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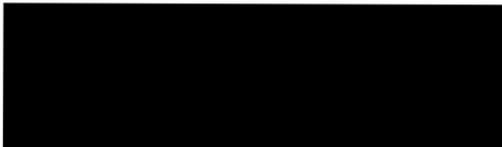
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529
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U.S. Citizenship
and Immigration
Services

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FILE: EAC 03 133 54843 Office: VERMONT SERVICE CENTER Date: MAR 04 2009

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:
[Redacted]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition on August 1, 2003, and a subsequent appeal filed on September 5, 2003 was rejected as untimely filed by the Administrative Appeals Office (AAO) on July 22, 2004. On October 12, 2004, the petitioner filed a motion to reopen and reconsider, which was granted by the director on February 5, 2005. Upon review, however, the director affirmed the initial decision denying the petition. In the interim, the director also reopened the proceedings and treated the late appeal filed on September 5, 2003 as a motion. The previous decision was again affirmed in a decision dated December 21, 2004. The matter currently before the AAO is the petitioner's January 24, 2005 appeal of the director's decision of December 21, 2004. The appeal will be dismissed, and the petition will be denied.

The petitioner is a manufacturer and wholesaler of ready-to-wear dresses. It seeks to employ the beneficiary as a credit manager. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition determining that the position was not a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's July 3, 2003 request for additional evidence; (3) the petitioner's response to the director's request received on July 24, 2003; (4) the director's August 1, 2003 denial letter; (5) the petitioner's Form I-290B with supporting affidavit received on September 5, 2003; (6) the AAO's rejection of the appeal dated July 22, 2004; (7) the petitioner's motion to reopen and reconsider received on October 12, 2004; (8) the director's decision dated February 5, 2005 granting the petitioner's October 12, 2004 motion and affirming its prior decision; (9) the director's decision dated December 21, 2004, treating the September 5, 2003 late appeal as a motion and affirming the denial; and (10) the petitioner's appeal of the director's December 21, 2004 decision dated January 24, 2005. The AAO reviewed the record in its entirety before issuing its decision.

The basis for the denial in this matter is whether the proffered position qualifies as a specialty occupation. However, the issue currently before the AAO is whether the director's December 21, 2004 decision, in which she determined that the petitioner's joint motion to reopen and reconsider contained no new evidence and that it had not overcome the grounds for the denial set forth in the August 1, 2003 decision, was proper.

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states:

If an untimely appeal meets the requirements of a motion to reopen as described in § 103.5(a)(2) of this part or a motion to reconsider as described in § 103.5(a)(3) of this part, the appeal must be treated as a motion, and a decision must be made on the merits of the case.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "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

The director, on her own motion, reopened the proceedings and treated the petitioner's September 5, 2003 late appeal as a motion. Upon review of the documentation submitted, which consisted merely of an affidavit executed by [REDACTED], vice-president and treasurer of the petitioner, the director found that the motion contained no new evidence, and the previous decision denying the petition was affirmed. The AAO notes that the accompanying affidavit merely restated the description of duties for the proffered position which were submitted in response to the request for evidence.

Motions for the reopening 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. *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 regard to the treatment of the late appeal as a motion to reopen, the petitioner did not meet that burden. The motion to reopen was therefore properly declined by the director.

The AAO will now examine the petitioner's January 24, 2004 appeal of the director's December 21, 2004 decision.

On appeal, the petitioner submitted a thirteen page document dated January 13, 2005 and entitled "Summary Aging Report," as well as copies of various financial documents, including letters of credit, evidence of wire transfers, checking account statements, and invoices. It appears that all of these documents are dated after the decision was rendered.

As argument in support of the newly-submitted documentation, the petitioner merely states: "Supporting evidence relates and provides information pertaining to corporate credit and other financial and otherwise privileged information from entities we are conducting business and which are not a party in this [sic] proceedings." The petitioner makes no reference or connection between the submitted documentation and the manner in which it overcomes the director's denial on the basis that the proffered position is not a specialty occupation. Furthermore, the petitioner does not address the basis for the director's December 21, 2004 letter affirming the prior denial.

Moreover, it is noted that the petitioner includes a new description of duties for the beneficiary in the proffered position, which provides some new duties not previously identified prior to adjudication. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to United States

¹ The 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).

Citizenship and Immigration Services (USCIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Finally, it is noted that the petitioner urges reconsideration of the late appeal, claiming that the due date of the appeal was September 1, 2003, a federal holiday. The petitioner's claims are flawed. First, as the petitioner filed an appeal in this matter on the director's decision, not the AAO's rejection, the AAO need not consider its prior decision. The time period during which a motion was permitted to have been filed on the AAO's decision has long since passed. 8 C.F.R. § 103.5(a)(1)(i).

Second, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days of service of the unfavorable decision "with the office where the unfavorable decision was made." If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). In accordance with 8 C.F.R. § 103.2(a)(7)(i), an application received in a USCIS office shall be stamped to show the time and date of actual receipt, if it is properly signed, executed, and accompanied by the correct fee. For calculating the date of filing, the appeal shall be regarded as properly filed on the date that it is so stamped by the service center or district office. In this matter, the appeal was mailed on August 1, 2003. Therefore, pursuant to the regulations, the due date was Wednesday, September 3, 2003, 33 days after the decision was mailed. The decision in this matter was stamped as received by USCIS on September 5, 2003, or 35 days after the decision was mailed. Therefore, the appeal was untimely filed and properly rejected by the AAO.

Upon review, the petitioner's appeal has failed to submit sufficient evidence to overcome the basis for the director's denial.

Finally, it should be noted for the record that, unless USCIS directs otherwise, the filing of a motion to reopen or reconsider does not stay the execution of any decision in a case or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

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 appeal is dismissed. The previous decisions of the director and the AAO are affirmed. The petition is denied.