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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



U.S. Citizenship
and Immigration
Services

B2



DATE:

JUN 29 2012

Office: TEXAS SERVICE CENTER

FILE:



IN RE:

Petitioner:
Beneficiary:



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:

SELF-REPRESENTED

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 November 3, 2009. The Administrative Appeals Office (AAO) upheld the director's decision, and dismissed the appeal on May 24, 2011. The matter is now before the AAO on a motion to reopen. The motion will be dismissed.

In order to properly file a motion, the regulation at 8 C.F.R. § 103.5(a)(1)(i) provides that the affected party or the attorney or representative of record must submit the complete motion within 30 days of service of the unfavorable decision. If the decision was mailed, the motion must be filed within 33 days. *See* 8 C.F.R. § 103.8(b). The date of filing is not the date of submission, but the date of actual receipt with the required fee. *See* 8 C.F.R. § 103.2(a)(7)(i).

The record indicates that the AAO issued the decision on May 24, 2011. It is noted that the AAO properly gave notice to the petitioner that she had 33 days to file the motion. Neither the Act nor the pertinent regulations grant the AAO authority to extend this time limit. The petitioner's initial attempt to file the motion was rejected as the form was not properly completed. The present motion was not received until July 6, 2011, or 43 days after the decision was issued. Accordingly, the motion was untimely filed. The petitioner has not explained why his failure to complete the Form I-290B, Notice of Appeal or Motion, was beyond his control such that USCIS can exercise discretion to excuse the untimely filing. 8 C.F.R. § 103.5(a)(1)(i).

Additionally, 8 C.F.R. § 103.5(a)(1) informs the public of the filing requirements for a motion and provides in pertinent part:

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.

(Emphasis added.)

In this case, the petitioner failed to submit a statement indicating if the validity of the AAO's unfavorable decision has been or is the subject of any judicial 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. As such, the motion must be dismissed pursuant to the regulation at 8 C.F.R. § 103.5(a)(4) without regard to the claims contained within the motion.

Furthermore, 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.¹ New evidence is considered to be material to the present case and not previously submitted.

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. at 108 (1988)). “There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases.” *INS v. Abudu*, 485 at 107. Based on its discretion, “[T]he INS [USCIS] has some latitude in deciding when to reopen a case. [USCIS] should have the right to be restrictive. Granting such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case.” *Id.* at 108. The result also needlessly wastes the time and efforts of the triers of fact who must attend to the filing requests. *Id.* A party seeking to reopen a proceeding bears a “heavy burden.” *Id.* at 110. With the current motion, the petitioner has not met that burden.

A motion to reopen is designed to afford the petitioner an opportunity to submit new evidence that may not have been available previously. It is not intended to allow the petitioner to improve upon the previously deficient evidence that failed to meet the clearly identified regulatory requirements. In addition, on motion a petitioner must still establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Moreover, the AAO cannot “consider facts that come into being only subsequent to the filing of a petition.” *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998) (citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981)). 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 (4th Cir. 2008). The petitioner failed to demonstrate that the newly submitted evidence on motion was both (1) not available and could not have been discovered or presented in the previous proceeding and (2) relates to eligibility as of the date of filing, January 6, 2009. Therefore, the new evidence cannot be considered a proper basis for a motion to reopen. As a result, this evidence will not be considered.

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.)

Pursuant to 8 C.F.R. § 103.5(a)(1), a motion must be accompanied by a statement indicating if the validity of the AAO's unfavorable decision has been or is the subject of any judicial proceeding. As the petitioner failed to submit such a statement accompanying the motion to reopen, the regulations at 8 C.F.R. § 103.5(a)(4) require that the motion be dismissed. Moreover, according to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. The petitioner has not filed a proper motion to reopen. The request was not accompanied by any evidence that can be considered new evidence under 8 C.F.R. § 103.5(a)(2) that was (1) not available and could not have been discovered or presented in the previous proceeding (2) relates to the petitioner's eligibility as of the date of filing. A request for motion must meet the regulatory requirements of a motion to reopen.

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.

ORDER: The motion to reopen is dismissed. The decision of the AAO dated May 24, 2011, is affirmed, and the petition remains denied.