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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



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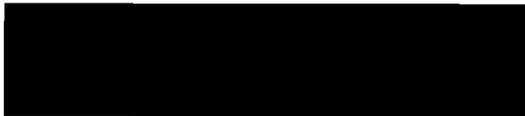
Date: **MAY 14 2012** Office: TEXAS SERVICE CENTER

FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as Outstanding Professor or Researcher Pursuant to Section 203(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(B)

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) rejected a subsequent appeal as untimely. The AAO granted a subsequent motion to reopen/reconsider and affirmed the previous decision of the AAO. The matter is now before the AAO on a second motion to reopen/reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is a community development organization. It seeks to classify the beneficiary as an outstanding professor or researcher pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(B). The petitioner seeks to employ the beneficiary permanently in the United States as a professor. The director determined the petitioner had not established that the beneficiary had attained the outstanding level of achievement required for classification as an outstanding researcher or professor and that the petitioner was a qualifying private employer. The AAO rejected the subsequent appeal as untimely filed. The AAO granted a subsequent motion to reopen and affirmed the previous decision of the AAO. The petitioner has filed a second motion to reopen/reconsider.

On motion, counsel does not contest the AAO's finding that the appeal was untimely. Counsel alleges ineffective assistance of prior counsel in failing to timely file the appeal with the proper fee. It is noted that any appeal based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The petitioner has not submitted any of the required documentation to support an appeal based on ineffective assistance of counsel. Therefore, the applicant is found not to have established a claim of ineffective assistance of counsel.

A motion to reopen must state the new facts to be proven in the reopened proceeding and, when filed, be supported by affidavits or other documentary evidence.¹ 8 C.F.R. § 103.5(a)(2). A

¹Accompanying the motion, the petitioner has submitted additional evidence in support of the beneficiary's eligibility pursuant to section 203(b)(1)(B) of the Act as follows: a book published by the beneficiary in 2009; press releases about that book; course materials authored by the beneficiary for a course taught in 2010 and student compositions from that course written in 2010 and 2011; and, a letter of recommendation from the director of the petitioner's school of practical nursing, where the beneficiary is a faculty member. However, the submitted evidence is not relevant to the AAO's reason for rejecting the appeal. In addition, regarding the beneficiary's book, the related press releases and the course materials, they are not relevant to the issue of the beneficiary's eligibility for the benefit sought; these events occurred after October 11, 2007, the date of filing the employment-based immigrant visa petition, and cannot be considered evidence of the beneficiary's eligibility after that date. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Further, regarding the remaining letter of

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 Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet the applicable requirements when filed shall be dismissed. 8 C.F.R. § 103.5(a)(4).

In this case, we concur with our prior decision that the appeal was untimely, and the untimely appeal did not meet the requirements of a motion to reopen or a motion to reconsider when it was filed. Therefore, our prior decision will be affirmed.

ORDER: The AAO's decision of February 23, 2010 is affirmed. The petition will remain denied.

reference, it is noted that on October 8, 2008, the director issued a Request for Evidence (RFE). The RFE instructed the petitioner to submit evidence of the applicant's eligibility pursuant to section 203(b)(1)(B) of the Act. In denying the application, the director concluded that the documents submitted in response to the RFE were not sufficient to establish that the applicant's eligibility. On appeal, the applicant did not submit any additional evidence previously requested by the director in the RFE. The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the application is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the application. 8 C.F.R. § 103.2(b)(14). As in the present matter, where an applicant has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Ohaigbena*, 19 I&N Dec. 533 (BIA 1988). If the applicant had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted with the motion. Regardless, the AAO notes that the letter of reference does not identify an original research contribution made by the beneficiary to the academic field as a whole, or provide evidence of his recognition beyond his own circle of collaborators.