



U.S. Citizenship
and Immigration
Services



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DATE: **DEC 18 2012**

OFFICE: NEBRASKA SERVICE CENTER

FILE: 

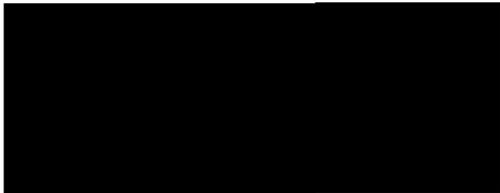
IN RE:

Petitioner: 

Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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 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 nonimmigrant visa petition was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The petitioner filed a second appeal which was rejected as improperly filed. The matter is now before the AAO on a motion to reopen. The motion will be dismissed.

The petitioner is a California corporation engaged in custom and fashion jewelry business. It seeks to employ the beneficiary as its manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

On May 22, 2008, the director denied the petition based on the determination that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity. On June 18, 2009, the AAO dismissed the appeal concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity.

On July 17, 2009, the petitioner filed Form I-290B, Notice of Appeal or Motion, and marked item B under Part 2 of the form, which states: "I am filing an appeal." In addition, according to the information provided on the Form I-290B, the petitioner indicated that it was seeking to appeal the Nebraska Service Center's decision dated May 22, 2008.

On January 13, 2011, the AAO rejected the appeal because neither the statute nor the regulations permit the petitioner to file more than one appeal with regard to the same petition. As noted in the AAO's decision, the petitioner had already sought appellate review of the director's May 22, 2008 decision, and the AAO's decision provided a comprehensive review of the petitioner's submissions and fully addressed all pertinent points. Neither the Form I-290B nor the accompanying affidavit from the petitioner made any reference to the AAO's decision dated June 18, 2009 and as such clearly did not seek to reopen that decision. The AAO noted for the record that even if the petitioner had filed a motion to reopen instead of an appeal, the petitioner did not submit the evidence needed to support its claim of ineffective assistance of counsel.

On January 28, 2011, the petitioner filed Form I-290B and indicated that it is filing a motion to reopen the AAO's decision dated January 13, 2011. According to 8 C.F.R. § 103.5(a)(1)(ii), jurisdiction over a motion resides in the official who made the latest decision in the proceeding. Since the AAO was the last official to enter a decision of this matter, the AAO may review the motion to reopen.

The regulations at 8 C.F.R. 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

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

A review of the evidence that the petitioner submits on motion reveals no fact that could be considered *new* under 8 C.F.R. § 103.5(a)(2). The evidence submitted was either previously available and could have been discovered or presented in the previous proceeding.

On motion, counsel disputes the AAO's rejection of the appeal filed on July 17, 2009, and maintains that "[t]he I-290B was filed as a Motion to Reopen." Counsel acknowledges that the Form I-290B indicated the petitioner's intent to file an appeal, but contends that "pursuant to 8 CFR § 103.3(a)(2)(ii), the AAO treats a properly and timely filed appeal as a Motion to Reopen or Reconsider." Counsel further states that the appeal met the requirements of a motion to reopen and that the AAO should have treated it as such.

Counsel's assertions are not persuasive. The petitioner indicated on the Form I-290B filed on July 17, 2009 that it was seeking to appeal the Nebraska Service Center's decision dated May 22, 2008 and made no reference to the AAO's decision. Therefore, the reviewing official pursuant to 8 C.F.R. § 103.3(a)(2)(ii) was the director of the Nebraska Service Center, and not the AAO. The director declined to treat the late appeal as a motion to reopen or reconsider and forwarded the appeal to the AAO. The AAO properly rejected the appeal because it has no statutory or regulatory authority to adjudicate a second appeal of the same petition denial. The AAO's decision to reject the appeal was appropriate as the appeal was improperly filed.

Counsel for the petitioner contends that the petitioner submitted substantial evidence in support of the appeal to establish that the petitioner and beneficiary received ineffective assistance from prior counsel.

Any appeal or motion 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).

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).

In support of the appeal filed on July 17, 2009, the petitioner submitted an affidavit from the beneficiary explaining the agreement that was entered into with former counsel. The beneficiary contends that he hired an attorney, [REDACTED], but was also working with another attorney, [REDACTED]. The beneficiary states that he did not wish to change attorneys from [REDACTED] and did not want [REDACTED] as his attorney. In the affidavit, the beneficiary stated in paragraph 14 the following:

Around September 2007, I stopped by [REDACTED]. I met with both [REDACTED] and [REDACTED]. They explained that it was the proper time for [the petitioner] to file an I-140 immigrant visa petition on my behalf so I could become a lawful permanent resident. I agreed and they explained that they would also concurrently file an I-485 adjustment of status applications for both my wife and myself based on this I-140 petition. It was again my understanding that [REDACTED] would be handling my case. Thus, when [REDACTED] presented his Attorney Client Fee Agreement to me I signed it. Unfortunately, I do not have a copy of this document any longer. But I do recall that it was from [REDACTED]'s office and I paid all legal fees to him in installments. A copy of one installment check is attached as Exhibit "3". This Attorney Client Fee Agreement stated that [REDACTED]'s office will be preparing and filing the I-140 petition and I-485 applications for adjustment of status. The total legal fees I believe was \$2,000.

The affidavit from the beneficiary does not provide sufficient evidence of ineffective counsel. The affidavit states that the beneficiary's first counsel, [REDACTED] told him that "he could not assist me at that time due to illness." The beneficiary also signed Attorney Client Fee Agreements with [REDACTED] and stated that this agreement indicated that "[REDACTED]'s office will be preparing and filing the I-140 petition and I-485 applications for adjustment of status." In addition, the petitioner submitted four checks written by the petitioner to [REDACTED] that indicated "Attorney" on the memo line of the check. In addition, the beneficiary stated that "when the I-140 petition was denied, I met with [REDACTED] and [REDACTED]." The record reflects that [REDACTED] filed the appeal which was subsequently dismissed by the AAO. After that, the beneficiary hired current counsel.

In the affidavit, the beneficiary stated that "[REDACTED] failed to describe the full nature and scope of [the petitioner's] business. Instead, he focused solely on retail jewelry sector, which is only one product line of my business." However, this is not sufficient evidence to establish inefficient representation by counsel. The petitioner does not provide any evidence that it provided additional information to counsel to include in the I-140 petition that counsel failed to include. In addition, the petitioner is required to sign the Form I-140 under Part 8, Signature, and certify, under penalty and perjury under the laws of the United States of America, that this petition and the evidence submitted with it are true and correct. The petitioner failed to provide any evidence that former counsel added or deleted important information that was not approved by the petitioner. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter*

of Soffici, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

In addition, on its second appeal, the petitioner submitted a letter dated July 15, 2009, from the petitioner written to the [REDACTED]. The letter states that the petitioner is filing a complaint against the Law Offices of [REDACTED]. However, the petitioner did not submit any evidence to establish that this letter was filed with the State Bar of California or proof of acceptance from the State Bar of California. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Furthermore, as stated above, any appeal or motion based upon a claim of ineffective assistance of counsel requires that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond. The petitioner failed to provide any evidence to establish this criterion. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. The AAO correctly determined that the petitioner's improperly filed appeal did not meet the requirements for an appeal or motion based on a claim of ineffective assistance of counsel.

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. With the current motion, the movant has not met that burden.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.