

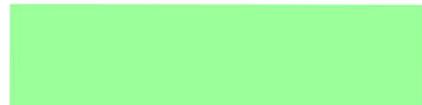


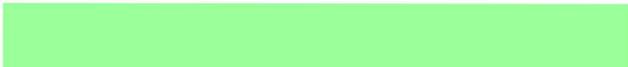
U.S. Citizenship  
and Immigration  
Services

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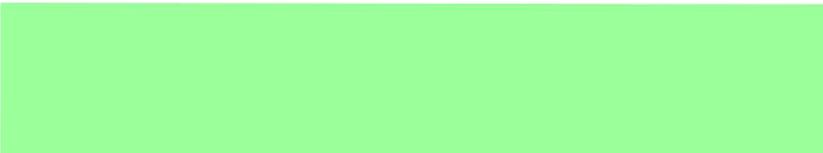


DATE: **MAR 14 2014** OFFICE: TEXAS SERVICE CENTER



IN RE: 

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:  


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,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, revoked the approval of the employment-based immigrant visa petition, made a finding of material misrepresentation and fraud, and invalidated the underlying labor certification. The director dismissed a subsequent motion to reopen and reconsider the decision on December 12, 2012, indicating that the regulatory requirements for a motion to reopen and reconsider had not been met. The petitioner appealed the decision to the Administrative Appeals Office (AAO), and the AAO affirmed the director's decision on May 28, 2013. The petitioner then filed a motion to reopen and reconsider with the AAO, which was dismissed as untimely on October 31, 2013, pursuant to 8 C.F.R. §§ 103.5(a)(1)(i), 103.5(a)(1)(iii)(C), and 103.5(a)(4). The petitioner filed a subsequent motion to reopen and reconsider with the AAO. The motion will be dismissed.

The record shows that the instant motion is properly filed and timely. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As indicated above, the AAO dismissed the appeal in this matter on May 28, 2013. The petitioner initially submitted documents on or about June 28, 2013, following the AAO's decision. However, the submission was rejected because it did not contain a Form I-290B, Notice of Appeal or Motion, as required by regulation. 8 C.F.R. § 103.5(a)(1)(iii). The petitioner subsequently filed a motion to reopen and reconsider on Form I-290B, which was received on July 9, 2013. The motion to reopen and reconsider was dismissed by the AAO as untimely on October 31, 2013.

United States Citizenship and Immigration Services (USCIS) regulations require that motions to reconsider be filed within 30 days of the underlying decision. 8 C.F.R. § 103.5(a)(1)(i). Similarly, USCIS regulations require that motions to reopen be filed within 30 days of the underlying decision, except that failure to timely file a motion to reopen may be excused in the discretion of USCIS where it is demonstrated that the delay was reasonable and was beyond the affected party's control. *Id.* In this matter, the initial motion was filed on July 9, 2013, 42 days after the AAO's May 28, 2013 decision. The record indicates that the AAO's decision was mailed to both the petitioner at its business address and to its counsel of record. The petitioner failed to timely file its motion and has not demonstrated that this failure was reasonable and beyond the affected party's control.

The regulation at 8 C.F.R. § 103.2(a)(7)(i), provide in part:

A benefit request which is not signed and submitted with the correct fee(s) will be rejected. A benefit request that is not executed may be rejected. Except as provided in 8 CFR parts 204, 245, or 245a, a benefit request will be considered received by USCIS as of the actual date of receipt at the location designated for filing such benefit request whether electronically or in paper format. The receipt date shall be recorded upon receipt by USCIS.

The regulation at 8 C.F.R. § 103.2(a)(7)(iii), provides in part:

A benefit request which is rejected will not retain a filing date. There is no appeal from such rejection.

Since the submission was properly rejected on June 28, 2013, it did not retain that filing date upon its filing with the required Form I-290B. The motion to reopen and reconsider was properly filed on July 9, 2013, 42 days after the AAO's decision, and was a late filing according to the regulations. The motion was then properly dismissed by the AAO as untimely.

Counsel asserts that the late filing of the first motion occurred because of "reasonable factors." Namely, that counsel's haste to prepare the initial submission, and delays in coordinating receipt of documentation with the beneficiary outside of the country, were the reasonable causes for delay. Counsel acknowledges in a "Statement in Support of Previously Submitted I-290B," dated November 13, 2013, that the Form I-290B was not included in the initial attempt to file a motion with USCIS on June 28, 2013. However, the AAO does not find that this admission is a sufficient basis for discretionary exemption in the matter because the basis of this assertion cannot be considered a matter outside of the affected party's control.

The regulation at 8 C.F.R. § 103.2(a)(7)(i) indicates in part that:

Every benefit request or other document submitted to Department of Homeland Security (DHS) must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 C.F.R. Chapter 1, to the contrary, and such instructions are incorporated into the regulations requiring its submission.

The regulation at 8 C.F.R. § 103.5(a)(1)(iii) indicates:

- (iii) Filing Requirements- 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.

Further, the AAO's May 28, 2013, decision notifies the petitioner of its ability to "file a motion to reconsider or a motion to reopen in accordance with the instruction on Form I-290B," and that the specific requirements for filing a motion are enumerated at 8 C.F.R. § 103.5. The Form I-290B

instructions clearly indicate that Form I-290B is required, and that it must be properly filed within 30 days of the underlying decision, and in accordance with the regulations.

The regulation at 8 C.F.R. § 103.5(a)(1)(i) indicates in part:

Any motion to reopen a proceeding before the Service filed by an applicant or petitioner, must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires, may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner.

A motion that does not meet applicable requirements shall be dismissed. *See* 8 C.F.R. § 103.5(a)(4). USCIS regulations require that motions to reopen be filed on Form I-290B within 30 days of the underlying decision, except that failure to timely file a motion to reopen may be excused in the discretion of USCIS where it is demonstrated that the delay was reasonable and was beyond the affected party's control. *See* 8 C.F.R. § 103.5(a)(1)(i).

In the instant motion, the petitioner has submitted no specific evidence to demonstrate that omitting or delaying submission of the Form I-290B was outside of their control in the June 28, 2013 filing. While counsel has offered an explanation for the rejected filing, the petitioner failed to establish that the untimely filing was reasonable and beyond its control. The motion to reopen and reconsider which the petitioner attempted to file on June 28, 2013, did not maintain its filing date because it was not properly filed at that time. The petitioner again filed its motion on July 9, 2013, through counsel, but has offered insufficient evidence to support its assertion that its late filing of the previous motion was outside of the affected party's control.

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'l Comm'r 1972)). The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As the record does not establish that the failure to file the previous motion within 30 days of the decision was reasonable and beyond the affected party's control, the AAO finds the prior motion was properly found to be untimely; therefore, the instant motion must be dismissed for that reason.

Further, as indicated above, only the late filing of a motion to reopen may be excused 8 C.F.R. § 103.5(a)(1)(i). Accordingly, even if the AAO were to excuse the late filing, the petitioner must demonstrate that its motion meets the regulations requirements for a motion to reopen. The regulations at 8 C.F.R. § 103.5(a)(2) state, 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.<sup>1</sup> The only evidence provided in the motion not previously within the record on appeal, are two letters dated June 27, 2013, from a Certified Public Accountant (CPA). One letter indicates that the petitioner’s “2001, 1040” is not available from the Internal Revenue Service (IRS) and the CPA is trying to obtain the beneficiary’s W-2 “from other sources.” The other letter states that, in the CPA’s opinion, an audit of the petitioner and beneficiary purportedly conducted by the IRS “resulted in no tax change,” which is a “clear indication that the business is operated in a very ethical and above board manner.”

While the CPA’s evaluations are acknowledged, these letters do not provide “new” facts that did not exist at the time of filing, or on appeal. Further, it is unclear what evidentiary weight these letters would carry even if they were determined to provide “new” facts which did not exist at the time of filing, or upon appeal. The petitioner must establish eligibility, and submit all required evidence. See 8 C.F.R. § 103.2(b)(1). If the petitioner cannot provide required evidence, the petitioner must establish that the required evidence, and secondary evidence, is unavailable before submitting at least two affidavits from non-parties with direct knowledge of that which is to be proven. See 8 C.F.R. § 103.2(b)(2)(i).

The record of proceedings does not contain independent, objective evidence that the required evidence or secondary evidence is unavailable. The record also does not contain two affidavits to stand in lieu of the purportedly unavailable evidence. Therefore, even if the AAO were to consider this evidence as establishing “new” facts, the letters would be insufficient to overcome the grounds in the AAO’s decision and the director’s decision.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. See *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 motion will be dismissed.

In visa petition proceedings, it is the petitioner’s burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not sustained that burden. 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.

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<sup>1</sup> 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).