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U.S. Department of Justice

Immigration and Naturalization Service

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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

File: WAC-98-234-50001 Office: California Service Center Date: OCT 04 2002

IN RE: Petitioner: [redacted]

Petition: Immigrant Petition by Alien Entrepreneur Pursuant to § 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(5)

IN BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which 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 which 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 which 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 preference visa petition was denied by the Director, California Service Center. The Associate Commissioner for Examinations summarily dismissed a subsequent appeal. The matter is now before the Associate Commissioner on motion to reopen. The motion will be granted, the previous decision of the Associate Commissioner will be affirmed and the petition will be denied.

The petitioner seeks classification as an alien entrepreneur pursuant to §203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(5).

The director determined that the petitioner had failed to demonstrate that he met all of the regulatory requirements.

On appeal, dated February 25, 2000, prior counsel requested an additional 90 days in which to submit a brief and/or additional evidence. On April 13, 2001, the Administrative Appeals Office (AAO), on behalf of the Associate Commissioner, noted that the record contained no further information and summarily dismissed the appeal.

On motion, counsel argues that prior counsel was ineffective. Counsel asserts that the petitioner had great difficulty obtaining his file from prior counsel and when he did, it contained an appellate brief dated June 20, 2000. Counsel does not argue that this brief was actually submitted. Rather, counsel argues that prior counsel was ineffective and requests additional time to supplement the record.

Counsel has not demonstrated that the AAO's previous decision was in error. Specifically, counsel has not submitted evidence that prior counsel did, in fact, submit a brief on June 20, 2000. Even if prior counsel's ineffectiveness was cause to consider the appellate brief on motion, counsel has not submitted a copy of that brief or his own brief on the merits of the petition. 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. There is no analogous regulation that allows a petitioner to submit new evidence in furtherance of a previously filed motion. The regulations governing motions to reopen clearly provide that the motion must be filed with the evidence that the decision was in error. 8 CFR 103.5(a)(2). By filing a motion, the petitioner does not guarantee himself an open-ended period in which to repeatedly supplement the record with evidence that plainly did not exist at the time the motion (let alone the underlying petition) was filed. Otherwise, a petitioner could indefinitely delay the adjudication of the motion, simply by repeatedly submitting new documents and requests for more time.

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. This decision is without prejudice to the filing of a new petition.

ORDER: The Associate Commissioner's decision of April 13, 2001 is affirmed. The petition is denied.