



U.S. Citizenship  
and Immigration  
Services

B2

[REDACTED]

DATE: DEC 05 2012

Office: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner:  
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:

[REDACTED]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you.

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the employment-based immigrant visa petition on September 26, 2005. On appeal, the Administrative Appeals Office (AAO) issued a notice advising the petitioner of derogatory information on March 7, 2007, providing the petitioner fifteen days to respond to the derogatory evidence that the AAO intended to use to make a finding of misrepresentation. On May 4, 2007, the AAO affirmed the director's adverse decision on the petition and issued a formal finding of misrepresentation. The petitioner's current counsel moves to reopen proceedings. In the brief supporting the motion to reopen, counsel asserts that independent and objective evidence is now available that shows the AAO's previous finding of fraud was erroneous. The motion will be dismissed. The previous decision of the AAO will be affirmed, and the petition will remain denied.

Regarding motions to reopen or reconsider, 8 C.F.R. § 103.5(a)(1)(ii) states in relevant part: "The official having jurisdiction is the official who made the latest decision in the proceeding unless the affected party moves to a new jurisdiction." The latest decision was the AAO's May 4, 2007 decision dismissing the appeal. Therefore, a review of any claims or assertions that the petitioner's motion raises is limited in scope and is restricted to the AAO's prior decision. In addition, to properly file a motion, the regulation at 8 C.F.R. § 103.5(a)(1)(iii) requires that the motion must 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 and, if so, the court, nature, date, and status or result of the proceeding." Furthermore, the regulation at 8 C.F.R. § 103.5(a)(4) requires that "[a] motion that does not meet applicable requirements shall be dismissed. In this case, the petitioner failed to submit a statement regarding whether the validity of the AAO's decision has been, or is, subject of any judicial proceeding. The regulation mandates that this shortcoming alone requires U.S. Citizenship and Immigration Services (USCIS) to dismiss the motion. See 8 C.F.R. § 103.5(a)(4).

Notwithstanding the fatal defect noted above, the AAO will consider the current motion to reopen. As an initial matter, the current motion to reopen is untimely. 8 C.F.R. § 103.5(a)(1)(i) provides that: "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." The AAO's most recent decision was issued on May 4, 2007. The petitioner filed the current motion on September 13, 2011, over four years after the issuance of the last AAO decision. Petitioner's current counsel asserts in the brief in support of the motion that the motion is untimely because the delay was necessary to secure the evidence that resulted from criminal prosecution of the petitioner's former attorneys. Along with the motion, the petitioner submitted the following documents:

1. An April 10, 2007 letter from [REDACTED] indicating that he represents the petitioner's spouse;
2. Evidence of [REDACTED] plea agreement entered on June 8, 2007;
3. Copies of a series of emails between a U.S. Immigration and Customs Enforcement Officer and current counsel from August, 2009 to January, 2010;
4. Letters from the Departmental Disciplinary Committee of the New York Supreme Court, dated May 19, 2010, and August 12, 2010, respectively;

5. A May 3, 2010 letter from [REDACTED] to the Disciplinary Committee;
6. A June 2, 2010 letter from the petitioner responding to [REDACTED] letter;  
and
7. An affidavit to contest the misrepresentation finding.<sup>1</sup>

Item 1, the letter from [REDACTED] attesting to the representation of the petitioner's husband, and item 2 [REDACTED] plea agreement, were available in 2007. Thus, the petitioner could have obtained both items before 2011. As for item 3, the emails with the Enforcement Officer, a thorough review of the contents reveal that they do not confirm anything relating to the petitioner's representations with her former attorneys, and thereby lack probative evidentiary value. As for items 4-6, the series of 2010 correspondence relating to the complaint the petitioner made against [REDACTED] to the New York Supreme Court, the petitioner was aware of the AAO's concerns relating to derogatory evidence in March 2007, and the petitioner has failed to provide an explanation for the delay in filing the complaint until 2010. Finally, item 7, the affidavit to contest the misrepresentation finding could have been prepared earlier, had the petitioner chosen to contest the misrepresentation finding earlier. The evidence that the petitioner now submits could also have been secured at an earlier date. The AAO, therefore, must find that a four year delay in filing the current motion is not reasonable or beyond the petitioner's control. Consequently, because the four year delay is not excusable, the current motion is untimely pursuant to 8 C.F.R. § 103.5(a)(1)(i).

Nonetheless, the AAO will consider the evidence the petitioner now submits to determine whether the proceedings should be reopened. Motions for the reopening of immigration proceedings are disfavored for the same reasons as are 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. A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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.<sup>2</sup> While some of the current evidence, as listed by number in the previous paragraph, further substantiates the claim of potential malfeasance on the part of the petitioner's purported attorneys, the prior AAO decision considered the petitioner's arguments relating to allegations of malfeasance.

As an initial matter, the AAO's May 4, 2007 decision observed that the record included no Form G-28, Notice of Entry of Appearance as Attorney or Representative, reflecting that the petitioner was represented by attorneys [REDACTED] immigration matters. The evidence the petitioner previously submitted and the new evidence that she submits with the motion do

<sup>1</sup> The record reflects that [REDACTED] is also known as [REDACTED] and [REDACTED]

<sup>2</sup> The word "new" is defined as "1: having recently come into existence : [REDACTED] 2a (1) : having been seen, used, or known for a short time : NOVEL <rice was a new crop for the area> ." <http://www.merriam-webster.com/dictionary/new>, accessed on November 8, 2012.

not sufficiently establish that the petitioner was actually represented by the attorneys she claims committed fraud without her knowledge. The "Retainer agreement of [REDACTED]" in the record, dated August 30, 2003, reflects that the client is [REDACTED]. Similarly, [REDACTED] letter dated April 10, 2007 states that: "[t]his office represents Mr. [REDACTED] in his immigration matters in the United States." Furthermore, in [REDACTED] May 3, 2010 letter to the Disciplinary Committee, he disavows ever having represented or assisted the petitioner with her Form I-140 petition. Consequently, the petitioner has failed to establish that she was ever represented or assisted in her Form I-140 petition and related matters by either [REDACTED] or [REDACTED] the two attorneys that the petitioner alleges committed the fraud related to her visa petition. While the petitioner references a February 7, 2007 "notice of intent to deny" listing Mr. [REDACTED] as her attorney in her response to Mr. [REDACTED] May 3, 2010 letter, the AAO issued its notice of intent to dismiss the appeal on March 7, 2007 and did not list Mr. [REDACTED] as her attorney.

The May 4, 2007 AAO decision also determined that the petitioner signed her Form I-140, thereby certifying under penalty of perjury that the petition and the evidence submitted with it are all true and correct. See section 287(b) of the Act, 8 U.S.C. § 1357(b); see also, 28 U.S.C. § 1746 and 18 U.S.C. § 1621. Furthermore, the AAO continues to find it significant that the previous submissions to USCIS relating to her visa petition were sent in envelopes which reflected the petitioner's home address in Staten Island. While the petitioner maintains that she was unaware of the contents of the envelopes and she only followed the instructions of her attorneys, the petitioner cannot be absolved of her responsibility to provide information and evidence that are true and correct, which she attested to under penalty of perjury. None of the evidence that the petitioner now submits is probative or otherwise has any bearing on this critical basis of the AAO's prior finding of fraud.

To the extent that the petitioner is making a claim of ineffective assistance of counsel along with her motion, the prior AAO decision stated the requirements for making such a claim pursuant to *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1<sup>st</sup> Cir. 1988), and determined that the petitioner failed to satisfy those requirements. Significantly, in the current motion, the petitioner does not challenge our previous determination of her failure to meet the *Lozada* requirements precludes a finding of ineffective of assistance of counsel, nor does the petitioner assert that the AAO's previous reliance upon that precedent decision was erroneous. Therefore, the AAO concludes that any claim of ineffective assistance of counsel was fully considered.

Finally, the May 7, 2007 AAO decision, after making a fraud finding, fully considered the petitioner's appeal on the merits and concluded that the petitioner failed to establish her eligibility as an "alien with extraordinary ability" under 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A), and the implementing regulations. The current motion contains no evidence relating to the merits of the petitioner's underlying visa petition and the petitioner does not challenge the AAO's decision in this regard. Consequently, the AAO considers abandoned any claims related to the merits of the petitioner's underlying visa petition. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at \*1, 9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO).

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the motion will be dismissed.

**ORDER:** The motion is dismissed, the AAO's March 4, 2007 decision is affirmed, and the petition remains denied.