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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: **MAY 03 2012**

Office: VERMONT 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 acting service center director denied the petition for a nonimmigrant visa. The petitioner appealed this denial to the Administrative Appeals Office (AAO) and, on June 1, 2010, the AAO summarily dismissed the appeal. On June 29, 2010, counsel for the petitioner filed a motion to reopen.<sup>1</sup> The motion will be dismissed.

On the Form I-129 visa petition, the petitioner stated that it is a "full service student transportation company." To employ the beneficiary in what it designates as a financial controller position, the petitioner endeavors to classify him 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 acting director denied the petition, finding that the petitioner failed to submit a certification from the Department of Labor (DOL) that it had submitted a Labor Condition Application (LCA) that corresponds to the proffered position as required by 8 C.F.R. § 214.2(h)(4)(i)(B)(1).

On appeal, counsel marked box B in Part 2 of the Form I-290B, indicating that a "brief and/or additional evidence will be submitted to the AAO within 30 days" and further stated in Part 3 that a brief would follow within 30 days, but he did not otherwise address the basis for the decision of denial. No further evidence or argument was received by the AAO, either with the appeal, or subsequently, prior to the adjudication of the appeal.

On June 1, 2010, the AAO issued a decision on the petitioner's appeal. The AAO found that the appeal did not specifically identify any erroneous conclusion of law or statement of fact for the appeal, and summarily dismissed the appeal pursuant to 8 C.F.R. § 103.3(a)(1)(v).

On motion, counsel stated that a brief that was timely submitted was not considered. Counsel provided a copy of that brief and evidence pertinent to its submission.

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.<sup>2</sup>

On motion, in addition to the brief previously mentioned and a new brief, counsel for the petitioner has submitted other evidence pertinent to the submission of an appeal brief, and an attestation, dated June 23, 2010, from counsel. All of the other submissions on the motion are documents that were already in the record of proceeding. Those documents, of course, contain no "new" facts.

In his June 23, 2010 attestation, counsel stated:

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<sup>1</sup> Counsel did not indicate that the motion is a motion to reconsider, and it will not be considered as such.

<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).

On November 20, 2008, we submitted an appeal brief on behalf of the Petitioner to the Vermont Service Center in support of the previously filed I-290B for the subject petition.

The other evidence provided pertinent to submission of the brief is a FedEx Shipment Receipt and a form letter FedEx sent to counsel in response to an inquiry. The shipment receipt indicates that counsel sent a package on November 20, 2008. The Form letter indicates that this FedEx package was received by the Vermont Service Center on November 21, 2008 and signed for by [REDACTED]

Again, however, that evidence indicates that the package, which presumably contained the brief on appeal, was addressed to, and received at, the Vermont Service Center.

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

*Filing appeal.* The affected party shall file an appeal on Form I-290B. Except as otherwise provided in this chapter, the affected party must pay the fee required by §103.7 of this par. The affected party shall file the complete appeal including any supporting brief with the office where the unfavorable decision was made within 30 days after service of the decision.

Counsel correctly filed the Form I-290 appeal and the appropriate fee with the service center. On that form, counsel correctly requested additional time to file a brief as per 103.3(a)(2)(vii). Again, the box that counsel checked for that purpose states:

I am filing an appeal. My brief and/or additional evidence will be submitted to the AAO within 30 days.

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

Where to submit supporting brief if additional time is granted. If the [AAO] grants additional time, the affected party shall submit the brief directly to the [AAO].

If the brief is not submitted contemporaneously with the Form I-290B appeal, the regulations at 8 C.F.R. § 103.3(a)(2)(viii) and the instructions to Form I-290B require the affected party to submit the brief or evidence directly to the AAO, not to the Vermont Service Center or any other federal office. Counsel did not send the subsequently submitted appeal brief to the AAO, but to the Vermont Service Center. Because counsel did not follow the regulations or the instructions, the AAO was not in possession of the brief and therefore could not consider it on appeal.

The only "new" facts alleged are that counsel asserts that he properly submitted a brief. However, the evidence shows that the brief was not correctly submitted, and was unavailable to the AAO when it rendered its decision on appeal. Further, as the brief itself could have been timely submitted to the AAO in accordance with the salient regulations, it will not now be considered "new" evidence to be

considered on the motion. As such, the submissions on the motion do not overcome the decision summarily dismissing the appeal and denying the visa petition. The motion will be dismissed.

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 this burden.

**ORDER:** The motion is dismissed.