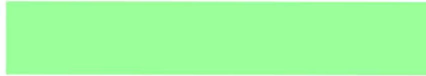
U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W. MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: APR 0 5 2013 OFFICE: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary: 

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)

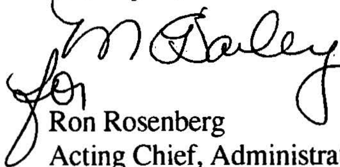
ON BEHALF OF PETITIONER:

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 petitioner submitted an appeal, and the Administrative Appeals Office (AAO) dismissed the appeal. The petitioner filed a motion to reopen and reconsider. The AAO reopened the matter and agreed with the director's decision to deny the petition. The matter is again before the AAO on a motion to reconsider. The motion to reconsider will be dismissed.

The petitioner submitted a Form I-129 (Petition for Nonimmigrant Worker) to the Vermont Service Center on June 19, 2008. On the Form I-129 visa petition, the petitioner describes itself as a telecommunications services company established in In order to continue to employ the beneficiary in what it designates as a synchronous optical network systems engineer position, the petitioner seeks to classify the beneficiary 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 beneficiary is eligible for an extension of stay. Counsel for the petitioner submitted an appeal. The AAO dismissed the appeal as moot. Counsel filed a joint motion to reopen and reconsider. The AAO reopened the proceeding, and found that the petitioner failed to overcome the basis for denial of the petition. Thereafter, counsel for the petitioner submitted a motion to reconsider.

The record of proceeding before the AAO contains: (1) the Form I-129 petition and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the RFE; (4) the director's denial notice; (5) the Form I-290B appeal; (6) the AAO's decision dismissing the appeal; (7) the Form I-290B joint motion to reopen and reconsider; (6) the AAO's decision on the joint motion; and (8) the Form I-290B motion to reconsider. The AAO reviewed the record in its entirety before issuing its decision.[1]

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 U.S. Citizenship and Immigration Services (USCIS) policy. In addition, a motion to reconsider a decision on an application or petition must, when filed, 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.[2]

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[1] The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

[2] The provision at 8 C.F.R. § 103.5(a)(3) provides 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 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.

In the instant case, counsel claims that the decision should be reversed, but provides inconsistent statements as to the basis of her disagreement with the decision. Moreover, counsel has not submitted any document that would meet the requirements of a motion to reconsider. She cites no statutory or regulatory authority, case law, or precedent decision that supports her assertions. 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 at the time of the initial decision. The petitioner and counsel have failed to comply with the procedural requirements of a motion to reconsider as stated at 8 C.F.R. § 103.5(a)(3). Accordingly, the motion to reconsider must be dismissed.

Moreover, even if the submitted motion met the procedural requirements for a motion to reconsider (which it does not), the petition could not be approved.

An alien who will perform services in a specialty occupation may be admitted to the United States as an H-1B nonimmigrant. *See* section 101(a)(15)(H)(i)(B) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(B). A specialty occupation is defined as an occupation that requires (1) theoretical and practical application of a body of highly specialized knowledge, and (2) the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States. *See* section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l). The total number of aliens who may be issued H-1B visas or otherwise accorded H-1B status in a fiscal year may not exceed 65,000. *See* section 214(g)(1)(A)(vii) of the Act, § 8 U.S.C. 1184(g)(1)(A)(vii).

Before filing an H-1B petition on behalf of an alien, a U.S. employer must first obtain certification of a Labor Condition Application (LCA) from the U.S. Department of Labor (DOL) that covers the proposed dates of H-1B employment. Under the LCA, the employer, among other things, attests to the position in which the alien will be employed, the wage to be paid to the alien, and the location

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This regulation is supplemented by the instructions on the Form I-290B, by operation of the regulation 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 counsel states the following:

> 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, the following:

> [E]very benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, and such instructions are incorporated into the regulations requiring its submission.

where the employment will occur. *See* 20 C.F.R. § 655.730(c)(4). Upon certification of the LCA, the petitioner may then file a Form I-129 (Petition for Nonimmigrant Worker) with USCIS seeking approval of H-1B classification on behalf of the alien.

An approved H–1B petition may be valid for a period of up to three years but may not exceed the validity period of the LCA. *See* 8 C.F.R. § 214.2(h)(9)(iii)(A)(1). Subsequently, the original employer or a different employer may petition USCIS for another H-1B approval on behalf of the beneficiary, which may, if the beneficiary is in the United States in H-1B status at the time the petition is filed, include a request to extend the beneficiary's stay in H-1B status. Again, the petitioning employer must first obtain a certified LCA from DOL before filing the petition. The petition may not be approved for more than three years and may not exceed the validity of the LCA. *Id.*

The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Amended or new petitions must be filed whenever "material changes" occur in the terms and conditions of employment or the beneficiary's eligibility as specified in the original H-1B petition. *See* 8 C.F.R. § 214.2(h)(2)(i)(E).

Under the Act, H-1B admission is limited to six years. *See* section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4). Generally, an H-1B petition may not be approved on behalf of a beneficiary who has spent the maximum allowable stay as an H-1B or L nonimmigrant in the United States, unless he/she has resided and been physically present outside the United States for the immediate prior year. *See* 8 C.F.R. § 214.2(h)(13)(iii)(A). Specific limits on what is regarded as a temporary period of stay in all H classifications are included in the regulations to reflect the temporary nature of these classifications and to achieve consistency in the processing of requests for extensions of stay. However, as will be discussed, section 106(a) and 104(c) of the "American Competitiveness in the Twenty-First Century Act" (AC21) as amended by the "Twenty-First Century Department of Justice Appropriations Authorization Act" (DOJ21) removes the six-year limitation on the authorized period of stay in H-1B classification for aliens under certain conditions.

In the instant matter, the petitioner submitted the Form I-129 petition on June 19, 2008. The petitioner requested the beneficiary be granted an extension of stay. As mentioned, section 214(g)(4) of the Act provides: "In the case of a nonimmigrant described in section 101(a)(15)(H)(i)(b), the period of authorized admission as such a nonimmigrant may not exceed 6 years." In the Form I-129 petition, the petitioner was asked to provide the beneficiary's prior period of stay in H classification in the United States. The petitioner was notified that it should list only those periods in which the beneficiary was actually in the United States in an H classification. The petitioner provided the following information on the Form I-129 petition (page 7):

From: **06/20/2001** To: **present**

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Thus, the petitioner indicated in the Form I-129 petition that the beneficiary's prior period of stay in H classification "in the United States" was from June 20, 2001 through the submission of the H-1B petition (without interruption). The AAO notes that this information appears to be inconsistent with other information in the record of proceeding, which indicates that the beneficiary last entered the United States on November 5, 2001. No explanation was provided for the discrepancy. As discussed above, section 214(g)(4) of the Act provides that the period of authorized admission of an H-1B nonimmigrant may not exceed six years.

Section 101(a)(13)(A) of the Act states that "[t]he terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien in the United States after inspection and authorization by an immigration officer." The plain language of the statute and the regulations indicate that the six-year period accrues only during periods when the alien is lawfully admitted and physically present in the United States. This conclusion is supported and explained by the court in *Nair v. Coultice*, 162 F. Supp. 2d 1209 (S.D. Cal. 2001). It is further supported by a policy memorandum issued by USCIS that adopts *Mutter of I-*, USCIS Adopted Decision 06-0001 (AAO, October 18, 2005), as formal policy. *See* Memorandum from Michael Aytes, Acting Associate Director for Domestic Operations, Citizenship and Immigration Services, Department of Homeland Security, *Procedures for Calculating Maximum Period of Stay Regarding the Limitations on Admission for H-1B and L-1 Nonimmigrants*. AFM Update AD 05-21 (October 21, 2005). Generally in this context, the term "recapture" is used in reference to the period of time spent outside the United States that an alien beneficiary seeks to have subtracted from the maximum period of stay in H-1B status, as governed by § 214(g)(4) of the Act, in order to have that period of time added back (i.e., "recaptured") when seeking an extension of H-1B status.

The regulation indicates that "the petitioner and the alien must provide clear and convincing proof that the alien qualifies for such an exception" to the limitation on admission. 8 C.F.R. § 214.2(h)(13)(v). The petitioner must submit supporting documentary evidence to meet its burden of proof. The petitioner and beneficiary are in the best position to organize and submit evidence of the beneficiary's departures from and reentry into the United States. The AAO notes that the standard of proof, as stated by this regulation, is the *clear and convincing* standard and not the *preponderance of the evidence* standard applicable to the remaining evidence in this record of proceeding. *See id.*; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (noting that the standard of proof to be applied in administrative immigration proceedings is the preponderance of the evidence standard, "except where a different standard is specified by law").

In the Form I-129 and supporting documents, the petitioner did not claim that the beneficiary was exempt from the six-year period based upon periods of being physically outside the United States. The AAO will not attempt to "guess" whether or not the beneficiary has made any trips of at least one 24-hour day outside the United States. Accordingly, as the petitioner does not assert that the beneficiary is eligible to "recapture" any time spent outside the United States and there is insufficient evidence in the record of proceeding to support such a claim, the AAO will not further address the "recapture" exemption. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

Based upon the petitioner's statement on the Form I-129 petition, the beneficiary reached the maximum period of authorized stay permitted for H-1B classification on June 19, 2007. The AAO observes that the petitioner's AVP, Human Resources signed the Form I-129, certifying, under penalty of perjury under the laws of the United States of America, that the "petition and the evidence submitted with it is all true and correct."

Notably, records indicate that an extension of stay for the beneficiary was previously granted based upon a Form I-129 petition that was filed by the petitioner on August 2, 2006. The petitioner provided a Form I-797A, Notice of Action, indicating that the petitioner's prior H-1B petition extension and extension of stay requests were approved with validity dates of January 15, 2007 to June 19, 2008.

In a letter dated June 20, 2008, counsel stated that this seventh year extension request had been approved based upon a labor certification application that had been pending for over one year. In the same letter, counsel continued by claiming that the petitioner decided not to pursue the "old" labor certification, and instead elected to file a new labor certification. Counsel further asserted that the "old" labor certification "expired pursuant to the new regulation at 20 CFR 656.30(b), which was recently implemented by DOL and requires an I-140 petition to be filed within 180 days of a labor certification." She claimed that the beneficiary was "left between the proverbial rock and hard place." Although counsel refers to 20 C.F.R. § 656.30(b) as a "new regulation" that "was recently implemented," the AAO notes that DOL issued the final rule on May 17, 2007 (effective July 16, 2007). Thus, notice of the regulation was issued more than a year before the petitioner filed this H-1B petition.

The instant H-1B petition is a request for an 8th year extension. In the H-1B submission, the petitioner and its counsel did not specify an exemption or provide a basis for the 8th year extension request. The only related document provided by the petitioner on this matter was a Form I-797A, Notice of Action, indicating that a Form I-140 petition on behalf of the beneficiary had been received by USCIS on May 21, 2008.

The AAO observes that the petitioner requested that the beneficiary be granted a one-year extension of stay in H-1B status. Specifically, on the Form I-129 petition (page 3), the petitioner listed the dates of intended employment as June 20, 2008 to June 19, 2009 (a one-year period). In addition, the petitioner submitted an LCA in support of the petition that also indicates the period of employment as June 20, 2008 2008 to June 19, 2009. The LCA was certified for employment from June 20, 2008 to June 19, 2009.

Again, section 214(g)(4) of the Act provides that the period of authorized admission of an H-1B nonimmigrant may not exceed six years. However, section 106(a) of AC21 as amended by DOJ21 removes the six-year limitation on the authorized period of stay in H-1B visa status for certain aliens whose labor certifications or immigrant petitions remain undecided due to lengthy adjudication delays and broadens the class of H-1B nonimmigrants who may avail themselves of this provision. *See* Pub. L. No. 106-313, § 106(a), 114 Stat. 1251, 1253-54 (2000); Pub. L. No. 107-273, § 11030A(a), 116 Stat. 1836 (2002). According to the text of section 106(b) of AC21, aliens

may have their "stay" extended in the United States in **one-year increments** pursuant to an exemption under section 106(a) of AC21.

As amended by section 11030A(a) of DOJ21, section 106(a) of AC21 reads:

> (a) EXEMPTION FROM LIMITATION. -- The limitation contained in section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. § 1184(g)(4)) with respect to the duration of authorized stay shall not apply to any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) of *such Act (8 U.S.C. § 1101(a)(15)(H)(i)(b))*, if 365 days or more have elapsed since *the filing of any of the following:*
>
> *(1) Any application for labor certification under section 212(a)(5)(A) of such Act (8 U.S.C. § 1182(a)(5)(A)), in a case in which certification is required or used by the alien to obtain status under section 203(b) of such Act (8 U.S.C. § 1153(b)).*
>
> *(2) A petition described in section 204(b) of such Act (8 U.S.C. § 1154(b)) to accord the alien a status under section 203(b) of such Act.*

Section 11030A(b) of DOJ21 amended section 106(b) of AC21 to read:

> (b) EXTENSION OF H-1B WORKER STATUS--The [Secretary of Homeland Security] shall extend the stay of an alien who qualifies for an exemption under subsection (a) in one-year increments until such time as a final decision is made—
>
> *(1) to deny the application described in subsection (a)(1), or, in a case in which such application is granted, to deny a petition described in subsection (a)(2) filed on behalf of the alien pursuant to such grant;*
>
> *(2) to deny the petition described in subsection (a)(2); or*
>
> *(3) to grant or deny the alien's application for an immigrant visa or for adjustment of status to that of an alien lawfully admitted for permanent residence.*

Pub. L. No. 106-313, § 106(a) and (b), 114 Stat. 1251, 1253-54 (2000); Pub. L. No. 107-273, § 11030A, 116 Stat. 1836, 1836-37 (2002) (emphasis added to identify sections amended by DOJ21). A delay of 365 days or more in the final adjudication of a filed labor certification application or employment based petition under section 203(b) of the Act is considered a lengthy adjudication delay for purposes of this exemption. *See* Pub. Law No. 107-273, 116 Stat. at 1836.

Upon review of the record of proceeding, there is no evidence to support an assertion that a qualifying labor certification application or Form I-140 petition had been or would have been pending for *at least 365 days* on or prior to the last day of the beneficiary's authorized period of

H-1B admission.[3] More specifically, the permanent labor certification application submitted by the petitioner to DOL was filed on February 1, 2008 and approved on April 11, 2008. Thus, it was approved 70 days after the labor certification application was submitted. The I-140 immigrant petition had been pending 29 days on June 19, 2008 (the date listed on the H-1B petition as the expiration of the beneficiary's authorized stay). There is no evidence to support an assertion that there had been "lengthy adjudication delays" in connection with the labor certification application or immigrant petition submitted on behalf of the beneficiary. Therefore, the beneficiary did not qualify for an extension of stay under section 106(a) of AC21.

The AAO now turns to section 104(c) of AC21 regarding the exemption to the period of authorized admission under 214(g)(4) of the Act. More specifically, section 104(c) of AC21 reads in, pertinent part, as follows:

> Notwithstanding section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(4)), any alien who—
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> > (1) is the beneficiary of a petition filed under section 204(a) of that Act [8 U.S.C. § 1154(a)] for a preference status under paragraph (1), (2), or (3) of section 203(b) of that Act [8 U.S.C. § 1153(b)]; and
> >
> > (2) is eligible to be granted that status but for application of the per country limitations applicable to immigrants under those paragraphs,
>
> may apply for, and the Attorney General may grant, an extension of such nonimmigrant status until the alien's application for adjustment of status has been processed and a decision made thereon.

Pub. L. No. 106-313, § 104(c), 114 Stat. at 1253.

Under 104(c) of AC21, an alien who is subject to a per-country limitation and who is the beneficiary of an approved immigrant petition under section 203(b)(1), (2), or (3) of the Act, 8 U.S.C. 1153(b)(1), (2), or (3), is eligible for H-1B approval beyond the statutory six-year maximum. *See* Pub. Law 106-313, 114 Stat. at 1252-1253. The H-1B petitioner must demonstrate that an immigrant visa is not available to the alien at the time the H-1B petition is filed.

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[3] Moreover, in a letter dated May 23, 2008, counsel stated that a labor certification application was filed on behalf of the beneficiary on February 1, 2008, and as such, that the petitioner was not eligible to file for an extension of stay on behalf of the beneficiary based on the current Form I-140 petition unless the Form I-140 petition was approved prior to the H-1B expiration date. Thus, it appears that counsel recognized that the beneficiary was not eligible for an extension of stay under section 106(a) of AC21.

In the instant case, the H-1B petition was filed on June 19, 2008. Notably, the Form I-140 petition was still pending when the H-1B petition was submitted. It was not approved until June 24, 2008. Therefore, the beneficiary was not eligible for an extension of stay under 104(c) of AC21.

Counsel claims that the H-1B petition should be approved, but provides inconsistent statements as to the basis of her disagreement with the denial of the petition. On the instant motion to reconsider, counsel claims that "the Form I-140 petition was approved at the same time as the timely filing for extension of status was filed." She continues by stating that "USCIS should approve the extension request *nunc pro tunc*; back to the date of the prior expiration, June 19, 2008, for a period of three years." In support of this assertion, counsel alleges the following facts (the AAO has added the days of the week):

- On or about May 15, 2008 (Thursday), counsel called the USCIS National Customer Service Center "to request expedited service on I-140 petitions for nine [redacted] engineers" (the beneficiary and eight other employees).

- In notices dated May 16, 2008 (Friday), USCIS stated that the Form I-140 petitions could not be processed due to lack of evidence of the emergent need for approval.[4]

- On May 21, 2008 (Wednesday), counsel contacted the USCIS National Customer Service Center "to request status" of the cases. Counsel was informed that a letter had been sent regarding the request. (It appears that the customer service representative was referring to the May 16, 2008 notices. Thereafter, the notices were received by counsel.)

- On or about May 21, 2008, the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, on behalf of the beneficiary pursuant to INA § 203(b) as a third preference professional worker. Counsel claims that the petitioner also filed eight other Form I-140 petitions around the same time period.

- Counsel states that at the time of filing the Form I-140 petitions, premium processing was not available. However, USCIS did set certain criteria allowing for a Form I-140 petition to be expedited.

[4] The AAO observes that the petitioner and counsel provided three notices from USCIS that are dated May 16, 2008. None of the notices relate to the beneficiary. Furthermore, the notices state the following: "Due to the high volume of expedite requests for this case type, we are strictly enforcing the criteria that has been set for these expedite requests. While your situation appears serious, you have not provided evidence of an extreme emergent need."

- On May 23, 2008 (Friday), counsel submitted a written request for expediting the processing of the pending I-140 petitions. The record of proceeding indicates that the request was sent to the Nebraska Service Center.[5]

- On or about June 5, 2008 (Thursday), counsel contacted the USCIS National Customer Service Center. Counsel claims that the customer service representative indicated that the expedite request was in process and that another inquiry could not be made for 60 days. Nevertheless, counsel decided to resubmit the written request to expedite. This request was sent to the Texas Service Center.[6]

- Counsel claims that on June 10, 2008 (Tuesday), USCIS returned the written request from June 5, 2008, along with the affidavit and other supporting evidence, to counsel via regular post. The package contained a letter stating that all inquiries must be made via telephone to the National Customer Service Center.[7]

- Counsel claims that on June 16, 2008 (Monday), USCIS announced the return of Premium Processing for I-140 petitions in cases where the approval of the I-140 was needed to secure a 7th or 8th year H1B visa extension pursuant to AC21.[8]

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[5] The AAO observes that counsel sent a facsimile and a written request via Federal Express to the Nebraska Service Center. However, the Form I-140 was submitted to, and was pending at, the Texas Service Center. Thus, counsel's requests to expedite the processing of the Form I-140 petition were not submitted to the service center with jurisdiction over the Form I-140 petition. That is, the Nebraska Service Center did not have jurisdiction over the Form I-140 petition, and by extension, the expedite request. Moreover, the AAO observes that the cover letter includes the name of the petitioner and the names of five employees. Notably, the cover letter lists the incorrect first name for the beneficiary, does not include a receipt number for the Form I-140 filed on behalf of the beneficiary and provides the incorrect filing date for the Form I-140.

[6] The AAO observes that the Texas Service Center announced that as of as of February 15, 2008, its expedite procedure had changed and that all customers or their representatives submitting an expedite request would be *required to call the National Customer Service Center.* The Texas Service Center stated that it was expected that this procedure would streamline the expedite process and enable it to make decisions in a more timely and efficient manner. The Texas Service Center indicated that it would make a determination on whether the expedite request was warranted within five days of receiving the request. Thus, this procedure had been in place for approximately four months when counsel elected to send the written request.

[7] Please refer to the above footnote. The AAO observes that the Texas Service Center responded to counsel's request within five days.

[8] The AAO observes that counsel is mistaken. USCIS announced on June 11, 2008 (Wednesday) that premium processing for such petitions would begin on June 16, 2008 (Monday).

- Counsel claims that on June 17, 2008 (Tuesday), she filed premium processing requests for all of the petitioner's Form I-140 petitions (for nine employees).[9]

- On June 19, 2008 (Thursday), counsel claims to have received a call from an officer at the Texas Service Center, who requested that counsel submit additional documents in support of the premium processing request. Counsel states that the officer promised that the Form I-140 petitions would be processed as quickly as possible.

- On June 19, 2008 (Thursday), the petitioner submitted an H-1B "extension of status pursuant to the American Competitiveness in the 21st Century Act ('AC21')." Counsel states that "AC21 allow H1B visa holders with long pending labor certifications or approved I-140 immigrant petitions to apply for extensions beyond the normal limit of six years, in cases where the alien would be eligible for immigrant visa status but for the lack of available visa numbers."[10]

- On June 20, 2008 (Friday), counsel faxed documents to the Texas Service in support of the Form I-140 petitions. Counsel claims that "[a]t that time, the I-140 petitions were approved."

As mentioned above, in this motion to reconsider counsel claims that "the approval of the I-140 Petition for Immigrant Worker happened simultaneously with the filing of the H1B extension." Counsel continues by asserting that "the petition should have been approved as [the beneficiary] qualified for an additional three year extension based on AC21 § 104(c)."[11]

Upon review of the record of proceeding, the AAO observes that the H-1B petition was received ("filed") on June 19, 2008 (Thursday). The Form I-140 was not approved until June 24, 2008 (Tuesday). This is confirmed by the Form I-797, Notice of Action, documents submitted by the

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[9] The AAO notes that counsel is mistaken as to the date the premium processing request was "filed." More specifically, the record of proceeding indicates that the request for premium processing was mailed on June 17, 2008 through Federal Express, standard overnight delivery. It was not received, and thus "filed," until June 18, 2008 (Wednesday). The regulations are clear that a benefit request will be considered received by USCIS as of the actual date of receipt at the location designated for filing such benefit request. 8 C.F.R. § 103.2(a)(7)(i). The date of filing is not the date of mailing, but the date of actual receipt. *Id.*

[10] The AAO reiterates that the petitioner and its counsel did not specify in the H-1B submission the basis for extending the beneficiary's stay in the United States in H-1B classification beyond the statutory period permitted.

[11] Again, the AAO observes that the petitioner requested a one year extension (not a three year extension) on the instant Form I-129 petition and LCA submitted on June 19, 2008.

petitioner and counsel, and counsel's own statements. There is no evidence in the record to support the assertion "that the approval of the I-140 Petition for Immigrant Worker happened simultaneously with the filing of the H1B extension" as claimed by counsel in the motion to reconsider.

Contrary to counsel's assertion the evidence does not support her claim that "the Form I-140 petition was approved at the same time as the timely filing for extension of status was filed." This is exemplified by counsel's acknowledgement that an officer at the Texas Service Center requested additional documentation to adjudicate the Form I-140 petition, and that counsel did not respond until June 20, 2008. Furthermore, the record contains a copy of a facsimile transmittal sheet dated June 20, 2008, from counsel to the officer, marked urgent, for a total of 27 pages, which states:

> Pursuant to our telephone conversation. Please call if you need additional information. Thank you!

As part of the facsimile submission, counsel submitted a letter dated June 20, 2008. The letter states the following:

> Pursuant to our telephone conversation of June 19, 2008, attached please find the following documents in support of the above-referenced requests for premium processing . . .
>
> - Copy of DOL approval letter for [the beneficiary];
> - Copy of Initial I-129 approval notice and visa for [the beneficiary], showing he has been in H-1B status for seven years.
>
> * * *
>
> We thank you for your prompt attention to this matter. Please note that the H-1B status [of the beneficiary and another employee] expired as of June 19, 2008. However, we filed a Request for Extension of the H-1B status on that date based on the pending premium processing requests for the I-140s, which were sent on June 17, 2008.

(Format modified from numbers to bullets.) Thus, counsel acknowledged that documentation in support of the Form I-140 was sent after the expiration of the beneficiary's period of authorized stay in H-1B classification.

Moreover, upon review of the record of proceeding, the AAO finds that counsel has provided inconsistent statements regarding her telephone conversation with the USCIS officer, which undermines the credibility of her claims. In counsel's brief dated August 5, 2009, she stated that the officer said that the petitions "would be processed as quickly as possible." This was reiterated in the brief dated July 10, 2012, which was submitted with the motion to reconsider. However, later, counsel claimed that "[it] appears that, although counsel was verbally told by [the officer] that the

I-140s were approved, the USCIS did not issue the receipt notices until June 24, 2008, four days after the expiration of [the beneficiary's] visa."

The AAO finds counsel's claim questionable. The officer contacted counsel directly by telephone to request additional documentation for at least five cases. It simply does not appear credible that the officer would have told counsel that the five cases were approved – prior to receiving and reviewing the documentation. Moreover, counsel's statement that the officer told her that the cases were approved prior to June 24, 2008 is not in accordance with the evidence in the record of proceeding or with other statements made by counsel.

Counsel now asserts that the "the Form I-140 petition was approved at the same time as the timely filing for extension of status was filed." However, this claim is not consistent with counsel's prior statements. For instance, in a letter received by USCIS on July 7, 2008, counsel stated, "On June 19, 2008 we filed [the petitioner's] H-1B extension on behalf of [the beneficiary]. At that time [the beneficiary] was eligible for one year extension based on his pending I-140, Petition for Alien Worker."[12] Counsel continued by stating that "[o]n June 24, 2008 [the beneficiary's] I-140 was approved." Thus, counsel acknowledged that the Form I-140 petition was not approved at the time the Form I-129 petition was filed with USCIS, and further specified that it was not approved until June 24, 2008.

Moreover, in a letter dated September 16, 2008, counsel stated, "On June 19, 2008, we filed [the petitioner's] H-1B extension petition on behalf of [the beneficiary]. On June 24, 2008, [the beneficiary's] I-140 petition was approved." Thus, again, counsel recognized that the immigrant petition was not adjudicated until several days after the filing of the H-1B petition.

Here, the AAO finds that counsel has provided inconsistent statements in the record of proceeding. Her claim in the motion to reconsider that the Form I-140 petition was approved "simultaneously" with the filing of the instant H-1B petition is not substantiated by probative evidence. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Further, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported

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[12] The AAO notes that as discussed in earlier, section 106(a) of AC21 permits applicants to extend their stay in H-1B nonimmigrant status in increments of up to one year, provided the Form I-140 petition or underlying labor certification has been *pending for at least 365 days*. There is no evidence in the record of proceeding to establish that the beneficiary qualified for this exemption.

Furthermore, it appears that counsel was well aware that the beneficiary did not qualify under this exemption. In a letter dated May 23, 2008, counsel stated that the beneficiary's labor certification was filed on February 1, 2008, and as such, that he was not eligible to file for an extension based on the current Form I-140 petition unless the Form I-140 petition was *approved* prior to the H-1B expiration date (which falls under 104(c) of AC21).

assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, the AAO finds the discrepancies in counsel's statements questionable. An inaccurate statement anywhere on the Form I-129 or in the evidence submitted in connection with the petition mandates its denial. *See* 8 C.F.R. § 214.2(h)(10)(ii); *see also* 8 C.F.R. § 103.2(b)(1).

Further, counsel claims that "USCIS ignored repeated follow ups and failed to act on legitimate expedition (sic) requests on the pending I-140 Petition" and attributes delays to USCIS. However, the AAO again finds that counsel's claims are not substantiated by documentary evidence. For instance, counsel claims that she called the USCIS National Customer Service Center on May 15, 2008 to request expedited service on the Form I-140 petition for the beneficiary and eight other immigrant petitions. However, the Form I-140 on behalf of the beneficiary was not submitted until May 21, 2008. Counsel provides no explanation for claiming that she requested expedited processing on May 15, 2008 for an immigrant petition on behalf of the beneficiary that, in fact, had not even been filed. It would be absurd to expect USCIS to expedite the processing of a Form I-140 petition that has not even been filed.

Counsel states that thereafter, on May 21, 2008, she contacted the USCIS National Customer Service Center "to request status" of these cases. Counsel claims that she was told that a letter had been sent regarding the request. The petitioner and counsel provided several USCIS response notices dated May 16, 2008, indicating that counsel contacted USCIS on May 15, 2008 to request expedited service for [redacted] and [redacted] for petitions submitted on March 26, 2008, as well as for [redacted] for a petition submitted on March 19, 2008.[13] It appears that counsel contacted the USCIS National Customer Service Center regarding cases that do not relate to the beneficiary, and in fact, are irrelevant to the issue here. As the cases do not involve the beneficiary, counsel's contact with the National Customer Service Center on this matter is not pertinent to the instant case.

Two days later, on May 23, 2008 (Friday), counsel submitted a facsimile request for expediting the processing of the pending I-140 petitions. The record of proceeding indicates that the request was sent to the Nebraska Service Center. Thereafter, on May 27, 2008 (Tuesday), counsel appears to have resubmitted the request to the Nebraska Service Center via Federal Express.[14] However, the Form I-140 on behalf of the beneficiary was submitted to, and was pending at, the Texas Service Center. Thus, counsel's facsimile and written request to expedite the processing of the Form I-140

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[13] In the brief submitted with the instant motion, counsel stated that the petitioner filed a Form I-140 petition on behalf of the beneficiary on May 21, 2008, and that the petitioner "filed eight other I-140 petitions on behalf of similarly situated [redacted] engineers working for the company around the same time period." The AAO notes that the USCIS response notices provided by the petitioner indicate that the immigrant petitions for three other employees were filed approximately *two months prior* to the submission of the Form I-140 petition on behalf of the beneficiary.

[14] May 26, 2008 (Monday) was Memorial Day, a national holiday.

petition were not submitted to the service center with jurisdiction over the Form I-140 petition. That is, the Nebraska Service Center did not have jurisdiction over the Form I-140 petition and the expedite request. Furthermore, the cover letter sent by counsel to the Nebraska Service Center does not include a receipt number for the Form I-140 filed on behalf of the beneficiary, lists the incorrect first name for the beneficiary and provides the incorrect filing date of the Form I-140. Counsel failed to provide an explanation for repeatedly submitting the request to the Nebraska Service Center.

Counsel stated that thereafter she submitted a written request on June 5, 2008 to the Texas Service Center to request expedited processing of the Form I-140 petition. The AAO observes that the Texas Service Center had previously announced that as of February 15, 2008, all customers/representatives submitting an expedite request would be required to call the National Customer Service Center. The Texas Service Center stated that it was expected that this procedure would streamline the expedite process and enable it to make decisions in a more timely and efficient manner. Furthermore, the Texas Service Center indicated that it would make a determination on whether the expedite request was warranted within five days of receiving the request. In the instant case, counsel confirmed that the Texas Service Center responded to counsel's submission on June 10, 2008. Specifically, the Texas Service Center returned the documents submitted by counsel and reminded her that such a request must be made via telephone to the National Customer Service Center.

The AAO observes that on June 11, 2008, USCIS announced that premium processing for certain Form I-140 petitions would begin on June 16, 2008. The petitioner's request for premium processing of the Form I-140 on behalf of the beneficiary was received by USCIS on June 18, 2008.

Notably, USCIS indicated that premium processing services were limited to Form I-140 petitions that were filed on behalf of aliens who met the following criteria:

- Who were currently in an H-1B nonimmigrant status;
- Whose sixth year would end within 60 days;
- Who were only eligible for a further extension of H-1B nonimmigrant status under section 104(c) of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21); and
- Who were **ineligible** to extend their H-1B status under section 106(a) of AC21.

(Emphasis added.)[15]

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[15] In the H-1B submission, the petitioner and its counsel did not specify an exemption or provide a basis for the extension request. The AAO observes that by requesting premium processing, it appears that the petitioner and counsel recognized that the beneficiary was not eligible to extend his stay in H-1B classification under section 106(a) of AC21. As previously discussed, section 106(a) of AC21 is an exemption that permits an extension of stay for nonimmigrants in H-1B classification in increments of up to one year, provided the Form I-140 petition or underlying labor certification has been pending for at least 365 days.

USCIS provided a list of documentation for petitioners to submit to facilitate the determination of whether a particular filing met the conditions for premium processing. Specifically, USCIS requested petitioners provide the following documents:

1. Copies of all Forms I-94, Arrival/Departure Record and I-797 H-1B or L approval notices that have been issued on behalf of the beneficiary;

2. A copy of the relating Form I-140 petition receipt notice, if the Form I-140 was previously filed; and

3. A copy of the labor certification approval letter issued by the Department of Labor, if filing under EB-2 or EB-3 classifications.

In the instant case, the petitioner and counsel submitted the premium processing request, but failed to include all of the Form I-797, Approval Notices, for H-1B classification on behalf of the beneficiary and also failed to include a copy of the labor certification approval letter issued by DOL. Thus, because the petitioner and counsel did not provide this documentation with the premium processing request, the processing of the request was delayed. As previously discussed, a USCIS officer contacted counsel to request that counsel submit the necessary documentation to establish eligibility. Counsel submitted the evidence via facsimile on June 20, 2008. Thereafter, the Form I-140 petition was adjudicated and an approval notice was sent on June 24, 2008. The AAO notes that once USCIS received the necessary documents, the immigrant petition was adjudicated just a few days later.

With regard to the H-1B petition, as previously mentioned, counsel stated that she submitted a request to the Vermont Service Center notifying the director of the approval of the Form I-140 petition and requesting a three year extension. The submission was received on July 7, 2008, and included a letter from counsel stating, "On June 24, 2008, [the beneficiary's] I-140 petition was approved. Therefore, [the petitioner] would like to request that [the beneficiary's] H-1B extension be extended for three (3) years based on the recent approval of his I-140 petition."

In the letter, counsel stated that various "updated" documents were being provided for USCIS to review and consider. The documents included an "updated" Form I-129 petition, an "updated" LCA, an "updated" letter of support from the petitioner, and an "updated Form I-539" for the beneficiary's spouse and child. Furthermore, counsel thanked USCIS for its "attention to this filing."

As previously mentioned, a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See* 8 C.F.R. § 103.2(b)(1); *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). Here the immigrant petition was not approved until *after* the H-1B petition was filed.

Moreover, the regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that the H-1B petition is supported by an LCA which corresponds with the petition. Counsel requested that the instant petition (receipt number , submitted on June 19, 2008) be approved and "that [the beneficiary's] H-1B extension be extended for three (3) years" without acknowledging that the petitioner only requested a one-year extension on the Form I-129 and LCA.

Specifically, the petitioner stated the dates of intended employment as "06/20/2008 to 06/19/2009" on the Form I-129 and LCA. Furthermore, the AAO notes that each LCA has a unique identification number. On the Form I-129 (page 3), the petitioner reported the corresponding LCA for the petition as LCA Case Number [16] As previously mentioned, the validity period of an H-1B petition may not exceed the validity period of the LCA. *See* 8 C.F.R. § 214.2(h)(9)(iii)(A)(1). Counsel cites no statutory or regulatory authority, case law, or precedent decision to support the assertion that a petition supported by an LCA certified for a *one-year extension* can be approved for a *three-year extension.*

The AAO notes that if significant changes are made to the initial request for approval, the petitioner must file a new or amended petition, with the proper fee(s), rather than seek approval of a petition that is not supported by the facts in the record. Here counsel submitted an "updated" Form I-129 petition, an "updated" LCA and an "updated" letter of support. Thus, it appears that counsel may be attempting to submit a new or amended petition. However, counsel's request was improperly submitted.

The general requirements for filing benefit requests are set forth at 8 C.F.R. §103.2(a)(1) as follows:

> Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, and such instructions are incorporated into the regulations requiring its submission. Each benefit request or other document must be filed with fee(s) as required by regulation. . . . Filing fees and biometric fees are non-refundable and, except as otherwise provided in this Chapter I, must be paid when the benefit request is filed.

The proper procedure for notifying USCIS of any material changes in the terms and conditions of employment or the beneficiary's eligibility as specified in the original petition is to submit a new or amended petition, with a valid LCA and the proper fee(s), for the director to consider. *See* 8 C.F.R. § 214.2(h)(2)(E). The Form I-129 instructions clearly indicate that the form must be filed with all of the required supplements, evidence and proper filing fee(s).

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[16] As previously discussed, USCIS is responsible for determining whether an LCA filed for a particular Form I-129 actually corresponds to that petition. *See* 20 C.F.R. § 655.705(b). Notably, the LCA Case Number and dates of validity on the Form I-129 petition submitted on June 19, 2008 do not correspond to the LCA submitted on July 7, 2008.

Here, the submission did not include the required supplements and supporting documentation, and the petitioner and counsel failed to submit the required filing fee(s) for a new or amended petition. Thus, the submission as a new or amended petition was improperly filed and the petitioner and counsel disregarded the pertinent statutory and regulatory provisions.

In alleging delays by USCIS, counsel references a *Senate Report* and asserts that "the reasoning behind allowing extensions for H1B workers beyond the sixth year where their employers had filed immigrant visa petitions was that 'individuals in these circumstances are currently being forced to leave the country and disrupt the projects they are working on simply on account of *entirely unreasonable administrative delays'* (emphasis added by counsel)." *See Senate Report* 106-260, p. 23, section 6 by Sen. Orin Hatch, Judiciary Committee, April 11, 2000, available at http://www.gpo.gov/fdsys/pkg/CRPT-106srpt260/pdf/CRPT-106srpt260.pdf (last accessed on April 3, 2013).

The AAO observes that, as asserted by counsel, this section of the *Senate Report* addresses "unreasonable administrative delays." As previously discussed, a delay of 365 days or more in the final adjudication of a filed labor certification application or employment based petition under section 203(b) of the Act is considered a lengthy adjudication delay. *See* Pub. Law No. 107-273, 116 Stat. at 1836. However, in the case at hand, the adjudication of the permanent labor certification application and the immigrant petition were completed within just a few months.

That is, the labor certification application was adjudicated 70 days after it was submitted to DOL. Further, the I-140 petition was filed on May 21, 2008 and an approval notice was sent on June 24, 2008 (approximately 33 days later). Thus, the evidence simply does not support counsel's assertion that there have been unreasonable administrative delays in the processing of the labor certification application and immigrant petition submitted on behalf of the beneficiary.

Instead, the AAO notes that any perceived delays may be the result of choices made by the petitioner and counsel. In a letter dated June 20, 2008, counsel stated the following regarding the beneficiary and several other employees:

> Additionally, please note that all five [employees] are actually in their 7th year in H1B status now. They filed a seventh year extension last year based on labor certifications pending over one year. However, the employer decided not to file I-140 Petitions based on those "old" labor certifications but rather to file new labor certifications which better reflected the beneficiaries' current positions with the company. Pursuant to the Neufeld Memo dated May 30, 2008, the company learned that this year it could no longer file an H1B extension request based on the "old" labor certifications, because they had expired pursuant to the new regulations at 20 CFR 656.30(b), which was recently implemented by the DOL and requires an I-140 petition to be filed within 180 days of a labor certification. Therefore, the five beneficiaries were left between the proverbial rock and hard place.

With regard to the labor certification, the AAO notes that DOL issued a Final Rule on May 17, 2007, which established expiration dates for approved labor certifications. DOL provided guidance on the issue and the information was widely publicized by DOL, USCIS, the American Immigration Lawyers Association and many other organizations.

Specifically, the regulation referenced by counsel provides the following information with regard to when an approved labor certification expires:

> (1) An approved permanent labor certification granted on or after July 16, 2007 expires if not filed in support of a Form I-140 petition with the Department of Homeland Security within 180 calendar days of the date the Department of Labor granted the certification.
>
> (2) An approved permanent labor certification granted before July 16, 2007 expires if not filed in support of a Form I-140 petition with the Department of Homeland Security within 180 calendar days of July 16, 2007.

See 20 C.F.R. § 656.30(b). While counsel alleges that "the company learned this year it could no longer file an H1B extension request based on the 'old' labor certifications," the AAO notes that the final rule was issued on May 17, 2007 (effective July 16, 2007). Thus, the petitioner and its counsel had constructive notice *over a year prior* to the expiration of the beneficiary's H-1B stay. The AAO also observes that the petitioner did not file the new labor certification until February 1, 2008 – over *eight months after* the final rule was published (as well as after the alleged "old" labor certifications had expired).

Furthermore, the AAO observes that USCIS announced on July 2, 2007 the temporary suspension of premium processing service for Form I-140 petitions in accordance with 8 C.F.R. § 103.2(f)(2). The petitioner knew that the beneficiary's authorized stay in H-1B classification was set to expire on June 19, 2008. The petitioner had notice (or constructive notice) that premium processing of the immigrant petition was not available. However, the petitioner elected to wait 41 days after the new labor certification was approved to submit the Form I-140 petition on behalf of the beneficiary.

Moreover (as previously discussed), counsel apparently requested expedited processing on a Form I-140 petition that had not been filed; submitted requests to a service center that did not have jurisdiction over the petition; provided incorrect and incomplete identifying information on her cover letters; and elected not to follow the proper procedures for requesting expedited processing. Additionally, once premium processing was available, the petitioner and counsel failed to submit all of the necessary documentation with the request for premium processing. Furthermore, counsel improperly filed the new/amended petition requesting the extension of stay be approved for a three-year period based upon the approval of the immigrant petition after the instant H-1B petition was filed. It is these steps by the petitioner and counsel that may, in fact, be attributable to any perceived processing delays, in addition to causing confusion for the petitioner and its counsel.

As a final matter, the AAO notes that in the motion, counsel claims that "under certain extraordinary circumstances beyond the control of the applicant or petitioner, an extension of stay may be approved when the status expired before the application for extension was filed." Counsel cites the regulations at 8 C.F.R. § 214.1(c)(4). However, the AAO notes that counsel's reliance on this provision of the regulations is misplaced.

More specifically, 8 C.F.R. § 214.1 states the following:

> (c) *Extension of stay* –
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> * * *
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> (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.

The AAO finds that this section of the regulations is not applicable to the case at hand. There is no evidence that when the instant petition was submitted the beneficiary had failed to maintain the previously accorded status or that such status expired before the application or petition was filed. The submission to extend the beneficiary's stay was timely filed. Notably, counsel repeatedly acknowledges that the instant H-1B petition was timely filed. In the instant case, the beneficiary had previously been granted an extension of stay until June 19, 2008, and the petition to extend the stay was filed on June 19, 2008.

The issue here is that the petitioner failed to establish eligibility for the benefit sought at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). That is, section 214(g)(4) of the Act limits the period of authorized admission of an H-1B nonimmigrant. The petitioner did not demonstrate that the beneficiary was eligible for an exemption from this statutory provision and was

eligible for an extension of stay when the H-1B petition was submitted. As previously mentioned, 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.

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. Accordingly, the motion will be dismissed and the proceedings will not be reconsidered. The previous decision will not be disturbed.

ORDER: The motion is dismissed.