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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

B4

[Redacted]

DATE: JUL 24 2012

OFFICE: TEXAS SERVICE CENTER

FILE: [Redacted]

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

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:

[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 preference visa petition was denied by the Director, Texas Service Center. The petitioner appealed the matter to the Administrative Appeals Office (AAO). The appeal was rejected as untimely filed. The matter is now before the AAO on motion to reopen and reconsider. The motion will be dismissed.

The petitioner is a Florida corporation that seeks to employ the beneficiary as its general 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. The director denied the petition based on three grounds of ineligibility. Specifically, the director determined that the petitioner failed to provide sufficient evidence to show that (1) the beneficiary was employed abroad in a qualifying managerial or executive capacity; (2) the beneficiary would be employed in the United States in a qualifying managerial or executive capacity; and (3) the petitioner meets the regulatory definition of "doing business."

The petitioner appealed the denial disputing the director's findings. The AAO determined that the appeal was untimely filed and therefore rejected the appeal.

On motion, counsel asserts that while the petitioner did not file the appeal with the proper filing fee, the appeal was nevertheless timely filed. Counsel seeks to have the AAO reconsider its November 16, 2010 decision rejecting the appeal and asks the AAO to give the petitioner another opportunity to overcome the grounds for denial. In a supporting statement dated December 13, 2010, counsel asserts that the petitioner's prior submissions met the requirements of a motion to reopen and a motion to reconsider.

The AAO finds that counsel's assertions are not persuasive and do not warrant a withdrawal of the AAO's November 16, 2010 decision to reject the appeal as untimely filed.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, that 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

While the petitioner provides supporting evidence addressing the director's three original grounds for denial, the AAO notes that the decision the petitioner currently seeks to reopen was based on the petitioner's untimely filing of the Form I-290B. The petitioner has not provided any evidence of new facts pertaining to the untimely filing of the appeal.

The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

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

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).

application of law or USCIS 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.

Counsel asserts that the AAO committed legal error by rejecting the petitioner's appeal as untimely filed, contending that the petitioner's failure to submit the appeal with a proper filing fee is not sufficient to deem the appeal untimely. The regulation at 8 C.F.R. § 103.2(a)(7)(i) states that a benefit request must be signed and accompanied by the correct fee. The record clearly shows that the Form I-290B was not accompanied by the correct fee. As such, the appeal cannot be deemed as having been filed on the date of the first filing attempt. Despite counsel's assertions on motion as to the correct filing date of the appeal, counsel has not presented any pertinent precedent decisions to support his reasoning. Therefore, the AAO finds that it was not erroneous to reject the petitioner's appeal, which was filed with the correct fee 49 days after the denial was issued.

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(1) states that an appeal which is not filed within the time allowed must be rejected as improperly filed. The AAO does not have discretionary authority to extend the 30-day filing period.

The petitioner's motion will be dismissed in accordance with 8 C.F.R. § 103.5(a)(4), which states, in pertinent part, that a motion that does not meet applicable requirements shall be dismissed.

As a final note, the proper filing of a motion to reopen and/or reconsider does not stay the AAO's prior decision to dismiss an appeal or extend a beneficiary's previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

In visa petition proceedings, the burden of proving eligibility for the benefit sought 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 is dismissed.