

(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 22 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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO again on appeal. The appeal will be rejected.

The director denied the instant petition on July 12, 2007. The petitioner filed a timely appeal on August 13, 2007, which was subsequently dismissed by the AAO on September 17, 2010. The petitioner then filed a timely motion to reopen and motion to reconsider on October 20, 2010. The AAO granted the motion and affirmed its prior decision denying the petition on February 5, 2013. The cover page of the AAO's February 5, 2013 decision instructed the petitioner that it may file either a motion to reopen or a motion to reconsider the decision pursuant to the requirements found at 8 C.F.R. § 103.5, and that any motion must be filed with the office that originally decided the case 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).

Counsel subsequently filed an appeal of the AAO's February 5, 2013 decision on the petitioner's behalf on March 11, 2013. The AAO, however, does not exercise appellate jurisdiction over its own decisions. The AAO only exercises appellate jurisdiction over matters that were specifically listed at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). For instance, in the event that a petitioner disagrees with an AAO decision, the petitioner can file a motion to reopen or a motion to reconsider in accordance with 8 C.F.R. § 103.5. In this matter, the petitioner did not check box D ("I am filing a motion to reopen a decision"), box E ("I am filing a motion to reconsider a decision"), or box F ("I am filing a motion to reopen and a motion to reconsider a decision") on the Form I-290B, Notice of Appeal or Motion. Counsel checked box B ("I am filing an appeal. My brief and/or additional evidence will be submitted to the AAO within 30 days"), instead.¹ Therefore, the appeal is improperly filed and must be rejected on this basis pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(I).

The AAO notes that, independent of counsel's statements that he is filing an appeal of the AAO's prior decision, the petitioner has not filed a proper motion to reopen or motion to reconsider. The Form I-290B filed on March 11, 2013, was not accompanied by any new evidence or arguments based on precedent decisions. A request for motion must meet the regulatory requirements of a motion to reopen or reconsider at the time it is filed; no provision exists for USCIS to grant an extension in order to await future correspondence that may or may not include evidence or arguments. The regulation at 8 C.F.R. § 103.5(a)(2) states, 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.² In this matter, the petitioner

¹ It is noted that the cover letter submitted with Form I-290B also states that counsel is appealing the AAO's prior decision, and the brief counsel submitted on April 5, 2013 was titled "Appeal of AAO Denial."

² 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).

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. The filing also does not meet the requirements of a motion to reconsider as counsel failed to cite to any appropriate statutes, regulations or precedent decisions.

Moreover, the AAO will not consider the additional evidence submitted by the petitioner on April 5, 2013, 59 days after the AAO’s February 5, 2013 decision. The regulations at 8 C.F.R. § 103.5(a)(1)(i) 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. The petitioner has not established that such an exception is warranted here. The fact that the petitioner on the Form I-290B checked box B (“I am filing an appeal. My brief and/or additional evidence will be submitted to the AAO within 30 days”) and stated that the petitioner “will again provide significant documentation,” does not allow him to submit evidence beyond the 30 day period allowed for motions. The cover page of the AAO’s February 2013 decision clearly instructed the petitioner that it may file either a motion to reopen or a motion to reconsider the decision pursuant to the requirements found at 8 C.F.R. § 103.5, and that any motion must be filed with the office that originally decided the case 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). Therefore, because a motion must be complete upon filing, the AAO will not consider the petitioner’s late filed documents.

Furthermore, the filing would be dismissed for failing to meet an applicable requirement, even if the AAO were to consider the filing as a motion. 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 filing 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 filing did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it would 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 petitioner has not met that burden.

In visa petition proceedings, it is the petitioner’s burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met. Accordingly, the appeal will be rejected, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The appeal is rejected.