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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date:

MAR 15 2010

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IN RE:

Petitioner:

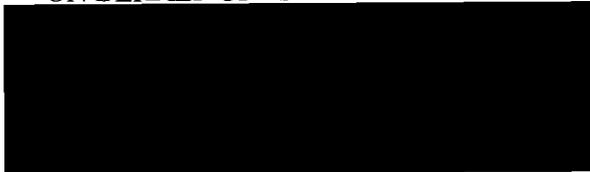


Beneficiary:

PETITION:

Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

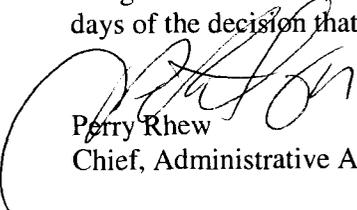
ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be summarily dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as an other, unskilled worker. The director determined that the petitioner failed to demonstrate that it has the continuing financial ability to pay the proffered wage as of the priority date. Accordingly, the director denied the petition.

The AAO dismissed the petitioner's appeal on March 24, 2009. The AAO noted in the appeal that the petitioner had not submitted copies of documents requested by the director. Specifically, on September 6, 2006, the director had issued a request for evidence instructing the petitioner to provide copies of his federal tax returns for 2001 through 2005 and a list of monthly recurring household expenses.

The petitioner, through current counsel filed a motion to reopen on May 7, 2009. Although Part 2, D of the Form I-290B, Notice of Appeal or Motion is checked indicating that a brief and/or additional evidence is attached, the petitioner states on Part 3 of the I-290B:

I, the petitioner, did not understand that copies of tax records were required to establish that I had the financial ability to pay the salary of my child care monitor. My previous attorney did not explain to me that these documents were necessary to submit in support of the I-140 visa petition. I am asking my accountant to provide me with these records. I respectfully request an additional 30 days to submit this documentation.

A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). It is noted that as of this date, more than nine months later, the AAO has received nothing further. Pursuant to 8 C.F.R. § 103.3(a)(2)(vii) and (viii), an affected party shall submit the brief directly to the AAO. The AAO finds that this motion to reopen is not supported by affidavits or other documentary evidence and must be dismissed.¹

¹ It is noted that 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

As stated in 8 C.F.R. § 103.3(a)(1)(v), an appeal shall be summarily dismissed if the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.²

The petitioner here has not specifically addressed the reasons stated for the dismissal of the appeal and has not provided any additional argument or evidence to overcome the basis for the dismissal of the appeal. The motion to reopen must therefore be summarily dismissed.

ORDER: The motion is dismissed.

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- (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). In this case, the petitioner failed to submit any additional evidence or brief to the record that demonstrates that the three requirements cited above have been fulfilled. Therefore, the motion to reopen has no merit. Moreover, where a petitioner 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 or on motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner 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 would not consider the sufficiency of the evidence submitted on motion after the dismissal of the appeal.

² It is additionally noted that the motion to reopen may be rejected as untimely filed. The regulation at 8 C.F.R. § 103.5(a)(1)(i) provides that the motion must be filed within 30 days of the decision that the motion seeks to reconsider or, in accordance with 8 C.F.R. § 103.5a(b), within 33 days if the decision was served by mail. In this case, the deadline for filing the motion was Monday, April 27, 2009. Although the petitioner initially submitted the motion within 33 days of service of the decision, this submission was not filed with the appropriate office and did not retain a timely filing date. The motion was subsequently received on May 9, 2009 or twelve days after the deadline. As such it was not properly filed and may be rejected as untimely.