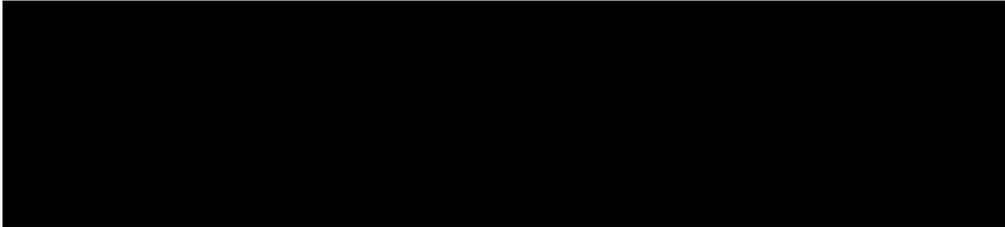


PUBLIC COPY
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

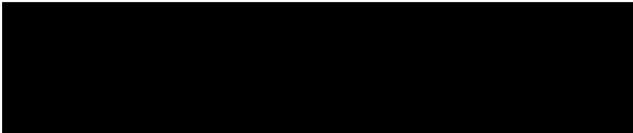


D2

FILE: LIN 06 135 51078 Office: NEBRASKA SERVICE CENTER

Date: AUG 30 2007

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for
Michael T. Kelly
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director, Nebraska Service Center. The Administrative Appeals Office (AAO) summarily dismissed the subsequently filed appeal and affirmed the director's decision to deny the petition. The matter is now before the AAO on a motion to reconsider. The motion is granted, but, upon reopening and reconsideration, the AAO's previous decision to dismiss the appeal will be affirmed, and the matter is moot due to the passage of time.

The petitioner is a resort hotel and restaurant. It seeks to employ the beneficiaries as housekeepers pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(ii)(b) for the period from May 15, 2006 to October 15, 2006.

The director denied the petition on May 21, 2006, concluding that the petitioner failed to establish that its need for the temporary housekeepers is peakload. The petitioner filed an appeal on June 29, 2006. On August 15, 2006, the AAO summarily dismissed the appeal, concluding that no evidence was submitted to demonstrate the petitioner's peakload need for housekeepers. On September 8, 2006, the petitioner submits a motion to reconsider and asserts the following on the Form I-290B:

This Motion to Reconsider is filed with a request that the Service reexamine at [sic] the documentation previously submitted. In the Request for Evidence, the Service requested documentation that was in the file. The petitioner had satisfactorily addressed the issue establishing the temporary nature of the requested employees' employment.

The petitioner marked the box at section two of the Form I-290B to indicate that a brief and/or evidence would be sent within 30 days. The AAO did not receive this additional brief and/or evidence. As such, the AAO faxed a follow-up letter to the petitioner's office on June 6, 2007, requesting that the brief and/or additional evidence be sent within five business days. The petitioner did not respond to the AAO's facsimile. Thus, the AAO deems the record complete and ready for adjudication.

An affected party has 30 days from the date of an adverse decision to file a motion to reopen or reconsider. 8 C.F.R. § 103.5(a)(1)(i). If the adverse decision was served by mail, an additional three days are added to the proscribed period. 8 C.F.R. § 103.5a(b). Any motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The petitioner's motion does not meet applicable requirements. The petitioner stated that additional evidence would be submitted in 30 days. Although the regulation at 8 C.F.R. § 103.3(a)(2)(vii) states that a petitioner may be permitted additional time to submit a brief or additional evidence to the AAO in connection with an appeal, no such provision applies to a motion to reopen or reconsider. The additional evidence must comprise the motion. *See* 8 C.F.R. §§ 103.5(a)(2) and (3). Accordingly, the motion must be dismissed for failing to meet applicable requirements.¹

¹ The regulation at 8 C.F.R. § 103.5(a)(1)(i) allows for excusal of a late filing of a motion to reopen, but only "where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner." There is no excusal provision for an untimely motion to reconsider.

Counsel's assertions do not satisfy the requirements of either a motion to reopen or a motion to reconsider.

A motion to reopen must state the new facts to be provided in the reopened proceeding, and it must be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Generally, the new facts must be material and unavailable previously, and such that they could not have been discovered earlier in the proceeding. *See* 8 C.F.R. § 1003.23(b)(3). The motion does not present such facts.

The matters filed as a motion also fail to satisfy the requirements of a motion to reconsider. A motion to reconsider must: (1) 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 Citizenship and Immigration Services policy; and (2) 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). The motion does not establish that the AAO's dismissal of the previous motion was based upon an incorrect application of law or policy. The AAO's previous decision correctly implemented the relevant regulations.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *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 to reopen will be dismissed.

A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

It is noted that the petitioner requested the beneficiary's services from May 15, 2006 until October 15, 2006. Therefore, the period of requested employment has passed.

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 petition is denied although the matter is moot due to the passage of time.