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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

DATE: **SEP 06 2012** OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

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 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 Director, Nebraska Service Center (director), denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on July 16, 2009, the AAO rejected the appeal, finding that the appeal was untimely. 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)(iii)(C), 103.5(a)(2), 103.5(a)(3), and 103.5(a)(4).

United States Citizenship and Immigration Services (USCIS) regulations require that a motion to reopen state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Similarly, USCIS regulations require that a motion to reconsider 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. The regulations further require that the motion to reconsider 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).

On July 26, 2007, the director denied the immigrant visa petition, finding that the petitioner had not obtained the required prevailing wage determination prior to filing the I-140 petition, in compliance with 20 C.F.R. §§ 656.15, 656.40 and 656.41. The petitioner appealed the director's decision, submitting Form I-290B which was initially received by the service center on August 24, 2007. However, the I-290B was not accompanied by the correct fee and, therefore, was rejected. The petitioner resubmitted the I-290B, with the correct fee and a supplemental letter, this package having been received by the service center on October 12, 2007. The AAO rejected the appeal as untimely because it was filed with the correct fee 78 days after the decision was issued.

In filing the instant motion, counsel asserts that the reason that the appeal was filed in an untimely manner was due to the instructions provided by the director on the notice of denial. Specifically, counsel asserts that in issuing his July 26, 2007 denial, the director notified the petitioner that the appropriate fee for filing an appeal was \$385. Counsel asserts that the I-290B which was initially received by the service center on August 24, 2007 was accompanied by a check for \$385 but that the appeal was rejected for an improper fee because, as of the date upon which the I-290B was filed, the filing fee was \$585. In filing the instant motion, counsel asserts that these facts constitute new facts and, therefore, that the motion meets the requirements of a motion to reopen under 8 C.F.R. § 103.5(a)(2).

However, subsequent to the service center's rejection of the I-290B for incorrect fee, counsel for the petitioner re-filed his appeal. In doing so, counsel submitted a letter dated October 8, 2007 in which he explained the situation regarding the filing fee. This information was considered by the AAO when we issued our rejection of the I-290B and does not constitute new facts. Therefore, the motion does not meet the requirements for a motion to reopen under 8 C.F.R. § 103.5(a)(2).

Though counsel for the petitioner requested that the instant motion be considered for purposes of either reopening or reconsidering the rejected appeal, counsel did not make any arguments in an effort to satisfy 8 C.F.R. § 103.5(a)(3). Counsel neither stated the reasons for reconsideration nor cited any pertinent precedent decisions in support of his arguments.

As stated above, counsel asserts that the director notified him on the denial notice that the filing fee for an appeal was \$385, but that when he filed the I-290B, the appeal was rejected because the fee was actually \$585. Counsel further asserts that this situation represents erroneous guidance on the part of the director.

The director issued the notice of denial on July 26, 2007. On the notice, it is true that the director indicated that the correct filing fee for an appeal was \$385. As of July 26, 2007, \$385 was the correct filing fee. However, USCIS implemented a new fee schedule which became effective on July 30, 2007. The proposed rule change was posted in the Federal Register on February 1, 2007, notifying the public of USCIS' intention to change the filing fees for USCIS forms. 72 Fed. Reg. 4888 (proposed February 1, 2007). On May 30, 2007 the final rule was published. 72 Fed. Reg. 29851, 29852 (May 20, 2007). At that time, the public was notified that the approved change to existing USCIS fees would become effective on July 30, 2007. Therefore, the public was given notice of the proposed fee changes six months prior to the implementation of the change and was further notified that the changes were accepted for publication nearly two months prior to their becoming effective. When the director issued his decision, the fee which he identified was correct. By the time counsel for the petitioner submitted the I-290B, the fee change had become effective.

As the record does not establish a basis for either a motion to reopen or a motion to reconsider, the instant motion shall 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 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.