

(b)(6)

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



Date: **AUG 10 2012**

Office: TEXAS SERVICE CENTER

FILE: 

IN RE:           Petitioner:  
                    Beneficiary:



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:



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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 preference visa petition was denied by the Director, Texas Service Center. The subsequent appeal was summarily dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on combined motion to reopen or reconsider. The motion to reopen or reconsider will be dismissed.

United States Citizenship and Immigration Services (USCIS) regulations require that motions to reopen or reconsider be filed within 30 days of the underlying decision. 8 C.F.R. § 103.5(a)(1)(i). Both motions were timely filed.

### **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 matter sought to be reopened is the AAO decision dated May 13, 2009 which is a summary dismissal and states in pertinent part,

Counsel failed to specifically address the director's analysis of the evidence, and did not furnish any additional evidence. Counsel indicated on the Form I-290B, Notice of Appeal or Motion, that a brief and/or additional evidence would be submitted to the AAO within 30 days. However, no such brief or evidence has been received by the AAO. The regulation at 8 CFR §§103.3(a)(2)(vii) and (viii) states that an affected party may make a written request to the AAO for additional time to submit a brief and that, if the AAO grants the affected additional time, it may submit the brief directly to the AAO.

In support of the motion, counsel states that he did submit additional evidence in support of the appeal and submits a copy of his December 11, 2007 letter addressed to the Texas Service Center in Mesquite, TX, along with the letter's enclosures, namely a copy of a letter from [REDACTED] Certified Public Accountant and copies of some Internal Revenue Service Forms W-2. Additionally, counsel submitted a copy of an U.S. Postal Service certified mail receipt showing receipt of counsel's letter at the Texas Service Center in Mesquite, TX on December 17, 2007.

When counsel filed the appeal, he checked Box B, which states: "I am filing an appeal. My brief and/or additional evidence is attached [sic] will be submitted to the AAO within 30 days." 8 CFR § 103.3(a)(2)(viii) states in pertinent part: "If the AA[O] grants additional time, the affected part shall submit the brief directly to the AA[O]." Thus any additional evidence submitted in support of an appeal must be submitted directly to the AAO.

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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).

In this matter, counsel presented no facts or 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. All evidence submitted on motion was previously available and could have been discovered or presented earlier in the proceeding, but counsel incorrectly sent it to the wrong place. Therefore, the evidence submitted on motion will not be considered “new” and will not be considered a proper basis for a motion to reopen.

The motion to reopen will be dismissed.

### **Motion to Reconsider**

8 C.F.R. § 103.5(a)(3) provides:

*Requirements for a motion to reconsider.* 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 Service 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.

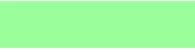
The motion to reconsider does not qualify for consideration under 8 C.F.R. § 103.5(a)(3) because counsel did not assert that the AAO made an erroneous decision through misapplication of law or policy.

The motion to reconsider will be dismissed.

Furthermore, 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.

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 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 to reopen or



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reconsider will be dismissed. The proceedings will not be reopened or reconsidered, and the previous decision of both the director and the AAO will not be disturbed.

**ORDER:** The motion to reopen or reconsider is dismissed. The petition remains denied.