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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

PUBLIC COPY

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[REDACTED]

FILE:

[REDACTED]

Office: NEBRASKA SERVICE CENTER

OCT 29 2010

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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:

SELF REPRESENTED

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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The approval of the employment-based immigrant visa petition was revoked by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed.

The petitioner is a married couple. They seek to permanently employ the beneficiary in the United States as a child monitor. The petitioner requests classification of the beneficiary as an unskilled worker pursuant to section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii).¹ The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is April 23, 1998, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

After initially approving the petition, the director revoked the approval of the petition on September 25, 2008.² The notice of revocation (NOR) states that the petitioner failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The petitioner's appeal was received by U.S. Citizenship and Immigration Services (USCIS) on October 27, 2008, 32 days after the decision was issued. An appeal of a revocation must be filed within 15 days after service of the decision. 8 C.F.R. § 205.2(d). If the decision was mailed, the appeal must be filed within 18 days. 8 C.F.R. § 103.5a(b). The date of filing is not the date of mailing, but the date of actual receipt by USCIS. *See* 8 C.F.R. § 103.2(a)(7)(i).

It is noted that the NOR incorrectly states that the petitioner had 33 days to file an appeal. Neither the Act nor the pertinent regulations grant the AAO authority to extend the time limit for filing an appeal. As the appeal was untimely filed, it must be rejected. The fact that the NOR states an incorrect period to file the appeal does not forgive the late filing.

Nevertheless, the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case. A motion to reopen must state the "new facts" to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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 application of law or USCIS policy. 8 C.F.R. § 103.5(a)(3). In addition, a motion to reconsider must establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *Id.* A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

¹ Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), grants preference classification to qualified immigrants who are capable of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

² Section 205 of the Act permits the director to revoke the approval of a petition "at any time, for what he deems to be good and sufficient cause."

On appeal, the petitioner submits business bank account statements for [REDACTED] from January 2000 to March 2007 as evidence of the petitioner's ability to pay the proffered wage. Based on the plain meaning of "new," a "new fact" is evidence that was not available and could not have been discovered or presented in the previous proceeding, either before the director or the AAO.³ In this matter, the petitioner presented no facts or relevant evidence on motion that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen. The submitted evidence could have been previously submitted to either the director or to the AAO.

The appeal brief does not state new facts to be proved that are supported by affidavits or other documentary evidence. The appeal is not supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. The appeal does not establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Motions for the reopening 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. *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. The petitioner has not met that burden.

The AAO will dismiss the motion for failure to meet the applicable requirements set forth in 8 C.F.R. §§ 103.5(a)(2) and (a)(3). 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.

As the appeal was untimely filed and does not qualify as a motion, the appeal must be rejected. This decision does not prevent the petitioner from filing a new petition on behalf of the beneficiary with the required filing fee and supporting documentation.

ORDER: The appeal is rejected.

³ The word "new" is defined as "having existed or been made for only a short time . . . 3. Just discovered, found, or learned." *Webster's II New Riverside University Dictionary* (Riverside, 1984).