Filing an H-1B or L-1 Extension of Nonimmigrant Status Where the Employee is Currently Out of Status

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When an employment-based nonimmigrant petition, such as an H-1B or L-1A, is denied, the U.S. petitioning company may file an appeal with the Administrative Appeals Office (AAO). The AAO usually takes 12 months or longer to render a decision. During that time, the petitioner and beneficiary may be checking the official website of the U.S. Citizenship and Immigration Service (USCIS) to check the case status of the appeal. Sometimes, the case status will indicate that the appeal is pending, when in fact, the appeal has already been denied.

The petitioner keeps waiting for the AAO decision and years go by. Ultimately, the petitioner or beneficiary make an Infopass appointment and discover that the AAO appeal was denied many years before. The petitioner may have changed its address and never received the denial notice. Furthermore, the petitioner may not have received a copy of the denial from its attorney because the AAO sometimes does not send a copy of the denial notice to the attorney of record.

If over six months has gone by since the original nonimmigrant petition was denied, then the beneficiary would be barred from obtaining a nonimmigrant visa at the U.S. consulate for the next 3 years. If over 1 year has passed, then the beneficiary would be barred for 10 years. The 30 day deadline for filing a motion to reopen has also passed.[1]

At this point, the only remedy which might be available is for a new nonimmigrant petition to be filed requesting an extension of status. 8 C.F.R. 214.1(c)(4) states:

> 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:
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> (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;
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> (ii) The alien has not otherwise violated his or her nonimmigrant status;
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> (iii) The alien remains a bona fide nonimmigrant; and
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> (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

[1] Where the beneficiary has been out of status for less than 6 months, then it is usually better to file a new nonimmigrant petition with a request for consular processing rather than an extension of status petition.

240 of the Act.

Extraordinary circumstances beyond the control of the applicant or petitioner do exist in this case. The case status on the official government website contained incorrect information. The information mislead both petitioner and the attorney of record as to the actual status of the appeal. The petitioner, beneficiary and their attorneys relied on the case status information which said that the AAO appeal was still pending.

Extraordinary circumstances also exist because USCIS regulations clearly state that the attorney of record must be notified of the AAO decision. 8 CFR 103.3(a)(2)(x) states:

> Decision on appeal. The decision must be in writing. A copy of the decision must be served on the affected party and the attorney or representative of record, if any.

That the petitioner did not notify the AAO of its change of address does not relieve the AAO from notifying the attorney of record of the final decision. Attorney notification is specifically required in the regulations. Failure to follow the regulations is an extraordinary circumstance.

All of the other requirements of 8 C.F.R. 214.1(c)(4) have also been met. The beneficiary has not violated his status in any other way. He has never been in deportation or removal proceedings. An H-1B or L-1A beneficiary is allowed to have dual intent. The remaining issue is whether the delay in filing the nonimmigrant extension petition is commensurate with the circumstances. Petitioner filed a new nonimmigrant petition as soon as it found out that the AAO denied its previous petition.

There is no question that USCIS failed to follow its rules in this case. First, USCIS case processing information mislead the petitioner and beneficiary. Second, USCIS regulations specifically state that an applicant's attorney of record **must** be notified of an AAO decision. Petitioner's attorney was not notified. These mistakes should be remedied by allowing the beneficiary to extend his nonimmigrant status pursuant to 8 C.F.R. 214.1(c)(4).