



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[Redacted]

DATE: **MAY 17 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: [Redacted]

IN RE: Petitioner: [Redacted]  
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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner submitted the Form I-129 (Petition for a Nonimmigrant Worker) to the California Service Center on July 8, 2011. On the Form I-129 visa petition and supporting documentation, the petitioner described itself as an enterprise engaged in education.<sup>1</sup> In order to continue to employ the beneficiary in what it designates as a pre-school teacher position, the petitioner seeks to classify her 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).<sup>2</sup>

The director denied the petition on April 13, 2012, finding that the petitioner failed to establish that the beneficiary is exempt from the six-year limitation of authorized stay in H-1B status. In addition, the director denied the petition on the grounds that the petitioner failed to submit sufficient evidence regarding its business operations, which precluded a material line of inquiry in the adjudication of the petition. On May 15, 2012, counsel for the petitioner filed a joint motion to reopen and reconsider the director's decision, stating that the beneficiary had not reached the statutory six-year limit on H-1B status. Counsel requested the petition be granted *nunc pro tunc* from September 29, 2010 to December 10, 2010.<sup>3</sup> The director reviewed counsel's submission and determined that the petitioner had not established eligibility for the benefit sought. Thereafter, counsel for the petitioner submitted an appeal of the decision.

The AAO has reviewed the record in its entirety and notes a more critical issue pertaining to the petitioner's eligibility to extend its employment of the beneficiary in H-1B classification. Specifically, the petition must be denied as it was filed after the expiration of the petition it sought to extend. See 8 C.F.R. § 214.2(h)(14).<sup>4</sup> In this matter, the petition that the petitioner sought to extend

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<sup>1</sup> In the Form I-129 petition, the petitioner did not provide its year of establishment, number of employees, approximate gross annual income, or approximate net annual income. No explanation was provided for the failure to submit this information as requested in the Form I-129.

<sup>2</sup> In the instant case, the petitioner stated in 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."

<sup>3</sup> In the Form I-129, the petitioner requested that the petition be granted from October 1, 2010 to September 30, 2013.

<sup>4</sup> 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. . . . *A request for a petition extension may be filed only if the validity of the original petition has not expired.*

(WAC 07 267 51358) expired on September 28, 2010. The instant petition was filed on July 8, 2011, over nine months after the original petition's expiration.

As opposed to a discretionary extension of stay application, there is no discretion to grant a late-filed petition extension.<sup>5</sup> In this matter, the director did not raise this issue in the denial, and thus it appears that the director erroneously exercised favorable discretion to the petitioner under the provisions of 8 C.F.R. § 214.1(c)(4)(i).<sup>6</sup> The director's error is harmless, however, because the AAO conducts a *de novo* review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility, and the omission of this non-discretionary ground for denial did not result in the improper granting of a benefit in this matter, i.e., the error did not change the outcome of this case. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004); *Black's Law Dictionary* 563 (7th Ed., West 1999) (defining the term "*harmless error*" and stating that it is not grounds for reversal).

As noted above, the petition must be denied as it was filed after the expiration of the petition it sought to extend. See 8 C.F.R. § 214.2(h)(14). This non-discretionary basis for denial renders the remaining issues in this proceeding moot.<sup>7</sup> Thus, the appeal must be dismissed and the petition denied. U.S. Citizenship and Immigration Services 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).

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(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*.

<sup>5</sup> 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 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.

<sup>6</sup> As evident from the regulation at 8 C.F.R. § 214.1(c)(4)(i), a request for an *extension of stay* can be distinguished from a request for a petition extension 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).

<sup>7</sup> As previously mentioned, the AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d at 145. However, as the appeal is dismissed, and the petition is denied for the reasons discussed above, the AAO need not nor will it address the additional issues and deficiencies that it observes in the record of proceeding.

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In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The appeal will be dismissed and the petition denied.

**ORDER:** The appeal is dismissed. The petition is denied.