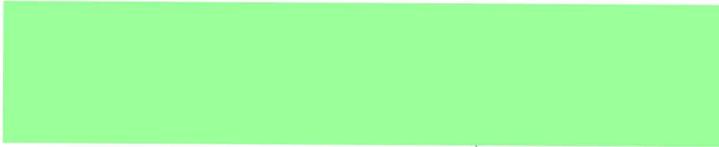


(b)(6)

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

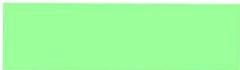


U.S. Citizenship
and Immigration
Services

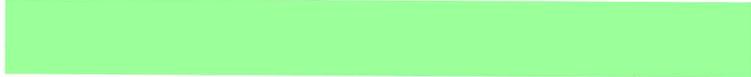


Date: **AUG 22 2013**

Office: NEBRASKA SERVICE CENTER

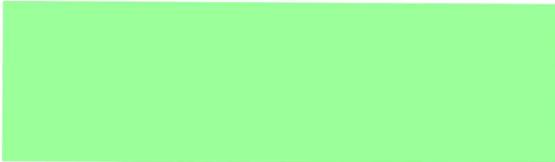
FILE: 

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.

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 Director, Nebraska Service Center denied the preference visa petition. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO) on January 3, 2011. The petitioner filed a motion to reconsider the AAO's decision. On May 18, 2012, the AAO reopened the appeal and affirmed its previous decision. On June 21, 2012, the petitioner filed a second motion to reconsider the AAO's decision, which was dismissed as untimely on February 14, 2013.¹ The matter is again before the AAO on a motion to reconsider. The motion will be dismissed pursuant to 8 C.F.R. §§ 103.5(a)(3), and 103.5(a)(4), and the AAO's prior decisions will be affirmed.

United States Citizenship and Immigration Services (USCIS) regulations require that motions 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 policy. 8 C.F.R. § 103.5(a)(3). 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. *Id.*

The AAO dismissed the petitioner's June 21, 2012 motion to pursuant to 8 C.F.R. § 103.5(a)(1)(i) which requires that motions be filed within 30 days of the underlying decision, or within 33 days if the unfavorable decision was mailed to the petitioner. 8 C.F.R. § 103.8(b). The petitioner's motion was received on June 21, 2012, which is more than 33 days after the AAO's May 18, 2012, decision.

In this matter, the petitioner has offered no reasonable explanation on motion for the untimely filing of the prior motion. Further, the petitioner has not asserted or provided evidence that the AAO's February 14, 2013, finding that the motion was untimely was an incorrect application of law or policy. The AAO previously determined that the motion, upon which its February 14, 2013 decision was based, was filed on June 21, 2012; therefore, the motion was received 34 days after the AAO's May 18, 2012 decision. The record indicates that the AAO's initial decision and all subsequent decisions were mailed to both the petitioner at its business address and copies were mailed to its counsel of record. A motion to reconsider cannot be used to raise a legal argument that could have been raised earlier in the proceedings. *See Matter of Medrano*, 20 I&N Dec. 216, 220 (BIA 1990, 1991). Rather, the "additional legal arguments" that may be raised in a motion to reconsider should flow from new law or a *de novo* legal determination reached in its decision that could not have been addressed by the party. Further, a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). Instead, the moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *Id.* at 60. The

¹ The AAO dismissed the petitioner's June 21, 2012 motion to pursuant to 8 C.F.R. § 103.5(a)(1)(i) which requires that motions be filed within 30 days of the underlying decision. *See also*, 8 C.F.R. § 103.8(b), which allows a motion to be filed within 33 days if the unfavorable decision was mailed. The petitioner's motion was received on June 21, 2012, more than 33 days after the AAO's May 18, 2012, decision.

regulation at 8 C.F.R. § 103.5(a)(4) requires that a motion that does not meet applicable requirements shall be dismissed.

Counsel in their brief attached to the instant motion indicates that although the motion was filed on the 34th day, this late filing was “harmless error,” and there was “substantial compliance with 8 C.F.R. § 103.5(a)(1)(i) in this instance.” However, the petitioner’s motion of June 21, 2012 was filed beyond the timeframe allowed by regulation, and counsel did not dispute this fact with any of the evidence presented. As the record does not establish that the AAO’s decision regarding the petitioner’s failure to file the motion within the 33 days allowed by regulation after receipt of a mailed decision was a misapplication of law or policy, the petitioner has not demonstrated that reconsideration based on this issue is supported by the evidence, and consequently must be dismissed.

The AAO notes that the petitioner has indicated in the instant motion that the validity of the AAO decision dated February 14, 2013, has not been, nor is it currently the subject of any judicial proceeding. However, this attempt to cure an omission which the AAO also determined was a basis for dismissal is insufficient to overcome the AAO’s previous decision in this case. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See e.g., Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm’r 1988).

Moreover, the AAO will not consider the additional evidence submitted by the petitioner on March 19, 2013, 305 days after the AAO’s grant of a motion to reconsider its initial substantive decision. As noted above, the regulations at 8 C.F.R. § 103.5(a)(1)(i) require that motions 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 instant motion is a motion to reconsider; further, the petitioner has not established that such an exception would be warranted here had the petitioner filed a motion to reopen.

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 or reconsider 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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not sustained that burden. Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion to reconsider is dismissed. The prior decisions of the AAO remain undisturbed.