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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



Date: OCT 21 2013 Office: NEBRASKA SERVICE CENTER

FILE: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

APPLICATION: 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 APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition on May 10, 2011. While the matter was before the Administrative Appeals Office (AAO) on appeal, on April 9, 2012, the petitioner, who is also the beneficiary, requested that the appeal be withdrawn. On May 25, 2012, the AAO dismissed the petitioner's appeal based on the withdrawal request. On November 26, 2012, the petitioner filed the instant motion, requesting that the matter be reopened. The petitioner's motion will be dismissed.

I. Untimely Motion

In order to properly file a motion to reopen, 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.

The AAO dismissed the petitioner's appeal on May 25, 2012. The decision was served on the petitioner via first-class mail on the same day. The petitioner dated the Notice of Appeal or Motion, Form I-290B, November 24, 2012. The United States Citizenship and Immigration Services (USCIS) received the Form I-290B and accompanying documents on November 26, 2012, six months after the AAO's dismissal of the petitioner's appeal. In addition, the petitioner has not demonstrated that the delay was either reasonable or was beyond his control, as required under the regulation at 8 C.F.R. § 103.5(a)(1)(i). Accordingly, the motion is dismissed as untimely filed.

II. Requirements of a Motion

The regulation at 8 C.F.R. § 103.5(a)(1)(iii) informs the public of the filing requirements for a motion and provides in subsection (C) that a motion shall be submitted on Form I-290B and it 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."

On motion, the petitioner has not submitted a statement indicating if the validity of the AAO's May 25, 2012 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 is dismissed pursuant to the regulation at 8 C.F.R. § 103.5(a)(4) without regard to the claims contained within the motion.

III. Motion to Reopen

A party seeking to reopen a proceeding bears a heavy burden and “must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.” 8 C.F.R. § 103.5(a)(2). In other words, in filing a motion to reopen, the petitioner seeks a new hearing based on new or previously unavailable evidence. *See Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991). Based on its discretion, “the INS [now the 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.” *INS v. Abudu*, 485 U.S. 94, 108 (1988). The result also needlessly wastes the time and efforts of the triers of fact who must attend to the filing requests. *Id.*

On motion, the petitioner seeks to retract his appeal withdrawal request, noting that he had made the request because “a mistake [was] made by either USCIS or USCIS info translation.” Specifically, he asserted that he made the withdrawal request based on the suggestion of Mr. [REDACTED] Special Assistant of [REDACTED]

The regulation at 8 C.F.R. § 103.2(b)(6) provides: “An applicant or petitioner may withdraw an benefit request at any time until a decision is issued by USCIS or, in the case of an approved petition, until the person is admitted or granted adjustment or change of status, based on the petition. *However, a withdrawal may not be retracted.*” (Emphasis added.) Accordingly, the petitioner has not stated new facts to be provided in the reopened proceeding or shown that a new hearing should be granted based on new or previously unavailable evidence. *See Matter of Cerna*, 20 I&N Dec. at 403; *see also* 8 C.F.R. § 103.5(a)(2). Accordingly, the motion is dismissed.

The motion to reopen will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The motion is dismissed, the decision of the AAO dated May 25, 2012 is affirmed, the appeal remains dismissed and the petition remains denied.