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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

D2

[redacted]

FILE: WAC 04 210 51261 Office: CALIFORNIA SERVICE CENTER Date: JAN 08 2010

IN RE: Petitioner: [redacted]
Beneficiary:

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:

[redacted]

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal on July 14, 2006. The matter is again before the AAO on motion to reopen. The motion will be dismissed.

The petitioner is a wholesaler of trimmings and bridal accessories, with five claimed employees. It seeks to extend its employment of the beneficiary as an accountant pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director determined that the petitioner had failed to establish the proposed position as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and that the petitioner lacked the organizational complexity to justify a position for an accountant. On appeal, counsel focused his analysis on the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), that a bachelor's degree is normally the minimum requirement for entry into the particular position, and on the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*), that the nature of the specific duties of the petitioner's proffered position is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. Upon review of all the evidence submitted, the AAO determined that the record of proceeding failed to establish any of the four criteria outlined at 8 C.F.R. § 214.2(h)(4)(iii)(A).

U.S. Citizenship and Immigration Services (USCIS) regulations require that motions to reopen be filed within 30 days of the underlying decision, except that failure to file before this period expires may be excused in the discretion of USCIS "where it is demonstrated that the delay was reasonable and was beyond the control of the [petitioner]." 8 C.F.R. § 103.5(a)(1)(i). Pursuant to 8 C.F.R. § 103.5a(b), if the AAO's decision is served by mail, an additional three days shall be added to the 30 day filing requirement.

The record in this matter indicates that the AAO's decision was mailed directly to both the petitioner and the petitioner's counsel on Friday, July 14, 2006. The motion to reopen was filed on Thursday, August 17, 2006, 34 days after the AAO's decision. Counsel contends that the appeal was not mailed until several days later, and submits a copy of an envelope from the AAO with a postmark of July 18, 2006.

Upon review of the postmark, it appears that the envelope was mailed from the AAO to zip code 91436-1921, the zip code matching counsel's address of record. However, it does not appear likely that this is a photocopy of the envelope used to mail the AAO's decision in this matter. First, both the decision as well as USCIS electronic records indicate that the decision was mailed on Friday, July 14, 2006. Second, it is simply not credible that a decision dated by the AAO and picked up by the U.S. Postal Service on Friday, July 14, 2006 would not be postmarked until the following Tuesday. Third, counsel chose to submit a photocopy of an AAO envelope delivered to his offices instead of the envelope used to deliver the AAO's decision to the petitioner. Based on a review of the AAO's records, it appears instead that the photocopied envelope submitted by counsel was used instead by the AAO to mail a request for evidence (RFE) to counsel's office in regard to a separate matter (WAC 03 193 50964). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Therefore, the AAO finds that the motion to reopen was not

filed within the proscribed 33 day period permitted by the regulations.

As noted above, the regulations permit USCIS, in its discretion, to excuse the untimely filing of the instant motion to reopen where it is demonstrated that the delay was reasonable and beyond the control of the petitioner. 8 C.F.R. § 103.5(a)(1)(i). Upon review, the AAO does not find that the untimely filing of the motion in this matter was either reasonable or beyond the control of the petitioner. First, no argument or evidence was submitted in support of a claim or request that USCIS excuse the late filing of the motion on this basis. Instead, counsel simply argues that the motion to reopen was timely filed, submitting the above-referenced AAO envelope in support of this assertion. Second, the AAO refuses to exercise its discretion to excuse the late filing of a motion to reopen in which counsel's assertions regarding the date the underlying decision was mailed is contrary to both USCIS paper and electronic records. Regardless, the filing requirements for Form I-290B are not deemed to be onerous or difficult, and it appears that the petitioner and the petitioner's counsel had more than adequate time to timely file the motion to reopen in this matter. Therefore, the motion to reopen must be deemed to be untimely filed; the AAO will not exercise its discretion to excuse its late filing; and the motion to reopen must be dismissed pursuant to 8 C.F.R. § 103.5(a)(4) for failure to meet an applicable requirement at 8 C.F.R. § 103.5(a)(1)(i).

Upon further review, the AAO will also dismiss the motion for failure to meet an additional requirement applicable to motions to reopen. The regulation at 8 C.F.R. § 103.5(a)(2) states in pertinent part that "[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." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.[1]

Counsel states that the purpose of the motion to reopen is to address the five issues raised by the AAO in its July 14, 2006 decision. Counsel claims that the accompanying letter from the petitioner dated August 16, 2006 provides additional information about the nature of the accounting position being offered to the beneficiary as well as the financial activities of the petitioner. The motion to reopen also includes the following documentation: (1) photocopies of the petitioner's 2004 and 2005 tax returns; (2) a "Buyer Estimated Closing Statement" for the purchase of [redacted] by an individual named [redacted] (3) quarterly wage statements for a company named "[redacted]"; (4) quarterly wage statements for the [redacted]; (5) printouts from the website of the Accreditation Counsel for Accounting and Taxation (ACAT); and (6) a photocopy of a U.S. District Court decision for which counsel was the plaintiffs' counsel.

In this matter, the petitioner presented no facts or evidence on motion that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen. While counsel provides copies of the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation, for the years 2004 and 2005, the petitioner has failed to state new facts supported by these tax returns that are relevant to the issue of whether the proffered position is a specialty occupation. In addition, the estimated closing and quarterly wage statements do not concern the petitioner. Instead, the estimated closing statement is for an individual buyer,

[1] The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <*new* evidence> . . . ." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

[redacted] and the quarterly wage statements are for two other separate legal entities, neither of which is the petitioner. Whether these other legal entities are or were affiliates of the petitioner has not been established nor is it relevant to the matter at hand. Moreover, even if the evidence were deemed relevant to this matter, the tax documents, along with the recent quarterly wage reports and closing statement for the purchase of the new manufacturing business, fail to overcome the director's finding and the AAO's affirmation on appeal that the proffered position is not a specialty occupation. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Finally, the ACAT printouts and the cited U.S. District Court decision are not new, as they could have been provided before a decision was entered in the previous proceeding, i.e., the AAO's prior decision. Accordingly, the motion to reopen will be dismissed for this additional reason.

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. The motion will be dismissed.

Finally, it should be noted for the record that, unless USCIS directs otherwise, the filing of a motion 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).

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 motion to reopen 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.