



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[Redacted]

DATE: JUL 11 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 (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  
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 May 20, 2011, the AAO dismissed the appeal. Counsel to the petitioner filed a motion to reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5, which the AAO dismissed for being untimely filed on March 7, 2013. In response to this decision, on April 1, 2013, the petitioner filed a motion<sup>1</sup> to the AAO regarding its May 20, 2011 decision. The motion will be dismissed.

The petitioner now seeks to address the AAO's May 20, 2011 decision in order to have the AAO substantively adjudicate an appeal of that decision. On the Form I-290B, the petitioner checked the box indicating it was filing an "appeal," and counsel's brief states that it is a "motion to appeal." Although the regulations do not allow the petitioner to appeal one of the AAO's decisions directly to the AAO, the petitioner has the option of filing a motion to reopen or a motion to reconsider the AAO's decision pursuant to 8 C.F.R. § 103.5(a)(1)(i). In this case, the AAO would have accepted the petitioner's having checked the box for "appeal" as a scrivener's error to treat this as a motion, but even by doing so the AAO would only consider the merits of its March 7, 2013 decision.

The AAO's March 7, 2013 decision found the petitioner's prior motion to be untimely. 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). If the unfavorable decision was mailed, the appeal must be filed within 33 days. 8 C.F.R. § 103.8(b). 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.* As stated in the AAO's March 7, 2013 decision, the petitioner's motion was filed on June 23, 2011, 34 days after the AAO's May 20, 2011 decision.<sup>2</sup> The record indicates that the AAO's decision was mailed to both the petitioner at its business address and to its counsel of record. As the record did 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 AAO dismissed the motion on March 7, 2013. The petitioner provides no evidence on motion that the late filing of its prior motion was reasonable and beyond the petitioner's control. Further, neither counsel nor the petitioner address the AAO's March 7, 2013 decision and the issue of the petitioner's motion being untimely. Counsel's brief only addresses the AAO's May 20, 2011 decision. Because the petitioner has not disputed the AAO's March 7, 2013 decision and has not presented any evidence demonstrating that the delay was reasonable and beyond the petitioner's control, that instant appeal cannot be considered on its merits. *See* 8 C.F.R. § 103.5(a)(1)(i).

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<sup>1</sup> The AAO stated in its March 7, 2013 decision that the instructions sent with the May 20, 2011 dismissal clearly state that any motion filings must be sent to the office that originally decided the case; not directly to the AAO. Counsel for the petitioner filed the motion to reopen directly with the AAO on June 17, 2011, which was returned as improperly filed. Counsel subsequently sent the motion to the Nebraska Service Center, which it received on June 23, 2011.

<sup>2</sup> As noted above, the petitioner submitted the motion to the AAO directly and not to the Nebraska Service Center that originally decided the case.

Additionally, the AAO will not consider the instant motion as a means to substantively review its May 20, 2011 decision.<sup>3</sup> Allowing the petitioner to file an appeal or motion of an underlying decision following the dismissal of an untimely motion to reopen or motion to reconsider, without evidence that the filing delay was reasonable and beyond the control of the petitioner, would essentially render the 30-day filing requirement of 8 C.F.R. § 103.5(a)(1)(i) to file such a motion meaningless.

Further, as noted by the AAO in its March 7, 2013 decision, the motion was dismissed for failing to meet an applicable requirement of 8 C.F.R. §§ 103.5(a)(1)(iii)(C), which 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.” The AAO noted that the motion did 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 prior motion did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it was also dismissed for this reason. In the instant filing, the petitioner has again failed to comply with 8 C.F.R. § 103.5(a)(1)(iii)(C).

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.

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<sup>3</sup> The AAO notes that the petitioner’s cover letter refers to the instant filing as a “motion to appeal.”