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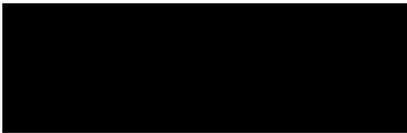
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



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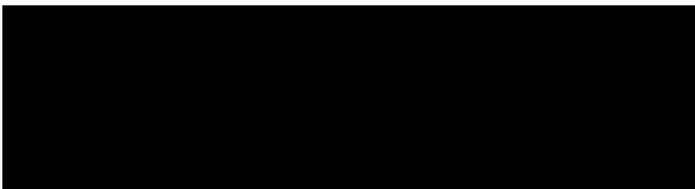


FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: JAN 10 2011

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:



**INSTRUCTIONS:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Texas Service Center on February 5, 2009. The Administrative Appeals Office (AAO) dismissed a subsequent appeal on December 3, 2009. On February 2, 2010, the petitioner filed a motion to reopen and reconsider the director's February 5, 2009 denial of the petition. Rather than forwarding the late motion to the AAO for consideration, the director dismissed the motion as untimely on July 29, 2010.<sup>1</sup> The petitioner filed an appeal on August 30, 2010, and the matter is now before the AAO. The February 2, 2010 motion will be dismissed and the August 30, 2010 appeal will be summarily dismissed.

The petitioner, an investment manager, seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability in business.<sup>2</sup> The director and the AAO determined that the petitioner had not established the requisite extraordinary ability through extensive documentation and sustained national or international acclaim.

### **I. The petitioner's February 2, 2010 motion to reopen and reconsider**

The director erred in not forwarding the petitioner's motion to the AAO. The official having jurisdiction over a motion is the official who made the latest decision in the proceeding, in this case the AAO. *See* 8 C.F.R. § 103.5(a)(1)(ii). Accordingly, we will consider the petitioner's February 2, 2010 motion. The motion will be dismissed by the AAO pursuant to 8 C.F.R. §§ 103.5(a)(1)(i), 103.5(a)(1)(iii)(C), and 103.5(a)(4).

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

Any motion to reconsider an action by the Service filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before the Service filed by an applicant or petitioner, 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 was beyond the control of the applicant or petitioner.

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<sup>1</sup> According to 8 C.F.R. § 103.5(a)(1)(ii), jurisdiction over a motion resides in the official who made the latest decision in the proceeding, in this instance the AAO.

<sup>2</sup> The director approved the petitioner's fee waiver requests for both the February 2, 2010 motion and the August 30, 2010 appeal, but the record is devoid of any supporting documentary evidence demonstrating that the petitioner's income level or financial condition makes him eligible for a fee waiver. We cannot ignore that the petitioner seeks classification as an alien of extraordinary ability in business as an investment manager. More specifically, the petitioner refers to himself as a "fund manager" with expertise in "investment management, risk management, and business development." Additionally, counsel asserts that the petitioner "commands a high salary or other significantly high remuneration in relation to others in the field." *See* 8 C.F.R. § 204.5(h)(3)(ix). The petitioner's repeated requests for fee waivers based on financial hardship are not consistent with his claims of extraordinary ability in managing investments and commanding a high salary or other significantly high remuneration in relation to his peers.

The regulation at 8 C.F.R. § 103.5(a)(1)(iii) provides:

*Filing Requirements* – A motion shall be submitted on Form I-290B, and may be accompanied by a brief. It must be:

- (A) In writing and signed by the affected party or the attorney or representative of record, if any;
- (B) Accompanied by a nonrefundable fee as set forth in § 103.7;
- (C) Accompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding;
- (D) Addressed to the official having jurisdiction; and;
- (E) Submitted to the office maintaining the record upon which the unfavorable decision was made for forwarding to the official having jurisdiction.

The regulation at 8 C.F.R. § 103.5(a)(1)(i) states that a motion must be filed within 30 days of the decision that the motion seeks to reopen or reconsider. The regulation at 8 C.F.R. § 103.5a(b) states that whenever a person is required to act within a prescribed period after the service of a notice upon him and the notice is served by mail, three days shall be added to the prescribed period. The AAO issued the decision dismissing the petitioner's appeal on December 3, 2009. The record indicates that the petitioner filed his motion to reopen and reconsider on February 2, 2010, 61 days after the decision of the AAO.

As it relates to motions to reopen, the regulation at 8 C.F.R. § 103.5(a)(1)(i) provides 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 was beyond the control of the applicant or petitioner." In this matter, the petitioner's motion was not properly filed within the required thirty days and he has not demonstrated that this delay was reasonable and beyond his control. The motion must therefore be dismissed as untimely filed. Moreover, the motion does not contain the statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding as required by the regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C). For this additional reason, the motion must be dismissed.

Motions for the reopening 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. *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 regulation at 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, the proceedings will

not be reopened and reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

## **II. The petitioner's August 30, 2010 appeal**

On appeal, the petitioner states:

Please understand that I initially planned to submit the additional evidence within 3 months of filing the motion. Yet due to market change and new business opportunities, my business partners decided to enhance our strategy and upgrade their commitment. As a result, we need to adjust our business plan including due diligence, market analysis and re-coordination of all stakeholders. I've been working hard to materialize our partnership so that I can submit the additional evidence in time. However, please understand we also don't want to compromise our work of quality and it may take more time to complete this process because we have to finalize a few factors critical to our business endeavor. I will submit a request for additional time for the submission of brief and/or additional evidence to the Appeals Office directly.

On the Form I-290B, Notice of Appeal or Motion, the petitioner checked the box indicating that a brief and/or evidence would be submitted to the AAO within 30 days. However, in a subsequent letter received by the AAO on September 24, 2010, the petitioner requests "additional time for submission of a brief and additional evidence" relating to his appeal. The petitioner states:

Supporting evidence from my business partners is essential for my appeal. Yet due to market change and new business opportunities, my business partners decided to enhance our strategy and upgrade their commitment. As a result, we need to adjust our business plan including due diligence, market analysis and re-coordination of all stakeholders. I've been working hard to materialize our partnership so that I can submit the additional evidence in time. However, please understand we also don't want to compromise our work of quality and it will take more time to complete this process because we have to finalize a few factors critical to our business endeavor. The benefit is that we will be better positioned for the current market opportunities, thus increasing our investment more efficiently due to our solid due diligence. Hence, I sincerely hope to be given another 2 months for the submission of additional evidence to the Appeals Office. I will submit a brief and additional evidence on or before November 30, 2010.

With regard to the petitioner's request for additional time to submit a brief and further evidence, there is no regulation that allows the petitioner an open-ended or indefinite period in which to supplement an appeal once it has been filed. The regulation at 8 C.F.R. § 103.3(a)(2)(vii) states "[t]he affected party may make a written request to the [AAO] for additional time to submit a brief. The [AAO] may, for good cause shown, allow the affected party additional time to submit one." In this instance, the petitioner initially requested and received 30 days in which to submit a brief and/or evidence. The regulations do not state or imply that the petitioner may request future extensions. Nevertheless, as of this date, more than four months after the appeal was filed, the AAO has received no further documentation.

Moreover, we note that the Form I-140, Immigrant Petition for Alien Worker, was filed on May 12, 2008. The business strategy enhancements and adjustments to the business plan discussed by the petitioner on appeal post-date the filing of the petition. A petitioner, however, must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). All of the case law on the issue of when eligibility must be established focuses on the policy of preventing petitioners from securing a priority date in the hope that they will subsequently be able to demonstrate eligibility. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Reg'l. Comm'r. 1977); *Matter of Katigbak*, 14 I&N Dec. at 49; *see also Matter of Izummi*, 22 I&N Dec. 169, 175-76 (Comm'r. 1998) (citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981) for the proposition that we cannot "consider facts that come into being only subsequent to the filing of a petition.") Ultimately, in order to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed. *Ogundipe v. Mukasey*, 541 F.3d 257, 261 (4<sup>th</sup> Cir. 2008). Accordingly, the AAO will not consider business developments that occur after May 12, 2008 in this proceeding.

In the present matter, the petitioner first indicated that a brief and/or evidence would be submitted to the AAO within 30 days. In a subsequent letter, the petitioner stated that he would "submit a brief and additional evidence on or before November 30, 2010." As of the date of this decision, the AAO has received nothing further.

The petitioner's August 30, 2010 appeal does not specifically challenge any of U.S. Citizenship and Immigration Services' findings or its analyses of the evidence submitted for the regulatory criteria at 8 C.F.R. § 204.5(h)(3). Moreover, the appellate submission was unaccompanied by arguments or evidence addressing the regulatory criteria at 8 C.F.R. § 204.5(h)(3) which the petitioner claims to meet.

As stated in 8 C.F.R. § 103.3(a)(1)(v), an appeal shall be summarily dismissed if the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

The petitioner has not specifically addressed the reasons stated for denial and has not provided any additional evidence pertaining to the classification sought. The appeal must therefore be summarily dismissed.

### **III. Conclusion**

Review of the record does not establish that the petitioner has distinguished himself to such an extent that he may be said to have achieved sustained national or international acclaim and to be within the small percentage at the very top of his field. The evidence is not persuasive that the petitioner's achievements set him significantly above almost all others in his field at a national or international level. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

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. Here, that burden has not been met.

**ORDER:** The February 2, 2010 motion to reopen and reconsider is dismissed; the August 30, 2010 appeal is dismissed; the AAO's December 3, 2009 decision is affirmed, and the petition remains denied.