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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:

AUG 07 2012

OFFICE: NEBRASKA SERVICE CENTER

FILE:



IN RE:

Petitioner:



Beneficiary:

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

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 employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (NSC). A timely appeal was filed, which was dismissed on the merits by the Chief, Administrative Appeals Office (AAO). The petitioner filed a motion to reconsider the AAO's decision. 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).

The petitioner is a distributor of ergonomic products. It seeks to permanently employ the beneficiary in the United States as a marketing director pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).<sup>1</sup>

The Director denied the petition on April 10, 2007, determining that beneficiary did not have the requisite education for the proffered position as specified on the labor certification (ETA Form 9089) – specifically, a bachelor's degree in business administration or a foreign educational equivalent. On appeal the petitioner asserted that it did not intend for its labor certification to exclude other educational credentials that are, in combination, equivalent to a U.S. bachelor's degree.

In a decision dated April 13, 2009, the AAO affirmed the Director's determination that the beneficiary did not fulfill the terms of the labor certification because he did not complete four years of college culminating in a bachelor's degree or a foreign equivalent degree in business administration. Accordingly, the AAO dismissed the appeal.

The cover page of the AAO's decision advised the petitioner that it "may file a motion to reconsider or a motion to reopen" and that it should "refer to 8 C.F.R. § 103.5 for the specific requirements." The cover page further instructed the petitioner as follows:

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).

(Emphasis added.) Despite these instructions, counsel for the petitioner proceeded to submit the motion to reconsider and accompanying fee on May 15, 2009, to the AAO, rather than the Nebraska Service Center, which was the office that originally decided the case. The AAO returned these materials to counsel with a cover letter, dated May 18, 2009, advising once again that the motion and fee should be sent to the office where the petition was originally filed (and decided) – the NSC. On May 20, 2009, counsel resubmitted the motion and fee to the NSC, where they were received and

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<sup>1</sup> Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

stamped as filed on May 21, 2009.<sup>2</sup> This date was 38 days after the Director's decision. As such, it was well after the 30-day period prescribed 8 C.F.R. § 103.5(a)(1)(i), even allowing three extra days for service by mail, in accordance with the regulation at 8 C.F.R. § 103.5a(b).

Counsel asserts that the motion should nevertheless be accepted as timely filed because there is a discrepancy between the information in the AAO's letter of May 18, 2009, and the instructions for completing Form I-290B. According to counsel, the instructions indicate on page 3 that an appeal (or motion) must be filed with the "USCIS [U.S. Citizenship and Immigration Services] office that rendered the unfavorable decision" (which for the dismissal of the appeal would be the AAO). However, no such language appears in the Form I-290B instructions cited by counsel. To the contrary, the instructions clearly state: "Do **not** send your appeal or motion directly to the Administrative Appeals Office (AAO)." (Emphasis in the original.) *Form I-290B Instructions (12/02/11)*, page 3. The quoted language is consistent with the AAO's letter of May 18, 2009, which instructed the petitioner to "**send your motion and fee to the [USCIS] office where you filed your original application or petition.**" (Emphasis in the original.)

In short the instructions the petitioner received on the cover page of the AAO's decision, in the Form I-290B Instructions, and in the cited regulations at 8 C.F.R. § 103.5, clearly indicated that the motion to reconsider the AAO's dismissal of the appeal had to be filed at the Nebraska Service Center within 33 days of the date of the decision, in accordance with the deadlines set in 8 C.F.R. § 103.5(a)(1)(i) and 8 C.F.R. § 103.5a(b). The 33-day filing period for a motion to reconsider the AAO's decision of April 13, 2009, expired on May 16, 2009. The petitioner's motion was not filed at the NSC until May 21, 2009 – five days after the deadline.

The regulation at 8 C.F.R. § 103.5(a)(1)(i) provides "that failure to file before this period expires may be excused in the discretion of the Service [USCIS] where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner." These conditions are not met in this case. The petitioner, and counsel, simply misread or misinterpreted the instructions as to where the motion to reconsider should be filed, and did not leave themselves a sufficient time cushion to rectify their mistake within the 33-day filing period. Thus, the delay in filing was neither reasonable nor beyond the petitioner's control. Accordingly, the appeal will be dismissed.

Furthermore, the motion failed to meet an applicable requirement in the regulations. At 8 C.F.R. § 103.5(a)(1)(iii) the filing requirements are listed for motions to reopen and motions to reconsider. 8 C.F.R. 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." The motion filed by the petitioner in this case 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 requirement listed at 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

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<sup>2</sup> The date of an item's filing is not the date of its mailing, but the date of its receipt. See 8 C.F.R. § 103.2(a)(7)(i).

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. *See* section 291 of the Act, 8 U.S.C. § 1361.

For the reasons discussed above, the petitioner's motion to reconsider will be dismissed. The AAO's decision of April 13, 2009 will not be reconsidered, and the Director's decision of April 10, 2007 will not be disturbed.

**ORDER:** The motion to reconsider is dismissed.