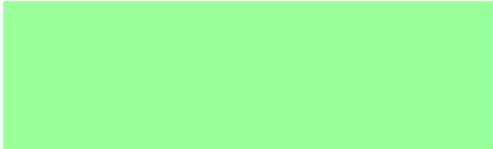




U.S. Citizenship
and Immigration
Services

(b)(6)



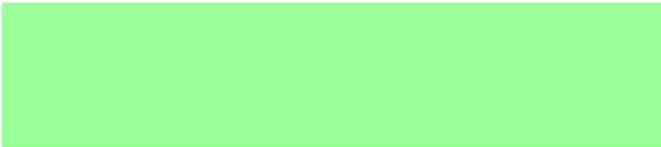
DATE: OFFICE: NEBRASKA SERVICE CENTER

JAN 28 2014

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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 Director, Nebraska Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on November 22, 2010, the AAO dismissed the petitioner's appeal. The AAO's decision affirmed the director's determination that the petitioner had failed to establish the ability to pay the proffered wage and also determined, beyond the decision of the director, that the beneficiary had not met the training requirements of the labor certification as of the priority date. Upon the petitioner's motion, the AAO reconsidered the case and dismissed the appeal again on June 21, 2012. On the petitioner's motion, the AAO reconsidered the case again on March 29, 2013, and again affirmed its previous decisions to dismiss the appeal. The petitioner filed another motion to reopen and motion to reconsider on May 2, 2013. The AAO granted the motions and issued a new decision on September 27, 2013, again affirming its previous decisions and dismissing the appeal. The matter is again before the AAO on motion to reopen and motion to reconsider in accordance with 8 C.F.R. § 103.5. The motion will be dismissed pursuant to 8 C.F.R. §§ 103.5(a)(1)(i), 103.5(a)(3), and 103.5(a)(4).

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 31, 2013, 34 days after the AAO's September 27, 2013, decision. 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 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.

Furthermore, it is noted that even if the motions were timely, the motions would not be granted. The regulations at 8 C.F.R. § 103.5(a)(2) state, 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

In this matter, the petitioner 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. Therefore, this evidence will not be considered a proper basis for a motion to reopen.

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. 8 C.F.R. § 103.5(a)(3). In the instant case, counsel states displeasure with the AAO's

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).

application of precedent decision in its previous decisions in this case, but does not address the AAO's lengthy discussions of *Matter of Sonogawa* and how it relates to this specific case. In addition, while counsel objects to the AAO's *de novo* review of the petition, counsel does not cite any legal authority that would limit the AAO's authority in the ways counsel is suggesting. 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). Therefore, the motion will not be considered a proper basis for reconsideration.

It is further noted that on the Form I-290B, Notice of Appeal or Motion, the petitioner checked the box indicating that it was filing an appeal from the AAO's most recent decision and that supporting documentation would be submitted within 30 days. However, the AAO has no appellate jurisdiction over our own decisions. Grounds for a motion to reopen or motion to reconsider must be established at time of filing; here, counsel's brief was not submitted at the time of filing, but rather, nearly a month later. Therefore, for this additional reason the motions must be dismissed.

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.

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). 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.