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



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: NOV 03 2010

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:

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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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
Perry Rhew
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 director's previous decision was again affirmed by the director in a decision dated December 21, 2004, and a subsequent appeal, filed on January 24, 2005, was dismissed by the AAO on March 4, 2009. The matter is now before the AAO on a motion to reopen and/or reconsider. 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)(3), and 103.5(a)(4).

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 the director's 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; (10) the petitioner's appeal of the director's December 21, 2004 decision dated January 24, 2005; (11) the AAO's decision dated March 4, 2009 dismissing the appeal dated January 24, 2005; and (12) the petitioner's motion to reopen and/or reconsider dated April 2, 2009. The AAO reviewed the record in its entirety before issuing its decision.

The issue currently before the AAO, on motion, is whether its March 4, 2009 decision, dismissing the petitioner's appeal of the director's December 21, 2004 decision, was proper.

United States Citizenship and Immigration Services (USCIS) regulations require that motions to reopen or reconsider be filed within 30 days of the underlying decision. 8 C.F.R. § 103.5(a)(1)(i). The record indicates that the AAO issued the decision that is the subject of the petitioner's motion on March 4, 2009. It is noted that the AAO properly gave notice to the petitioner that it had 30 days to file a motion to reopen or reconsider. Additionally, the decision included the following instructions:

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).

(Emphasis added).

In addition, the regulation at 8 C.F.R. § 103.5(a)(1)(iii)(E) provides that a motion must be submitted to the office maintaining the record upon which the unfavorable decision was made for forwarding to the official having jurisdiction.

According to the initial date stamp on the Form I-290B Notice of Appeal, it was received by the AAO on Friday, April 6, 2009 with the filing fee of \$585. On April 20, 2009, the AAO returned the motion to the petitioner and advised that the Notice of Appeal or Motion and fee must be filed with the service center which rendered the original decision. The materials were then submitted to the Vermont Service Center on April 27, 2009, 54 days after the AAO's decision was mailed. Accordingly, the motion to reconsider was untimely filed.

The AAO notes that the motion is identified as a joint motion to reopen and/or reconsider. To the extent the motion could in any way be construed to be a motion to reopen, 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. 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).

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. 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.

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.

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 reconsidered or reopened, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.