

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy  
**PUBLIC COPY**

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



U.S. Citizenship  
and Immigration  
Services

*Br*

[REDACTED]

DATE: **JUL 23 2012** OFFICE: TEXAS SERVICE CENTER

[REDACTED]

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:

[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,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition on March 24, 2011. On appeal, the Administrative Appeals Office (AAO) found that the petitioner did not meet his burden of establishing eligibility for the benefit sought and dismissed his appeal on July 11, 2011. The matter is now before the AAO on a motion to reopen and reconsider, filed on August 16, 2011. The motion will be dismissed. The previous decision of the AAO will be affirmed, and the petition will remain denied.

In order to properly file a motion to reopen or reconsider, the regulation at 8 C.F.R. § 103.5(a)(1)(i) provides that the motion must be filed within 30 days of the unfavorable decision that the motion seeks to reopen. If the decision was mailed, the motion must be filed within 33 days. See 8 C.F.R. § 103.8(b). The regulation at 8 C.F.R. § 1.2 explains that when the last day of a period falls on a Saturday, Sunday, or legal holiday, the period shall run until the end of the next day that is not a Saturday, Sunday, or legal holiday. The date of filing is not the date of submission, but the date of actual receipt with the proper signature and the required fee. See 8 C.F.R. § 103.2(a)(7)(i). The regulation at 8 C.F.R. § 103.5(a)(1)(i) further provides that if the petitioner fails to file a motion to reopen before the prescribed period expires, the AAO may, in its discretion, excuse the delay if the petitioner shows that the delay was reasonable and was beyond his or her control. Furthermore, under the regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C), a 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.” Finally, 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 record indicates that the AAO issued the unfavorable decision on July 11, 2011. The decision was served on counsel via first-class mail on July 11, 2011. The AAO properly provided notice to the petitioner that the specific requirements for filing a motion to reopen can be found under the regulation at 8 C.F.R. § 103.5 and that the petitioner could file a motion “to the office that originally decided” the case.

Counsel dated the Notice of Appeal or Motion, Form I-290B, August 9, 2011 and submitted the motion directly to the AAO on August 10, 2011. The AAO returned the filing, advising that the AAO does not accept fees and providing the correct address. The Texas Service Center received the motion along with the required fee on Tuesday, August 16, 2011. In other words, USCIS did not receive the properly filed motion until 36 days after the unfavorable decision was issued. Moreover, counsel has failed to demonstrate in his letters to the AAO dated August 9, 2011, October 3, 2011 and November 15, 2011 that the delay was either reasonable or was beyond the control of the petitioner, as required under the regulation at 8 C.F.R. § 103.5(a)(1)(i). Accordingly, the motion was untimely filed.

Furthermore, counsel has failed to submit a statement indicating if the validity of the AAO’s July 11, 2011 unfavorable decision has been or is the subject of any judicial proceeding pursuant to the regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) requires that “[a] motion that does not meet applicable requirements shall be dismissed.” Accordingly,

the motion must also be dismissed pursuant to 8 C.F.R. § 103.5(a)(4) without regard to the claims contained within the motion.

Finally, 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). 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 (USCIS) policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new or previously unavailable evidence. *See Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991).

The August 16, 2011 filing references new evidence that the petitioner will submit on a future date. A motion must meet the requirements of a motion at the time of filing. At the time of filing, the petitioner had submitted a personal statement and evidence that postdates the filing of the petition and, thus, cannot establish eligibility as of that date. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). The August 16, 2011 filing also fails to identify an incorrect application of law or policy. Thus, the filing does not constitute a motion to reopen or reconsider.

In conclusion, the motion to reopen and reconsider is dismissed because the petitioner has failed to file it timely, because the petitioner has failed to submit a statement regarding any judicial proceeding relating to the validity of the AAO's July 11, 2011 unfavorable decision and because the filing did not meet the requirements of a motion as of the date of filing.

**ORDER:** The motion is dismissed.