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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: [Redacted] Office: NEBRASKA SERVICE CENTER Date: **MAY 28 2010**

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

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 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 \$585. 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, Nebraska Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on July 16, 2009, the AAO dismissed the appeal. Counsel to the petitioner filed a Motion to Reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be dismissed pursuant to 8 C.F.R. §§ 103.5(a)(1)(iii)(C), 103.5(a)(3), and 103.5(a)(4).

U.S. Citizenship and Immigration Services (USCIS) regulations require that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." See 8 C.F.R. § 103.5(a)(1)(iii)(C). The instant motion does not include such a statement. The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, the motion must be dismissed because it does not meet the filing requirements listed at 8 C.F.R. § 103.5(a)(1)(iii)(C).

According to 8 C.F.R. § 103.5(a)(3), a motion to reconsider must state the reasons for reconsideration and be supported by any relevant precedent decisions to demonstrate that the initial decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on a petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. In this case, counsel indicated on motion that in this matter the director was obligated to issue a request for evidence (RFE) before denying the petition based on the petitioner's failure to submit a labor certification application which properly supported the employment visa category under which the Form I-140 was filed. This is incorrect. The regulations in place at the time of the filing of the Form I-140 indicated that the director had no obligation to issue an RFE where the documentation submitted at the time of filing included evidence of ineligibility. See 8 C.F.R. § 103.2(b)(8)(2006). The labor certification application that supports the instant petition relates to a visa category other than the one under which the petition is filed. This is evidence of ineligibility. Thus, the director's denial is valid. Therefore, the motion must be dismissed because it fails to establish that the director's decision was incorrect based on the evidence of record at the time of the initial decision.

The AAO notes that the petitioner also asserted through counsel that the version of the Form I-290B it filed on July 25, 2007 states on its face that the form is valid through October 31, 2008. Therefore, it was improper for the AAO's Acting Chief to have rejected the filing based on a finding that the petitioner had used an outdated version of the Form I-290B. The AAO concurs and withdraws the finding made in these proceedings that the appeal filed on July 25, 2007 should be rejected.

Motions to reopen or reconsider immigration proceedings shall be dismissed for the same reasons that petitions for rehearing and motions for a new trial on the basis of newly discovered evidence are dismissed. See *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party that seeks 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.

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. 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 be withdrawn in part and affirmed in part.



ORDER: The motion is dismissed.