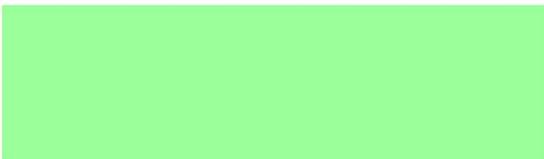


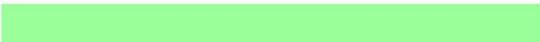


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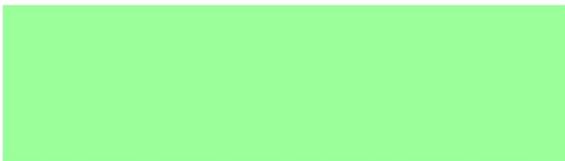


DATE: OFFICE: VERMONT SERVICE CENTER FILE: 

IN RE: **DEC 11 2014**
Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:

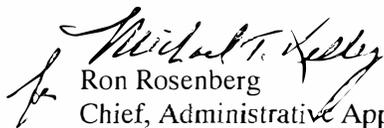


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director (the director) denied the nonimmigrant visa petition and then affirmed his decision in response to a subsequent motion to reopen. The matter is now before us, the Administrative Appeals Office (AAO), on appeal. The director's decision will be withdrawn and the matter remanded for further adjudication and entry of a new decision.

I. PROCEDURAL AND FACTUAL BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as an eleven-employee stone masonry business established in [REDACTED]. In order to temporarily employ the beneficiary in what it designates as a "Construction Helper" position, the petitioner seeks to classify him as an H-2B temporary nonagricultural worker pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

The beneficiary of this petition was previously approved for H-2B employment with the petitioner from March 2, 2012 through November 30, 2012.

With this petition, the petitioner seeks to again employ the beneficiary in H-2B status from February 1, 2013 through November 30, 2013. The temporary labor certification (TLC) submitted by the petitioner in support of this petition was certified for the same period.

The instant petition was properly filed on December 11, 2012, and the director issued a request for additional evidence (RFE) on February 15, 2013. In the RFE, the director noted the request for an extension of the beneficiary's H-2B status; that the beneficiary's previous nonimmigrant status had expired on November 30, 2012; and that the period of employment authorized in the TLC did not start until February 1, 2013. As the beneficiary was therefore not authorized to work between December 1, 2012 and January 31, 2013, the director requested evidence that the beneficiary had been maintaining valid nonimmigrant status during this time.

The director denied the petition on July 1, 2013 due to abandonment pursuant to 8 C.F.R. § 103.2(b)(13). The director advised the petitioner that although a denial due to abandonment could not be appealed,¹ the petitioner could file a motion to reopen pursuant to 8 C.F.R. § 103.5.

The petitioner filed a motion to reopen on July 9, 2013. Counsel submitted evidence that she had in fact submitted a timely response to the RFE, and the director reopened the proceeding. The director denied the petition on September 5, 2013, concluding that the evidence of record does not demonstrate that the beneficiary was maintaining valid H-2B status at the time the petition was filed. The director did not render a determination with regard to the merits of the H-2B petition itself, that is, as to whether the evidence of record meets the substantive H-2B requirements at 8 C.F.R. § 214.2(h)(6). The decision is now before us on appeal.²

¹ 8 C.F.R. § 103.2(b)(15).

² The beneficiary of this petition was also one of several named beneficiaries of two approved H-2B petitions whose periods of approval fell subsequent to the filing date of the instant petition: (1) [REDACTED] which was approved on January 11, 2013 for employment lasting from February 1, 2013 to November 30,

The record of proceeding before us contains the following: (1) the Form I-129 and supporting documentation; (2) the director's RFE; (3) the petitioner's response to the RFE; (4) the director's decision denying the petition; (5) the Form I-290B and supporting documentation relating to the petitioner's motion to reopen the director's decision; (6) the director's decision affirming her decision denying the petition; (7) the Form I-290B and supporting documentation relating to the appeal; (8) our RFE requesting a properly completed and executed current Form G-28 (Notice of Entry of Appearance); and (9) a current Form 28, submitted in response to our RFE.

II. DISCUSSION

As noted, the director did not address the substantive H-2B requirements at 8 C.F.R. § 214.2(h)(6). In other words, the director did not address the merits and validity of the petition itself. Rather, the director's basis for denying the petition was her finding that the beneficiary was not maintaining valid H-2B status at the time the petition was filed. We have no jurisdiction over that particular issue, as the regulations do not provide for an appeal from a denial of an extension of stay filed on Form I-129. *See* 8 C.F.R. § 214.1(c)(5). (Also, the regulations do not provide for an appeal from a denial of a request to change status. *See* 8 C.F.R. § 248.3(g).)

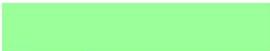
Moreover, the authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). We exercise appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003), with one exception - petitions for approval of schools under 8 C.F.R. § 214.3 are now the responsibility of U.S. Immigration and Customs Enforcement. Appeals from denials of requests to change status and appeals from denials of requests for extension of stay are not listed as matters over which we have jurisdiction.

We therefore have no jurisdiction over the single determination that the director has made, that is, that the beneficiary may not be granted an extension of stay under the circumstances. Accordingly, we leave that determination in place, because it is not appealable.

We will not offer an opinion as to the merits of the petition, as that issue is not before us. However, we will remand this petition to the director for entry of a new decision that will include the director's determination on the merits of the petition, that is, a determination to approve or deny the H-2B petition based upon whether the evidence of record satisfied the substantive H-2B requirements set forth at 8 C.F.R. § 214.2(h)(6).

We respectfully note, that, if the Form I-129 was filed to both (1) extend the validity of the previous petition, and also (2) apply for an extension of the beneficiary's stay, the regulation at 8 C.F.R. § 214.2(h)(15), *Extension of stay*, provides in part, that "[e]ven though the requests to extend the

2013; and (2) [REDACTED] which was approved on March 12, 2014 for employment lasting from March 12, 2014 to November 30, 2014.



petition and the alien's stay are combined on the petition, *the director shall make a separate determination on each.*" (Emphasis added.)

III. CONCLUSION AND ORDER

As discussed, we have no jurisdiction over the attempt to appeal the director's decision regarding the beneficiary's maintenance of status, and that portion of the director's decision will not be disturbed. However, because the director's decision did not make a determination as to the merits of the petition, we are remanding the petition for continued adjudication and entry of a new decision that will include a determination as to the validity of the petition itself.

ORDER: The petition is remanded for continued adjudication and processing in accordance with the above discussion. As always, determination of the issue of a beneficiary's maintenance of nonimmigrant status remains within the sole discretion of the director.