider must state the reasons for reconsideration and be supported by citations to pertinent statutes, regulations, and/or precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on a petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. See 8 C.F.R. § 103.5(a)(3) (requirements for a motion to reconsider) and the instructions for motions to reconsider at Part 3 of the Form I-290B.⁸ The AAO does not

⁷ Furthermore, the AAO notes that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). In the instant case, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents with the initial petition or in response to the director's request for evidence. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The petitioner has not provided a valid reason for failing to previously provide the evidence.

⁸ The provision at 8 C.F.R. § 103.5(a)(3) states the following:

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to

find that the petitioner has established that the AAO's prior decision was based on an incorrect application of law or USCIS policy.

In the instant case, counsel claims that the AAO's decision should be reversed, but has not submitted any document that would meet the requirements of a motion to reconsider. A motion to reconsider that merely restates the arguments that the AAO previously rejected provides no reason for the AAO to change its prior decision. That is, reiterating arguments that were previously presented to the AAO does not constitute specifying errors in the application of law or USCIS policy as required for a successful motion to reconsider. Counsel fails to establish that the decision was based on an incorrect application of law or USCIS policy. Moreover, counsel has not established that the decision was incorrect based on the evidence of record that was before the AAO at the time of its initial decision. Thus, the petitioner and counsel have failed to comply with the requirements of a motion to reconsider. Thus, the motion to reconsider must be dismissed.

Although the joint motion is dismissed for failing to meet the applicable requirements for a motion to reopen and motion to reconsider, the AAO will address an issue pertaining to the petitioner's eligibility to extend its employment of the beneficiary in H-1B classification.⁹ Specifically, the AAO notes that the petition must be denied as it was filed after the expiration of the petition it sought to extend. As will be discussed, as opposed to a discretionary extension of stay application, there is no discretion to grant a late-filed petition extension.¹⁰

reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

This regulation is supplemented by the instructions on the Form I-290B, by operation of the rule at 8 C.F.R. § 103.2(a)(1) that all submissions must comply with the instructions that appear on any form prescribed for those submissions. With regard to motions for reconsideration, Part 3 of the Form I-290B submitted by the petitioner states:

Motion to Reconsider: The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions.

The regulation at 8 C.F.R. § 103.2(a)(1) states in pertinent part:

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions . . . and such instructions are incorporated into the regulations requiring its submission.

⁹ It must be emphasized that the issue is moot as the motion does not satisfy the requirements of a motion to reconsider as required by the regulations. Therefore, the AAO's prior decision may not be disturbed pursuant to this dismissed motion. Again, the AAO notes that the discussion is provided to assist the petitioner and its counsel in understanding the deficiencies in the record of proceeding.

¹⁰ It must be noted for the record that, even if eligibility for the benefit sought was otherwise established, as the authority of the AAO is limited to that specifically granted or delegated to it by the Act, its implementing regulations, and the Secretary of the U.S. Department of Homeland Security pursuant to 8 C.F.R. § 2.1, the

Notably, a request for a petition extension and a request for an extension of stay are both filed together on the Form I-129. Specifically, the requests are: (1) the petitioner's request to classify the employment offer as appropriate for the H-1B category (the basis for classification); and (2) the request for the procedural benefit relevant to the beneficiary's authorized stay in the United States (requested action).¹¹ The regulations are clear, however, that even though the request to extend the petition and the request to extend the beneficiary's stay are combined on the Form I-129, the director shall make a separate determination on each. *See* 8 C.F.R. § 214.2(h)(15)(i).

Title 8 C.F.R. § 214.2(h) states, in pertinent part, the following about petition extensions:

(14) *Extension of visa petition validity.* The petitioner shall file a request for a petition extension on Form I-129 to extend the validity of the original petition under section 101(a)(15)(H) of the Act. Supporting evidence is not required unless requested by the director. *A request for a petition extension may be filed only if the validity of the original petition has not expired.*

(Emphasis added.) As noted above, a request for a *petition extension* may be filed only if the *validity of the original petition has not expired*. Thus, the regulations do not permit for the late filing of a *petition extension*.

Title 8 C.F.R. § 214.2(h) provides the following information regarding extension of stay requests:

(15) *Extension of stay--*

AAO cannot grant a petition *nunc pro tunc*. Specifically, the regulations mandate that a petition extension be filed before the validity of the petition being extended has expired. Again, *see* 8 C.F.R. § 214.2(h)(14). Furthermore, a petitioner must establish eligibility for the benefit sought at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Accordingly, as the law does not provide a discretionary basis to do so, the AAO does not possess the authority to grant a petition *nunc pro tunc* in this matter.

¹¹ These functions previously required two separate filings: one by the petitioner (Form I-129H) and the other by the beneficiary. For example, the regulations in 1991 state that a petitioner "shall file a petition in duplicate on Form I-129H with the service center which has jurisdiction over I-129H petitions in the area where the alien will perform services or receive training or as further prescribed in this section." 8 C.F.R. § 214.2(h)(2)(i)(A) (1991). Further, the 1991 regulations state that "[a]n alien . . . shall apply for an extension of stay on Form I-539. . . . [E]ach alien seeking an extension of stay generally must execute and submit a separate application for extension of stay to the district office having jurisdiction over the alien's place of temporary residence in the United States." 8 C.F.R. § 214.1(c)(1)(1991). In implementing the Immigration Act of 1990 (IMMACT90) Pub. L. No. 101-649, 104 Stat. 4978, these functions were combined to more efficiently process the Form I-129. *See* 56 Fed. Reg. 61111 (Dec. 2, 1991).

(i) General. The petitioner shall apply for extension of an alien's stay in the United States by filing a petition extension on Form I-129 accompanied by the documents described for the particular classification in paragraph (h)(15)(ii) of this section. *The petitioner must also request a petition extension.* The dates of extension shall be the same for the petition and the beneficiary's extension of stay. The beneficiary must be physically present in the United States at the time of the filing of the extension of stay. *Even though the requests to extend the petition and the alien's stay are combined on the petition, the director shall make a separate determination on each.* If the alien is required to leave the United States for business or personal reasons while the extension requests are pending, the petitioner may request the director to cable notification of approval of the petition extension to the consular office abroad where the alien will apply for a visa. When the total period of stay in an H classification has been reached, no further extensions may be granted.

(Emphasis added.) As previously mentioned, while the regulations state that the request to extend the petition and the request to extend the beneficiary's stay are combined on the Form I-129, a separate determination is made on each request.

Notably, 8 C.F.R. § 214.1 states, in pertinent part, the following about *extension of stay* requests:

(c) *Extension of stay* –

* * *

(4) Timely filing and maintenance of status. An *extension of stay* may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed, except that failure to file before the period of previously authorized status expired may be excused in the discretion of the Service and without separate application, with any extension granted from the date the previously authorized stay expired, where it is demonstrated at the time of filing that:

(i) The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds the delay commensurate with the circumstances;

(ii) The alien has not otherwise violated his or her nonimmigrant status;

(iii) The alien remains a bona fide nonimmigrant; and

(iv) The alien is not the subject of deportation proceedings under section 242 of the Act (prior to April 1, 1997) or removal proceedings under section 240 of the Act.

(Emphasis added.) As evident from the above regulations, a request for a petition extension can be distinguished from a request for an *extension of stay* in that the late filing of a request for an extension of stay may be excused at the discretion of the director under certain circumstances. In contrast, as noted earlier, the regulations clearly state that a "*request for a petition extension may be filed only if the validity of the original petition has not expired.*" See 8 C.F.R. § 214.2(h)(14) (emphasis added).

The distinct aspects of a request for a *petition extension* and a request for an *extension of stay* are further illustrated by the regulations regarding the denials of these separate requests.

Title 8 C.F.R. § 214.2(h)(10)(ii) provides the following with regard to denials:

(ii) Notice of denial. The petitioner shall be notified of the reasons for the denial and of the right to appeal the denial of the petition under 8 CFR part 103. The petition will be denied if it is determined that the statements on the petition were inaccurate, fraudulent, or misrepresented a material fact. *There is no appeal from a decision to deny an extension of stay to the alien.*

(Emphasis added.) The regulations limit the AAO's jurisdiction over petitions for temporary workers to those described under 8 C.F.R. §§ 214.2 and 214.6. See 8 C.F.R. § 103.1(f)(3)(iii)(J) (2003). While a petitioner may appeal the denial of certain petitions (including a timely filed H-1B extension petition), the regulations state that "[t]here is no appeal from a decision to deny an extension of stay to the alien."

Furthermore, 8 C.F.R. § 214.1 states, in pertinent part, the following:

(c) *Extension of stay* –

* * *

(5) Decision in Form I-129 or I-539 extension proceedings. Where an applicant or petitioner demonstrates eligibility for a requested extension, it may be granted at the discretion of the Service. *There is no appeal from the denial of an application for extension of stay filed on Form I-129 or I-539.*

(Emphasis added.) Notably, the regulation at 8 C.F.R. § 214.1(c)(5) refers to an "application for extension of stay filed on Form I-129 or I-539." That is, the regulation does not refer to the request for an extension of stay filed on a Form I-129 as a petition, but rather as an application. Thus, the distinct aspects of the request for an extension petition and a request for an extension of stay are further clarified. A request for an extension of stay in an H-1B submission is not a petition within the meaning of section 214(c)(1) of the Act, 8 U.S.C. § 1184(c)(1), and does not confer any of the appeal rights normally associated with a petition. The Form I-129 in this context is merely the

vehicle by which information is collected to make a discretionary determination on the request (i.e., application) for an extension of stay.

In the instant case, the petitioner stated on the Form I-129 (in Part 2.1) that it was requesting H-1B nonimmigrant classification. The petitioner marked (in Part 2.2) the "Basis for Classification" as "Continuation of previously approved employment without change with the same employer." In the section entitled "Requested Action" (Part 2.3) the petitioner marked "Extend the stay of the person(s) since they now hold this status."

Notably, the petition that the petitioner sought to extend (WAC 06 251 3310) expired on June 17, 2007. The instant petition was filed on April 6, 2010, almost three years after the expiration of the last approved petition filed by the petitioner on behalf of the beneficiary. The AAO notes that USCIS records indicate that additional H-1B petitions were filed between May 1, 2007 and January 8, 2009 on behalf of the beneficiary. The AAO observes that each of these H-1B petitions was denied prior to the filing of the instant petition.

The instant petition was filed after the expiration of the petition it sought to extend. *See* 8 C.F.R. § 214.2(h)(14) (stating that a "request for a petition extension may be filed only if the validity of the original petition has not expired"). There is no discretion to grant a late-filed petition extension. USCIS does not have the discretion to disregard its own regulations, even if it would benefit a petitioner. *See Reuters Ltd. v. F.C.C.*, 781 F.2d 946 (C.A.D.C. 1986) (an agency must adhere to its own rules and regulations; ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned). Thus, even if the petitioner had otherwise established eligibility, which it did not, the petition cannot be approved.

As previously discussed, the instant motion does not meet the applicable filing requirement. Accordingly, it must be dismissed. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.¹²

It should be noted for the record that, unless USCIS directs otherwise, the filing of a motion to reopen or reconsider does not stay the execution of any decision in a case or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

Title 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the joint motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The joint motion is dismissed.

¹² The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). However, as the motion will be dismissed for the reasons discussed in this decision, the AAO will not address the petitioner's failure to previously clearly identify the actual petitioning company (including on the Form I-129 petition, LCA and supporting documents) and the relationship between Reston Investments, Inc. and IIT, as well as the additional issues and deficiencies that the AAO observes in the record of proceeding.