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FILE: SRC 03 221 55200 Office: TEXAS SERVICE CENTER Date: **NOV 15 2005**

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

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) rejected an untimely appeal. The matter is again before the AAO on motion to reopen or reconsider. The motion will be dismissed. The decisions of the director and the AAO will be affirmed. The petition will be denied.

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days after service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b).

The record indicates that the director issued the decision on December 3, 2003. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. The Form I-290B was initially rejected for lack of a required signature and was not received by Citizenship and Immigration Services in proper condition for filing until January 16, 2004, or 44 days after the decision was issued. Accordingly, the appeal was untimely filed.

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case. The official having jurisdiction over a motion is the official who made the last decision in the proceeding; at the time of the AAO's decision it was the service center director. *See* 8 C.F.R. § 103.5(a)(1)(ii). The director declined to treat the late appeal as a motion and forwarded the matter to the AAO. The AAO had no jurisdiction over this motion, and it was properly rejected.

On motion, counsel contends that the AAO erred in rejecting the motion. Counsel submits a copy of the service center's notice of rejection of the original appeal, and asserts that the appeal was in fact timely filed. Counsel states that the appeal should not have been considered late because the failure to file it timely was "through no intended fault of [the] Attorney," and that other than the missing signature, the entire Form I-290B was fully completed, and that the appeal was *de facto* accepted.

Counsel's contentions are not persuasive. The AAO properly rejected the appeal, as it has no jurisdiction to accept untimely appeals.

Counsel's submission satisfies neither the requirements of a motion to reopen nor a motion to reconsider. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) 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 Citizenship and Immigration Services (CIS) policy; and (2) 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)(3).

As previously stated, a motion to reopen must state the new facts that will be proven if the matter is reopened, and must be supported by affidavits or other documentary evidence. Generally, the new facts must be material and unavailable previously, and could not have been discovered earlier in the proceeding. *See* 8 C.F.R. § 1003.23(b)(3). Here, no evidence in the motion contains new facts that were previously available. The documents submitted on motion were available on appeal.

Nor does the submitted evidence satisfy the requirements of a motion to reconsider. Although counsel states that the AAO's rejection of the appeal was incorrect, he does not support his assertion by any pertinent precedent decisions, or establish that the AAO misinterpreted the evidence of record.

A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). 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. The petitioner has not met that burden.

ORDER: The motion is dismissed. The AAO's August 5, 2004 decision is affirmed. The petition is denied.