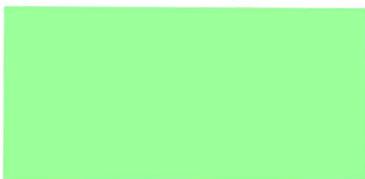




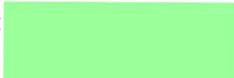
U.S. Citizenship
and Immigration
Services

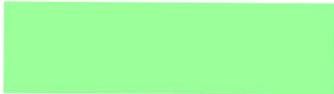
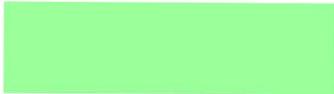
(b)(6)



DATE: **JAN - 4 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)

SELF-REPRESENTED

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner appealed the director's decision which was dismissed by the Administrative Appeals Office (AAO). The petitioner filed a motion to reopen and reconsider the decision. The matter is again before the AAO. The motion to reopen and reconsider will be dismissed pursuant to 8 C.F.R. § 103.5(a)(1)(i).

The petitioner is a retail distribution company. It seeks to employ the beneficiary permanently in the United States as a purchase price analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that it had not been established that the beneficiary met the minimum level of education as stated in the labor certification. The director denied the petition accordingly. On August 6, 2008, the petitioner filed an appeal of the director's decision to the AAO. On March 25, 2010, the AAO issued a request for additional evidence (RFE) to determine the petitioner's intent concerning the actual minimum educational requirements of the proffered position.¹ In the RFE, the AAO specifically alerted the petitioner that failure to respond to the RFE would result in dismissal of the appeal. The petitioner failed to respond to the RFE, and the AAO dismissed the appeal accordingly.

The petitioner states in its motion that the case should be reopened because it did not understand where to mail the motion. 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.*

In this matter, the motion was filed on October 8, 2010, 46 days after the AAO's August 23, 2010 decision. The petitioner initially filed the motion to reopen and reconsider directly to the AAO, and the filing was rejected and returned to the petitioner. In support of the motion, the petitioner submits a letter explaining that it filed the motion to reopen and reconsider late because it did not understand the USCIS website's instructions regarding where to send the motion. The petitioner explains that while the USCIS website states that the motion should be sent "to the office that made the unfavorable decision," it thought that it should send the motion to the AAO directly instead because the AAO has jurisdiction over motions to reopen its own decisions. In support of its contention, it submits a copy of questions and answers from a January 28, 2009 teleconference on motions to reopen which discusses the AAO's jurisdiction over motions to reopen an AAO decision. The petitioner also includes the rejection notice from USCIS and a copy of the filing instructions from the USCIS website.

The record indicates that the AAO's decision was mailed to both the petitioner at its business address and to its counsel of record. On the first page of the AAO's decision, it clearly states the motion to reconsider or reopen must be filed with the office that originally decided the case. It further states

¹ The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

that the specific requirements for filing such motions may be found at 8 C.F.R. § 103.5. The petitioner also states that it consulted the USCIS website for instructions on where to send the motion. The instructions on the USCIS website are consistent with both the instructions in the cover letter of the AAO's decision that was mailed to the petitioner and with the regulations. The questions and answers that the petitioner submitted from the January 28, 2009 teleconference on motions to reopen is not the authority on where to file motions to reopen. Nor do the questions and answers ever instruct that a motion to reopen should be filed directly to the AAO. As the record does not establish that the failure to file the motion within 30 days of the decision was reasonable and beyond the affected party's control, the motion is untimely and must be dismissed for that reason.

The petitioner does not submit any document that would meet the requirements of a motion to reconsider. The petitioner does not state any reasons for reconsideration nor cite any precedent decisions in support of a motion to reconsider. The petitioner does not argue that the previous decisions were based on an incorrect application of law or Service policy. The petitioner does not state any reasons that would meet the standard for reconsideration.

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. The petition remains denied.