U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass., 3/F
Washington, D.C. 20536

PUBLIC COPY

[redacted]

AUG 18 2003

File: [redacted] Office: Vermont Service Center Date:

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Vermont Service Center. The Administrative Appeals Office ("AAO") dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be dismissed.

8 C.F.R. § 103.5(a)(1)(i), in pertinent part, provides:

> Any motion to reconsider an action by the Service filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before the Service filed by an applicant or petitioner, must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires, may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner.

8 C.F.R. § 103.5(a)(1)(iii) provides:

> (iii) Filing Requirements--A motion shall be submitted on Form I-290A, and may be accompanied by a brief. It must be--
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> (A) In writing and signed by the affected party or the attorney or representative of record, if any;
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> (B) Accompanied by a nonrefundable fee as set forth in § 103.7;
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> (C) Accompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding;
>
> (D) Addressed to the official having jurisdiction; and;
>
> (E) Submitted to the office maintaining the record upon which the unfavorable decision was made for forwarding to the official having jurisdiction.

The AAO affirmed the director's denial in a decision dated August 27, 2002. The Service Center received a letter from the petitioner on January 4, 2003, stating that the letter constituted his motion to reopen. The motion, however, was not properly filed, nor was it timely.

On January 10, 2003, the Service Center issued a notice stating: "The application or petition cannot be accepted because the proper fee of $110.00 is not attached. Since the case is not properly filed, a processing date cannot be assigned."

On January 17, 2003, the petitioner responded to the Service Center's notice by submitting the $110.00 fee. More than four months had elapsed since the AAO issued its appellate decision. The regulation at 8 C.F.R. § 103.5(a)(1)(i) states that a motion must be filed within 30 days of the decision that the motion seeks to reopen or reconsider. 8 C.F.R. § 103.5a(b) adds three days to the prescribed

period when service of a decision is by mail, as in this case. In this matter, the petitioner's motion was not properly filed within the required thirty days, and he has not demonstrated that this delay was reasonable and beyond his control. The motion must therefore be dismissed as untimely filed.

It is noted that petitioner initially sought classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(A), as an alien of extraordinary ability in business. On motion, the petitioner states:

> I have new facts which prove that I also have extraordinary ability in the field of art. I have extraordinary ability of poetry creation in English although English is foreign language to me. This extraordinary ability has been well manifested by publication of my poems and by awards received for my outstanding achievement in poetry.

The evidence presented on motion, however, came into existence subsequent to the petition's 2001 filing date. *See Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Bureau held that aliens seeking employment based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. New circumstances that did not exist as of the filing date cannot retroactively establish eligibility as of that date. Even if we were to consider the petitioner's poetry award nomination and his poem's selection for publication, there is no accompanying documentation to establish that any of this evidence would satisfy the regulatory criteria at 8 C.F.R. § 204.5(h)(3). None of the documentary evidence submitted on motion demonstrates that the petitioner has earned sustained national or international acclaim in the arts or business.

The petitioner has not specifically addressed the AAO's appellate findings and has not provided any additional evidence that existed as of the petition's filing date. 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.

8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.