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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

b8

[redacted]

FILE: WAC 09 800 02878 Office: CALIFORNIA SERVICE CENTER Date: MAY 17 2010

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will summarily dismiss the appeal.

The petitioner filed the nonimmigrant visa petition seeking classification of the beneficiary under section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O)(i), as an alien with extraordinary ability in the sciences, art, education or business. The petitioner operates a nursing home and seeks to employ the beneficiary as a physical therapist for a period of 13 months.

The director denied the petition on January 20, 2009, concluding that the petitioner failed to submit any of the required initial evidence in support of its petition, which was filed using the U.S. Citizenship and Immigration Services (USCIS) Electronic Filing (e-Filing) system.[1]

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner states that it regrets its failure to submit the required documentation within seven business days of e-filing the petition, noting that it "just totally overlooked the said requirement." In support of the appeal, the petitioner submits: a completed Form I-129 requesting that the beneficiary be granted an amendment and extension of her existing H-1B status; H Classification Supplement to Form I-129; H-1B Data Collection and Filing Fee Exemption Supplement; evidence that the beneficiary is maintaining H-1B status, an employer letter and the petitioner's 2007 corporation tax return (IRS Form 1120S).

Section 101(a)(15)(O)(i) of the Act provides classification to a qualified alien who has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim, or, with regard to motion picture and television productions, a demonstrated record of extraordinary achievement, and whose achievements have been recognized in the field through extensive documentation, and who seeks to enter the United States to continue work in the area of extraordinary ability. The extraordinary ability provisions of this visa classification are intended to be highly restrictive. *See* 137 Cong. Rec. S18247 (daily ed., Nov. 16, 1991). In order to establish eligibility for O-1 classification, the petitioner must establish that the beneficiary is "at the very top" of his field of endeavor. 8 C.F.R. § 214.2(o)(3)(ii).

The regulation at 8 C.F.R. § 214.2(o)(3)(ii) defines, in pertinent part:

> *Extraordinary ability in the field of science, education, business, or athletics* means a level of expertise indicating that the person is one of the small percentage who have arisen to the very top of the field of endeavor.

The evidentiary criteria for aliens of extraordinary ability in the fields of science, education, business or athletics are set forth at 8 C.F.R. § 214.2(o)(3)(iii). In addition, all O nonimmigrant petitions must be accompanied by the evidence set forth at 8 C.F.R. § 214.2(o)(2)(ii).

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[1] Subsequent to the denial of the petition, the payment method used to pay the filing fee for the petition was rejected. The required fee was eventually collected from the petitioner on June 10, 2009. As the petition was already denied, the director's decision is not affected by the non-payment of the filing fee. New fees will be required with any new application or petition. *See* 8 C.F.R. § 103.2(a)(7)(ii).

The issue in this matter is whether the director appropriately denied the petition based on the petitioner's failure to submit the required initial evidence for the visa classification in support of its electronically filed petition.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, using the USCIS e-Filing system on December 23, 2008. The form instructions for Form I-129 advise that if a petition is filed without the required initial evidence, the petitioner will not establish a basis for eligibility and USCIS may deny the petition. The instructions for electronic filing further instruct the petitioner that the required initial evidence must be received by the Service Center within seven business days of filing the form electronically.

Pursuant to 8 C.F.R. § 103.2(a)(1), the instructions contained on a petition are to be given the force and effect of a regulation:

> Every application, petition, appeal, motion, request or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions (including where an application or petition should be filed) being hereby incorporated into the particular section of the regulations in this chapter requiring its submission....

The regulation at 8 C.F.R. § 103.2(b)(1) states:

> An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. Any evidence submitted in connection with the application or petition is incorporated into and considered part of the relating application or petition.

Finally, the regulation at 8 C.F.R. § 103.2(b)(8)(ii) states, in pertinent part:

> *Initial evidence.* If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or ineligibility. . . .

The director denied the petition on January 20, 2009, after waiting 23 days for submission of the required initial evidence, which, as noted above, was due within seven business days of the date of filing. While the regulations at 8 C.F.R. § 214.2(o)(11) provide that no supporting documents are required when a petitioner seeks to extend the validity of a beneficiary's original O-1 petition unless requested by the director, the instant petition was for new employment. Therefore, the AAO concludes that the director's decision to deny the petition based on lack of initial evidence was proper.

On appeal, counsel requests that the AAO approve the petition based on the newly submitted documentation. As noted above, the petitioner has submitted an amended I-129 Petition requesting that the beneficiary be granted an

extension of her H-1B status. The petitioner does not address, and the submitted evidence does not satisfy, any of the evidentiary requirements pertaining to O-1 nonimmigrants. *See* 8 C.F.R. §§ 214.2(o)(2)(ii) and (o)(3)(iii).

Regulations at 8 C.F.R. § 103.3(a)(1)(v) state, in pertinent part:

> An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

On appeal, the petitioner does not identify an erroneous conclusion of law or statement of fact on the part of the director. Rather, the petitioner concedes that it simply overlooked the requirement that it promptly submit the required supporting evidence. Furthermore, the evidence submitted on appeal suggests that the petitioner likely intended to file an H-1B, rather than an O-1, nonimmigrant petition. There is no statutory or regulatory provision allowing for the approval of the petitioner's request to amend the petition on appeal.

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. Inasmuch as the petitioner has failed to identify specifically an erroneous conclusion of law or a statement of fact in support of the appeal, the petitioner has not sustained that burden.

The denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate supporting evidence and filing fees.

ORDER: The appeal is summarily dismissed.