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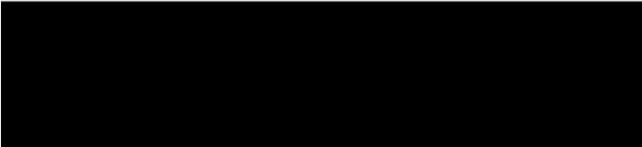
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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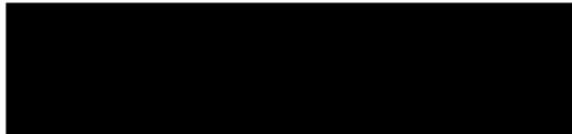
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File: WAC 08 007 52428 Office: CALIFORNIA SERVICE CENTER Date:

AUG 11 2009

IN RE: Petitioner:
Beneficiary:



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

IN 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.

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).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: On November 28, 2007, the Director of the California Service Center denied the nonimmigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on August 1, 2008, the AAO dismissed the appeal. On September 8, 2008, counsel for the petitioner filed a Motion to Reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The AAO dismissed the motion on March 4, 2009, pursuant to the regulations at 8 C.F.R. §§ 103.5(a)(1)(i), 103.5(a)(1)(iii)(C), and 103.5(a)(4).

The petitioner filed this nonimmigrant visa petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a limited liability company organized under the laws of the State of California and is allegedly an importer of tiles, frames, and other building materials. It seeks to employ the beneficiary in the position of "art frame department manager" for a period of three years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial capacity. The AAO dismissed the subsequently filed appeal on the basis that the petitioner failed to establish that the beneficiary would be primarily employed in a managerial or executive capacity and further determined that the petitioner failed to establish that the beneficiary was employed abroad in a primarily managerial or executive capacity.

The petitioner subsequently filed a motion to reconsider the AAO's adverse decision on September 8, 2008, 38 days after the AAO's August 1, 2008 decision.¹ The AAO dismissed the motion as untimely filed pursuant to the regulation at 8 C.F.R. § 103.5(a)(1)(i), which requires the affected party to file a motion to reconsider within 30 days of the underlying decision. The AAO also dismissed the previous motion for failing to meet an applicable filing requirement. Specifically, the AAO found that the motion filed on September 8, 2008, did not contain a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding, as required by 8 C.F.R. § 103.5(a)(1)(iii)(C).

Counsel for the petitioner timely filed the instant motion to reopen on April 1, 2009. On motion, counsel submits a brief which is identical in substantive content to the brief submitted in support of the previous motion to reconsider, and the brief submitted in support of the petitioner's appeal. Although counsel acknowledges the AAO's dismissal of the petitioner's appeal and the subsequent motion, the brief contains no direct reference to the specific findings made in the AAO's decisions dated August 1, 2008 or March 4, 2009. Rather, counsel requests,

¹ In dismissing the motion, the AAO acknowledged that counsel had attempted to file the instant motion directly with the AAO on August 28, 2008. However, the AAO immediately, and appropriately, returned the motion and the filing fee to counsel. The AAO emphasized that the regulations clearly require that all motions be "submitted to the office maintaining the record upon which the unfavorable decision was made for forwarding to the official having jurisdiction." 8 C.F.R. § 103.5(a)(1)(iii)(E). Likewise, the instructions on the first page of the AAO's August 1, 2008 decision indicated that all further inquiries be made to the office which originally decided the case. The AAO noted that all documents filed with USCIS must be filed "in accordance with the instructions on the form," which includes where the documents should be filed, and improperly filed documents shall not retain filing dates. See 8 C.F.R. § 103.2. Accordingly, the AAO determined that counsel's attempt to file the motion directly with the AAO did not establish a receipt date of August 28, 2008.

for the third time, that the AAO conduct a *de novo* review of the record, and either approve the petition or remand the matter to the Service Center for further review.

The regulation at 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.

The regulation at 8 C.F.R. § 103.5(a)(3) states:

A motion to reconsider 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 [U.S. Citizenship and Immigration Services (USCIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The regulation at 8 C.F.R. § 103.5(a)(4) states, in pertinent part: "A motion that does not meet applicable requirements shall be dismissed."

The instant motion consists of counsel's brief dated March 31, 2009. There is no reference made to the findings made in the AAO's most recent decision and the specific deficiencies remarked upon therein, no new facts provided to support a motion to reopen, and no reasons stated for reconsideration. Accordingly, the motion will be dismissed for failing to meet the applicable requirements.

The purpose of a motion to reopen is different from the purpose of an appeal. While the AAO conducts a comprehensive, *de novo* review of the entire record on appeal, a review in the case of a motion to reopen is strictly limited to an examination of any new facts, which must be supported by affidavits and documentary evidence. As such, counsel's previously submitted arguments based on the Service Center director's original decision cannot be considered "new" facts. The AAO previously conducted a *de novo* review of the entire record of proceeding and has already addressed the arguments contained in counsel's brief. There is no regulatory or statutory provision that allows a petitioner more than one appellate decision per petition filed. In the present matter, an appellate decision was issued and the deficiencies were expressly stated.

Rather, the AAO's review in this matter is limited to the narrow issue of whether the petitioner has presented and documented new facts warranting re-opening of the AAO's most recent decision issued on March 4, 2009.

As noted above, the AAO's most recent decision dated March 4, 2009, ordered the dismissal of the petitioner's motion to reconsider because it was untimely filed, and because it failed to include a statement indicating whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding. Upon review, the AAO finds that both grounds for dismissal were correct.

In the current proceeding, counsel has not even acknowledged these grounds for dismissal, much less attempted to overcome them. The petitioner has neither claimed that the previous motion was timely filed, nor submitted documentary evidence to establish the previous motion was timely filed, such as evidence

documenting that the AAO's decision dated August 1, 2008 was mailed to the wrong address. Absent such evidence, the AAO must conclude that the AAO's decision was properly served to the petitioner and counsel by mail on August 1, 2008, and the motion to reconsider was due to be filed with the California Service Center on or before Wednesday, September 3, 2008 in order to be considered timely filed.

As noted in the AAO's decision dated March 4, 2009, the regulation at 8 C.F.R. § 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and motions to reconsider. Section 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." The petitioner's previous motion to reconsider did not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C), nor does the current motion to reopen. 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 does not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this 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, the AAO notes for the record that the only issue addressed in either motion is whether the petitioner established that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive capacity. This was the sole issue addressed in the director's decision dated November 28, 2007. As noted above, the AAO entered a second ground of ineligibility in its decision dated August 1, 2008, in which it determined that the petitioner had not established that the beneficiary had been employed by the foreign entity in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(iv).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d at 1002 n. 9 (noting that the AAO reviews appeals on a *de novo* basis). When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

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 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.