

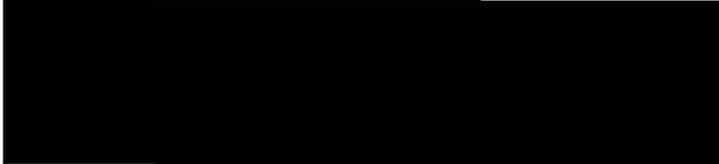
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



B6

Date: **JUN 24 2011**

Office: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 \$630. 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, Texas Service Center (TSC), denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on October 5, 2010, the AAO dismissed the appeal. Counsel to the petitioner filed a motion to reopen and 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)(i), 103.5(a)(1)(iii)(C), 103.5(a)(3), and 103.5(a)(4).

United States Citizenship and Immigration Services (USCIS) regulations require that motions to reopen/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 motion was initially sent to a wrong place; thus the motion was received on November 15, 2010, 41 days after the AAO's October 5, 2010 decision. Counsel for the petitioner initially sent the motion along with the appropriate fee to the AAO's office in Washington, D.C., where it was received on November 9, 2010. The motion along with the fee was returned to counsel on November 10, 2010.

The instructions found at the cover page of the AAO's decision state, "All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion." These instructions are consistent with the instructions found at the Form I-290B, under the topic "Where to File," which indicate as follows:

You must file your appeal or motion with the USCIS office that made the unfavorable decision within 30 calendar days after service of the decision (33 days if your decision was mailed).

Do not send your appeal directly to the Administrative Appeals Office (AAO).

Counsel contends that she has submitted the motion timely (within 30 days after the AAO issued the decision) and to the right place. Counsel states that the AAO is the right place to send the motion, because the AAO was the office that made the unfavorable decision. Additionally, counsel notes that she did not send the motion to USCIS – TSC because this is not an appeal, but rather, a motion.

Consistent with the instructions on the cover page of the AAO's decision, the AAO is not the original USCIS office that decided the case. The case was originally decided by USCIS – TSC on May 31, 2008. Additionally, the Form I-290B, under the heading "Where to File," instructs all who want to file an appeal or a motion to file it with the USCIS office that made the unfavorable decision. The AAO is not the USCIS office that made the unfavorable decision. That office is USCIS – TSC. The motion was, therefore, sent to a wrong place, and consequently was not received within the time permitted.

The record indicates that the AAO's decision was mailed to both the petitioner at its business address and to its counsel of record. As the record does not establish that the failure to file the motion within 30 days of the decision was reasonable and beyond the affected party's control, the motion is untimely and must be dismissed for that reason.

Furthermore, the motion shall be dismissed for failing to meet an applicable requirement. 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. 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. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Finally, the motion shall be dismissed for failing to meet an applicable requirement. The regulation at 8 C.F.R. §§ 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and motions to reconsider. Section 103.5(a)(1)(iii)(C) requires 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." In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). 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, because the instant motion did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

On motion to reopen/reconsider, counsel maintains that the petitioner has the ability to pay. Counsel states that the beneficiary is capable to generate additional income for the business. Further, counsel urges that the AAO consider the sworn statements already submitted as credible evidence of the petitioner's ability to pay.

Here, the motion does not state new facts to be proved in the reopened proceeding. Nor does it provide reasons for reconsideration. Counsel's assertions that the beneficiary is capable of generating additional income are not supported by any evidence of record. As stated earlier, 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Therefore, because the instant motion did not meet the applicable filing requirements listed in 8 C.F.R. §§ 103.5(a)(2)-(4), the motion must be dismissed for this additional reason.

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.

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 not be disturbed.

ORDER: The motion is dismissed.