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U.S. Department of Justice

Immigration and Naturalization Service

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: [Redacted] Office: Nebraska Service Center Date: DEC 08 2002

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

IN BEHALF OF PETITIONER:
[Redacted]

PUBLIC COPY

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 Service 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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the Director, Nebraska Service Center, and a subsequent appeal was dismissed by the Associate Commissioner for Examinations. The Associate Commissioner then reopened the case on a motion from the petitioner, and again denied the petition. The petitioner filed a second motion to reopen, which the Associate Commissioner dismissed on the grounds that (1) it was untimely filed, and (2) it did not meet the regulatory requirements for a motion. The petitioner has now filed a third motion to reopen. The motion will be granted. The decision of the Associate Commissioner will be affirmed, and the petition will be denied.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(2), as an alien of exceptional ability. The petitioner seeks employment as a financial consultant. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The Administrative Appeals Office ("AAO"), acting on behalf of the Associate Commissioner, found that the petitioner does not qualify for classification as an alien of exceptional ability or as a member of the professions holding an advanced degree, and that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

8 C.F.R. 103.5(a)(1)(i) requires that a motion to reopen must be filed within thirty days of the underlying decision, except that failure to file during this period may be excused at the Service's discretion when the petitioner has demonstrated that the delay was reasonable and beyond the control of the petitioner.

8 C.F.R. 103.5a(b) states "[w]henever a person has the right or is required to do some act within a prescribed period after the service of a notice upon him and the notice is served by mail, 3 days shall be added to the prescribed period. Service by mail is complete upon mailing."

8 C.F.R. 103.5(a)(2) states "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

8 C.F.R. 103.5(a)(3) states, in pertinent part:

A motion for reconsideration 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 . . . [and] must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

8 C.F.R. 103.5(a)(4) states "[a] motion that does not meet applicable requirements shall be dismissed."

In the letter which marked the proper filing of his latest motion, the petitioner states "[t]he order of the Director is bad and law [sic] and deserves to be reviewed. . . . The director has not considered the evidences, submitted and applied to the case as required." These general statements appear to be directed not at the AAO's stated grounds for dismissing the previous motion, but rather at earlier findings regarding the petitioner's eligibility for the classification sought and the accompanying national interest waiver.

Because the AAO's most recent decision was limited to the issues of timeliness and whether the motion met regulatory requirements, the petitioner must overcome the AAO's findings in these two areas before we will give any consideration to underlying issues of eligibility. We reopen this matter for the limited purpose of determining whether the AAO acted properly in dismissing the prior motion.

The petitioner's letter which initiated this motion does not directly address the prior motion's lateness or qualifications as a motion to reopen or to reconsider. The petitioner indicates that he seeks "30 days time to retain another attorney and to submit [a] brief in support of this Motion for reconsideration." The petitioner subsequently submitted repeated requests for further extensions of time, finally submitting a brief and new evidence in May 2000 through newly-retained counsel.

The regulation at 8 C.F.R. 103.3(a)(2)(vii) allows for limited circumstances in which a petitioner can supplement an already-submitted appeal. This regulation, however, applies only to appeals, and not to motions to reopen or reconsider. There is no analogous regulation which allows a petitioner to submit new evidence in furtherance of a previously-filed motion. By filing a motion, the petitioner does not guarantee himself an open-ended period in which to repeatedly request even more time, or to supplement the record with additional arguments and evidence. Otherwise, a petitioner could indefinitely delay the adjudication of the motion, simply by repeatedly submitting new documents and requesting still more time to prepare still more submissions.

For the above reasons, any consideration at all that is given to the petitioner's untimely submission is entirely discretionary. We will briefly review the petitioner's arguments relating to the grounds for the AAO's dismissal of the petitioner's second motion.

In its decision of November 17, 1999, the AAO stated:

The instructions on the cover of the Associate Commissioner's most recent decision specified "[a]ny motion must be filed with the office which originally

decided your case," i.e., the Nebraska Service Center, in keeping with 8 C.F.R. 103.5(a)(1)(iii)(D). On July 31, 1998, 32 days after the date of the underlying decision, the Associate Commissioner received the petitioner's motion to reopen. The Associate Commissioner returned the motion because the petitioner had not followed the instructions on the aforementioned cover sheet. The Service Center did not receive the motion until August 17, 1998, 49 days after the underlying decision.

In this latest, third motion, counsel states that the Service received the petitioner's second motion 32 days after the issuance of the decision that the motion sought to overturn. Therefore, argues counsel, the motion was timely filed. As noted above, the petitioner had disregarded the AAO's instructions and submitted that motion directly to the AAO, which does not process fees, and therefore the motion was not properly filed on the 32nd day. No receipt was registered at that time, and the AAO returned the improperly filed motion to the petitioner who then submitted it to the proper office.

Counsel does not address the above facts, instead arguing that the motion was timely because it was in the hands of the Service before 33 days had elapsed. Because counsel has not even discussed the AAO's argument in this regard, we cannot find that counsel has overcome or rebutted that argument. The AAO instructed the petitioner to submit the motion to the original office of record (i.e. the Nebraska Service Center) within 30 days, and the petitioner failed to do so. Therefore, the motion was not properly filed in a timely manner, and the AAO acted within its rights by dismissing it as late.

Even if the petitioner's prior motion had been timely, there was another plainly stated ground for dismissing the motion. In its decision of November 17, 1999, the AAO stated:

The petitioner's new motion consists of a letter from an associate, who asserts that despite several obstacles, the petitioner's business venture is on "the point of bearing fruit." The associate indicates that to deny the petition after so much effort by the petitioner "would be a huge waste of time, personal and human resources." The letter submitted on motion does not meet the above requirements for a motion to reopen or a motion to reconsider. The letter simply expresses disagreement with the outcome of the decision.

The brief submitted in support of the latest motion does not in any way address the AAO's finding that the previous filing does not meet the basic requirements of a motion to reopen or a motion to reconsider. Because this ground for dismissal has not been overcome or even addressed, the AAO's dismissal of the petitioner's second motion stands.

The remainder of the newly-submitted brief contests findings made by the AAO not in response to the second motion, but rather in earlier decisions rendered in 1997 and 1998. The proper time to raise these arguments was during the 30-day motion periods immediately following the issuance of those decisions. The petitioner failed to do so in his second motion, and the AAO accordingly dismissed that motion. Having failed to contest the AAO's specific findings in a timely manner, the petitioner cannot now remedy this deficiency by submitting yet another motion which contains the arguments that should have been made with the earlier motion.

We note that the petitioner has submitted documentation concerning his business activities. Many of these documents are dated between late 1997 and 2000 and thus plainly did not exist when the petition was first filed in August 1996. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements. See Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 13, 1998), and Matter of Katigbak, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Service held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. Business documents from 1997-2000 cannot retroactively establish that the director should have approved the petition in 1996, months or years before those documents existed or the corresponding business transactions took place. The Service may consider these activities in the context of a new visa petition, but they cannot preserve a 1996 priority date.

Because the petitioner has not established that his second motion was timely or properly filed, there is no need to revisit in detail the arguments and findings advanced regarding the first motion or the initial appeal. The initial petition, the appeal, and the petitioner's first two motions have all been adjudicated and the allotted time for contesting those decisions has passed.

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 previous decision of the Associate Commissioner will be affirmed, and the petition will be denied.

ORDER: The Associate Commissioner's decision of November 17, 1999 is affirmed. The petition is denied.