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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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Date:

JUL 05 2011

Office: CALIFORNIA SERVICE CENTER

FILE:

IN RE:

Petitioner:

Beneficiary:

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:

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: The service center director denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) summarily dismissed a subsequent appeal. The matter is again before the AAO on a combined motion to reopen and reconsider. The motion will be dismissed.

The petitioner is an assisted living facility for adults that seeks to employ the beneficiary as a restorative programs development specialist. 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 beneficiary was not qualified for the proffered position since he failed to possess the required licensure, and the AAO summarily dismissed the petitioner's appeal.

An affected party has 30 days from the date of an adverse decision to file a motion to reopen or reconsider a proceeding before U.S. Citizenship and Immigration Services (USCIS). 8 C.F.R. § 103.5(a)(1)(i). If the adverse decision was served by mail, an additional three-day period is added to the 30-day 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).

According to the date stamp on the Form I-290B, the petitioner's motion was received by the California Service Center on August 14, 2009, or 38 days after the decision was issued. Accordingly, the motion was untimely filed. As the record does not establish that the failure to file the motion to reopen within 33 days of the decision was reasonable and beyond the affected party's control, and as there is no such provision for motions to reconsider, the combined motion is untimely and must be dismissed for that reason.¹

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

¹It is noted that counsel attempted to file the instant motion directly with the AAO on August 7, 2009. However, the AAO immediately, and appropriately, returned the motion and the filing fee to counsel. The regulations clearly require that all motions be "submitted to the office maintaining the record upon which the unfavorable decision was made for forwarding to the official having jurisdiction." 8 C.F.R. § 103.5(a)(1)(iii)(E). Likewise, the instructions on the first page of the AAO's July 7, 2009 decision indicate that all motions be filed with the office which originally decided the case. It is noted that all documents filed with USCIS must be filed "in accordance with the instructions on the form," which includes where the documents should be filed, and improperly filed documents shall not retain filing dates. See 8 C.F.R. §§ 103.2(a)(1) and (a)(7)(i). Accordingly, counsel's attempt to file the motion directly with the AAO did not establish a receipt date of August 7, 2009. It is further noted that counsel's ability to file the motion, albeit incorrectly, with the AAO within 33 days of the date of the AAO's decision indicates that it was not beyond the petitioner's control to file a timely motion.

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.

Finally, upon review, the AAO will dismiss the motion for failure to meet the applicable requirements for motions to reopen set forth in 8 C.F.R. § 103.5(a)(2) and motions to reconsider set forth in 8 C.F.R. § 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." In this matter, the petitioner offers no new evidence. Accordingly, the motion does not meet applicable requirements and must be dismissed. 8 C.F.R. § 103.5(a)(4).

Likewise, 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 cites no precedent decisions and fails to clearly articulate any reasons for reconsideration of the decision to summarily dismiss the appeal. As such, the motion does not meet the applicable requirements and must be dismissed. 8 C.F.R. § 103.5(a)(4).²

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.

²It is noted that counsel cites to an unpublished decision by the AAO as well as a federal court decision in support of his contention that the director of the California Service Center erred in issuing the denial dated August 27, 2008. However, the instant motion is not requesting reconsideration of the director's August 28, 2009 decision, but rather the AAO's decision dated July 7, 2009 which summarily dismissed the appeal for failure to specify an erroneous conclusion of law or fact by the director. Counsel does not contend that the AAO's summary dismissal of the petitioner's appeal on July 7, 2009 was based on an incorrect application of law or USCIS policy, and the decisions cited by counsel on motion likewise do not support such a contention.

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. The previous decision of the AAO, dated July 7, 2009, is affirmed. The petition is denied.