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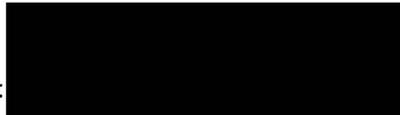
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File:   
LIN 05 121 50422

Office: NEBRASKA SERVICE CENTER

Date: AUG 05 2009

IN RE: Petitioner:  
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

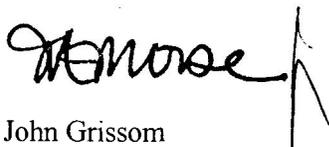
IN BEHALF OF BENEFICIARY:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).



John Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** On June 10, 2005, the Director of the Nebraska Service Center denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on February 20, 2007, the AAO dismissed the appeal. On April 23, 2007, a motion to reconsider the AAO's decision was filed with the Nebraska Service Center. The motion will be dismissed pursuant to 8 C.F.R. §§ 103.5(a)(1)(i), 103.5(a)(1)(iii)(C), 103.5(a)(3), and 103.5(a)(4).

The petitioner, a restaurant/food service company, seeks to employ the beneficiary permanently in the United States as a bakery manager. As required by statute, an ETA Form 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the position requires at least two years of training or experience to qualify for skilled worker consideration and that the petitioner failed to demonstrate that it was able to pay the proffered wage to the beneficiary. As indicated above, the AAO dismissed the subsequently filed appeal of the director's decision on February 20, 2007, and a motion to reconsider the AAO's decision was filed on April 23, 2007.

The regulation at 8 C.F.R. § 103.5(a)(1)(i) states in pertinent part that:

Any motion to reconsider an action by [U.S. Citizenship and Immigration Services (USCIS)] filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider.

In this matter, the instant motion was filed with the Nebraska Service Center on April 23, 2007, or 62 days after the decision of the AAO. Therefore, the motion was untimely and must be dismissed for failing to meet applicable requirements. 8 C.F.R. § 103.5(a)(4).<sup>1</sup>

In addition, the motion shall be dismissed for failing to meet one other applicable requirement. The regulation at 8 C.F.R. §§ 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and motions to reconsider. 8 C.F.R. § 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." This motion contains no such statement.

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<sup>1</sup> The record indicates that an attempt to file the instant motion was made directly with the AAO on June 8, 2007, 29 days after the decision of the AAO. It is noted that the attempt to file this motion directly with the AAO did not establish a receipt date of June 8, 2007. As clearly explained in the AAO's decision dated May 10, 2007, further inquiries regarding the matter should have been made to the Nebraska Service Center. Moreover, the regulation at 8 C.F.R. § 103.5(a)(1)(iii)(E) requires that this motion be filed at the office maintaining the record, i.e., the Nebraska Service Center, for forwarding to the official having jurisdiction, i.e., the AAO. Therefore, the receipt date for the instant motion was the day it was received by the Nebraska Service Center – July 6, 2007. Furthermore, it is noted that the instant motion is described by counsel as a motion to reconsider. However, even if the instant motion could be construed to be a motion to reopen, it must also be dismissed as untimely under 8 C.F.R. § 103.5(a)(1)(i). As the motion does not establish that its tardiness was "reasonable and was beyond the control of the applicant or petitioner," the movant was not permitted to file the motion more than 30 days, plus 3 days for mailing, after the AAO's decision. *Id.*

The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion did not meet the applicable filing requirement listed in 8 C.F.R. §§ 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

Finally, the AAO will dismiss the motion for failure to meet the applicable requirements set forth in 8 C.F.R. § 103.5(a)(3). The regulations at 8 C.F.R. § 103.5(a)(3) require motions to reconsider to "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 [USCIS] policy." In this matter, counsel did not support its motion with any pertinent precedent decisions to establish that the AAO's decision was based on an incorrect application of law or policy. For this reason, the motion must also be dismissed pursuant to 8 C.F.R. § 103.5(a)(4) as the motion fails to meet applicable requirements.

8 C.F.R. § 103.5(a)(2) states the requirements for a motion to reopen which include that new evidence be submitted. The evidence included with the petitioner's motion goes only to the issue of whether the petitioner is able to pay the proffered wage, it does not purport to nor does it supply evidence regarding the position's requirements and qualification under the skilled worker category. As the previous decision denied the petitioner's claim for both of the above reasons, even if we had accepted the evidence regarding the petitioner's eligibility to pay the proffered wage, the petition would still be denied based on the petition's misfiling. As such, the motion is moot as granting the motion to reopen and accepting the evidence regarding the ability of the petitioner to pay, even assuming that the new evidence establishes the petitioner's ability to pay, a finding we do not make, would not make the petition approvable.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden.

Finally, it should be noted for the record that, unless USCIS directs otherwise, the filing of a motion to reopen does not stay the execution of any decision in a case or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

Accordingly, the motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

**ORDER:**                   The motion is dismissed.