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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  
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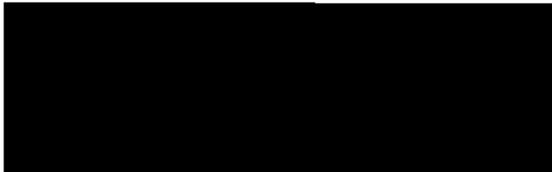


IN RE:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. Please note that all documents have been returned to the office that originally decided your case. Please also note that any further inquiry must be made to that office.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reopen and 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)(2), 103.5(a)(3), and 103.5(a)(4).

The petitioner is a telecommunications company and seeks to employ the beneficiary as an assistant network administrator. The petitioner, therefore, 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, finding that the petitioner had failed to comply with the requirements for filing a Form I-129, Petition for Nonimmigrant Worker. On appeal, the petitioner asserted that, due to ineffective prior counsel, the petitioner's Labor Condition Application (LCA) was not filed until after the submission of the I-129 petition. The AAO dismissed the appeal, finding that the petitioner had failed to establish that it had satisfied the requirements for a claim of ineffective assistance of counsel as set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd* 857 F.2d 10 (1<sup>st</sup> Cir. 1988).

U.S. Citizenship and Immigration Services (USCIS) regulations require that motions to reconsider be filed within 30 days of the underlying decision. 8 C.F.R. § 103.5(a)(1)(i). Similarly, 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. *Id.* In this matter, the motion was filed on Tuesday, September 28, 2010, 40 days after the AAO's August 19, 2010 decision. As the record 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, the motion is untimely and must be dismissed for that reason.<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

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<sup>1</sup>It is noted that the petitioner attempted to file the instant motion directly with the AAO on September 20, 2010. However, the AAO immediately, and appropriately, returned the motion and the filing fee to the petitioner. 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 August 19, 2010 decision indicate that all further inquiries be made to 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)(7)(i). Accordingly, the petitioner's attempt to file the motion directly with the AAO did not establish a receipt date of September 20, 2010. It is further noted that the petitioner'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 to reopen.

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).

This 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, this 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." Counsel provides no evidence and makes no assertion that the AAO's prior decision was based on an incorrect application of law or USCIS policy. Instead, counsel simply reasserts that the ineffective assistance of the petitioner's prior counsel negatively affected the outcome of the instant petition. Although counsel refers to *Matter of Lozada* and contends that the petitioner satisfied the three required elements for an ineffective assistance of counsel claim set forth therein, counsel cites no precedent decisions to establish that the AAO's findings constituted an incorrect application of law or service policy, and likewise fails to clearly articulate the reasons for reconsideration. More importantly, however, the motion to reconsider did not establish that the prior decision of the AAO was incorrect based on the evidence of record at the time the decision was issued. As such, the motion does not meet the applicable requirements and must be dismissed. 8 C.F.R. § 103.5(a)(4).

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.

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 proceeding 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.