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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

D2

[REDACTED]

FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date: DEC 03 2010

IN RE:

Petitioner:

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:

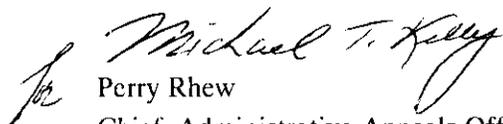
[REDACTED]

**INSTRUCTIONS:**

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** On August 6, 2008, the Director of the Vermont Service Center (VSC) denied the nonimmigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO) and the AAO dismissed the appeal on December 3, 2009. On February 1, 2010, counsel for the petitioner filed a motion to reopen and reconsider the AAO's decision 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)(1)(iii)(C), 103.5(a)(2), 103.5(a)(3), and 103.5(a)(4).

The petitioner is a restaurant that seeks to employ the beneficiary as an administrative restaurant service manager. 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 on the basis that the proffered position did not meet the definition of a specialty occupation, and the AAO subsequently affirmed the director's decision.

The regulation at 8 C.F.R. § 103.5(a)(1)(i) requires that motions to reopen or reconsider be filed within 30 days of the underlying decision or, in accordance with 8 C.F.R. § 103.5a(b), within 33 days if the decision was served by mail. In this matter, the petitioner's Form I-290B, Notice of Appeal or Motion, was initially received by the VSC on January 5, 2010, 33 days after the AAO's decision was mailed. However, the Form I-290B was not signed by the petitioner or counsel as required by 8 C.F.R. § 103.5(a)(1)(iii)(A). On January 6, 2010, the CSC rejected the motion and returned the Form I-290B to counsel, indicating that an original signature in ink was required. On January 13, 2010, counsel resubmitted the Form I-290B and accompanying documents. The CSC again rejected the motion, noting that an original signature in ink was still missing. On February 1, 2010, counsel for the petitioner submitted the Form I-290B and supporting documents a third time, and the CSC accepted the motion for filing.

The regulation at 8 C.F.R. § 103.2(a)(7)(i) requires USCIS to reject any petition or application which is not properly signed. Likewise, filings which were rejected because they were not properly signed do not retain filing dates. Therefore, in this matter, United States Citizenship and Immigration Services (USCIS) is required to reject the motion as untimely filed. Although the petitioner initially submitted the I-290B within 33 days of service of the decision, this submission omitted the required signature. Therefore, as this filing did not retain a filing date, the actual filing date for the Form I-290B is February 1, 2010, 60 days after the decision was served by mail. Thus, the motion was not timely filed and must be rejected on these grounds pursuant to 8 C.F.R. § 103.5(a)(1)(i).<sup>1</sup>

Furthermore, the motion 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.

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<sup>1</sup> It is noted that counsel identifies the instant motion as a Motion to Reopen and Reconsider. 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. 8 C.F.R. § 103.5(a)(1)(i). In this matter, the motion 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. Therefore, the untimely filing of the motion will not be excused by USCIS in this matter.

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.

Finally, the AAO will dismiss the motion for failure to meet the applicable requirements for motions to reopen and reconsider set forth in 8 C.F.R. §§ 103.5(a)(2) and 103.5(a)(3).

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.<sup>2</sup>

On motion, counsel for the petitioner resubmits the beneficiary's resume and certificates, a copy of the degree earned by the [REDACTED], and two pages of job advertisements. Counsel also submits for the first time the petitioner's business plan.

A review of the evidence that the petitioner submits on motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2). All evidence except for the petitioner's business plan was previously submitted into the record. Moreover, the petitioner's business plan was available and could have been discovered or presented in the previous proceeding. As the petitioner was previously put on notice and provided with a reasonable opportunity to provide the required evidence, the evidence submitted on motion will not be considered "new" and will not be considered a proper basis for a motion to reopen under 8 C.F.R. § 103.5(a)(2).

The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part, that "[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 [USCIS] policy." In this matter, counsel fails to cite to any precedent decisions establishing that the AAO's decision was an incorrect application of law or USCIS policy. As such, the motion does not meet the requirements of 8 C.F.R. § 103.5(a)(3).

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.

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<sup>2</sup> 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).

Finally, it should be noted for the record that, unless USCIS directs otherwise, the filing of a motion 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. 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.