



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JUN 03 2013**

OFFICE: TEXAS SERVICE CENTER

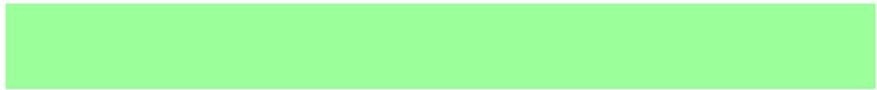
FILE



IN RE:

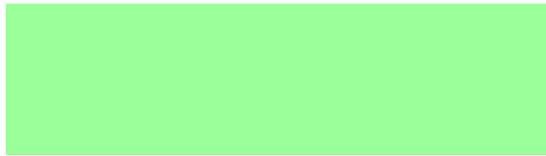
Petitioner:

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. 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.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition on February 27, 2008. The petitioner appealed the director's decision and the Administrative Appeals Office (AAO) rejected the appeal on October 22, 2010. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motion to reopen and motion to reconsider will be dismissed. The AAO's decision will be affirmed.

The petitioner describes itself as a restaurant. It seeks to permanently employ the beneficiary in the United States as a cook, Mexican specialty chef. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).

The AAO's decision rejecting the appeal concluded that the petitioner failed to timely file the appeal.

United States Citizenship and Immigration Services (USCIS) regulations require that motions to reopen and reconsider be filed within 30 days of the underlying decision. 8 C.F.R. § 103.5(a)(1)(i). The motion was timely filed.

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.¹

On motion, the movant requests that the AAO withdraw its October 22, 2010 decision. The motion, however, is unsupported by any new facts or evidence demonstrating that appeal was timely filed. The record indicates that the director issued the decision on February 27, 2008. Where a decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.8(b). The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(I) provides that an appeal which is not filed within the time allowed must be rejected as improperly filed. The AAO received the appeal on June 9, 2008, 133 days after the decision was issued. On appeal, the petitioner's counsel provided a copy of the DHL overnight courier label used to mail the appeal. The petitioner's counsel also provided a copy of an envelope which he claimed was used to mail the director's decision in the instant case. The envelope was postmarked May 7, 2008. However, the AAO noted in its decision that the electronic records of USCIS, and the director's decision itself, indicate that the petition was issued on February 27, 2008. The AAO also noted that there was no evidence establishing that the envelope submitted on appeal was the envelope used to mail the director's decision in the instant case. Accordingly, the AAO determined that the appeal was untimely filed.

¹The 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).

On motion, the movant states that the director's decision was delivered to the petitioner's counsel on May 7, 2008. In support of this claim, the movant provides the same copies of the envelope and DHL label that were submitted on appeal. On motion, the movant fails to provide any new facts or evidence demonstrating that the appeal was properly and timely filed.

In this matter, the movant 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. All evidence submitted on motion was presented earlier in the proceeding. Therefore, the evidence submitted on motion will not be considered "new" and will not be considered a proper basis for a motion to reopen. The motion to reopen will be dismissed for this reason.

In addition, the regulation at 8 C.F.R. § 103.5(a)(3) provides:

Requirements for a motion to reconsider. A motion to reconsider must 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 Service policy. 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.

The motion to reconsider does not qualify for consideration under 8 C.F.R. § 103.5(a)(3) because the movant did not establish that the AAO made an erroneous decision based on the evidence of record at the time of the initial decision, and the motion was not supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. The motion to reconsider will be dismissed for this reason.

Furthermore, the motion to reopen and motion to reconsider 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.

The motion will also be dismissed because it was filed by the beneficiary. The regulation at 8 C.F.R. § 103.5(a)(1)(i) provides:

General. Except where the Board has jurisdiction and as otherwise provided in 8 CFR parts 3, 210, 242 and 245a, when the affected party files a motion, the official having jurisdiction may, for proper cause shown, reopen the proceeding or reconsider the prior decision.

The term “affected party” means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition. 8 C.F.R. § 103.3(a)(1)(iii)(B). The party affected in visa petition cases is the petitioner, and the beneficiary does not have standing to move to reopen or reconsider the proceedings. *Matter of Dabaase*, 16 I&N Dec. 720 (BIA 1979).

Accompanying the motion to reopen and motion to reconsider is a properly executed Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, for the beneficiary’s representative. However, the beneficiary is not an affected party. There is no evidence in the record that the petitioner consented to the filing of the motion to reopen and motion to reconsider.³ Accordingly, the motion to reopen and motion to reconsider will 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.

Accordingly, the motion to reopen and the motion to reconsider will be dismissed, the previous decision of the AAO will be affirmed and the petition will remain denied.

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.

ORDER: The motion is dismissed. The AAO’s decision dated October 22, 2010 is affirmed. The petition remains denied.

³ The AAO notes that the petitioner was administratively dissolved by the State of Missouri in 2011, and thus it appears that the petitioner is no longer in business. *See* <https://www.sos.mo.gov/BusinessEntity/soskb/csearch.asp> (accessed May 23, 2013). If the petitioner is no longer in business, then no *bona fide* job offer exists, and the petition and motion are therefore moot. Even if the motion could be otherwise be granted and the petition approved, the approval of the petition would be subject to automatic revocation due to the termination of the petitioner’s business. *See* 8 C.F.R. § 205.1(a)(iii)(D).