

(b)(6)



U.S. Citizenship
and Immigration
Services

Date: **APR 04 2013**

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on June 22, 2010, the AAO dismissed the appeal. Counsel to the petitioner filed a motion to reopen and motion to reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The AAO dismissed the motion to reopen and reconsider on April 10, 2012 for being untimely filed.¹ The petitioner filed a motion to reopen and motion to reconsider the AAO's April 10, 2012 decision. The motion will be dismissed pursuant to 8 C.F.R. §§ 103.5(a)(1)(i), (a)(1)(iii)(C), (a)(2), (a)(3), and (a)(4).

The AAO's April 10, 2012 decision dismissed the petitioner's motion to reopen and reconsider its June 22, 2010 decision because (1) the motion was untimely filed pursuant to 8 C.F.R. § 103.5(a); and (2) the motion did not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C) as to whether the validity of the AAO's June 22, 2010 decision had been or was the subject of any judicial proceeding. The petitioner has now filed a motion to reopen and reconsider, asserting that the petitioner had the ability to pay the proffered wage, but the petitioner did not submit any additional evidence or new facts to support this claim or to address the above-referenced grounds of dismissal in the AAO's April 10, 2012 decision.

Pursuant to 8 C.F.R. § 103.5(a)(1)(i), the petitioner's motion must be filed within 30 days of the AAO's decision. Failing to meet that deadline may be excused only where the petitioner has demonstrated that the delay in filing was both reasonable and beyond the control of the petitioner. *Id.* Here, despite the AAO's prior decision notifying the petitioner that its motion was dismissed as untimely, the petitioner has not addressed this issue.

Further, even if the petitioner had addressed the AAO's grounds for dismissal, the instant motion could not be granted. 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). The motion to reopen does not qualify for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner did not allege any new facts or provide supporting documentation not previously in the record demonstrating why the prior motion should have been considered timely filed.

A motion to reconsider must: (1) 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; and (2) 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). The motion to reconsider does not qualify for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel did not allege that the director and the AAO made an erroneous decision through misapplication of law or policy, or provide precedent decisions to support such a claim, in determining that the previous motion to reopen and reconsider was untimely filed. An untimely motion to reopen and reconsider cannot be

¹ United States Citizenship and Immigration Services (USCIS) regulations require that motions to 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.* The motion was received on July 28, 2010, 36 days after the AAO's June 22, 2010 decision.

cured and adjudicated merely by filing a motion to reopen without demonstrating why that prior decision, which found the first motion to be untimely, warrants being reopened or reconsidered after such a finding. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

As noted in the AAO's decision on April 10, 2012 dismissing the untimely motion, 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.

Furthermore, the motion shall be dismissed for again failing to meet an applicable requirement. As the AAO informed the petitioner in its previous decision, 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.

Finally, even if the instant motion could be reopened, the AAO would uphold its June 22, 2010 decision. The petitioner asserts in the Form I-290B, Notice of Appeal or Motion, that the AAO failed to consider depreciation, assets owned by the petitioner, and the petitioner's bank balances. A review of the record and the AAO's June 22, 2010 decision demonstrates that the AAO addressed each of the points and the petitioner has not provided any new facts, additional evidence, or precedent decisions to overcome these findings.

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.