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

(b)(6)

U.S. Citizenship and Immigration Services

Date: APR 01 2013 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: SELF-REPRESENTED

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the nonimmigrant visa petition, and the petitioner filed a late appeal. The director considered the petitioner's late appeal as a motion, dismissed the late motion, and affirmed the previous decision. The petitioner subsequently filed a motion to reopen, which was dismissed as untimely filed. The petitioner appealed to the Administrative Appeals Office (AAO), and the appeal was dismissed. The petitioner subsequently filed a motion to reconsider, which the AAO dismissed. The matter is again before the AAO on a combined motion to reopen and motion to reconsider. The motion will be dismissed.

The petitioner is a restaurant that seeks to employ the beneficiary as a "Sales and Customer Relations 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).

On August 8, 2006, the director denied the petition, finding that the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation. The petitioner filed an untimely appeal of the director's decision on September 22, 2006. Consequently, the director treated the appeal as a motion to reopen/reconsider and granted the motion. On October 30, 2006, the director dismissed the motion for failure to meet the applicable requirements, and affirmed his prior decision denying the petition.

The petitioner filed a motion to reopen, which was not accompanied by the required filing fee; therefore, on December 20, 2006, the California Service Center returned the motion to the petitioner, and indicated that the petitioner omitted the required filing fee. The California Service Center subsequently received a motion on January 11, 2007. The director dismissed that motion on October 5, 2007, finding that the motion was untimely filed pursuant to 8 C.F.R. § 103.5(a).

On November 5, 2007, the petitioner filed an appeal of the director's October 5, 2007 decision to the AAO. The issue then before the AAO was whether the director's October 5, 2007 decision was correct. The AAO found that the director was correct in determining that the January 11, 2007 motion was submitted late, and that the director, therefore, correctly dismissed the motion. Specifically, the AAO found that the petitioner's original submission omitted the required filing fee, and therefore, that filing did not retain a filing date, and the actual filing date was January 11, 2007, which was 73 days after the director's October 30, 2006 decision. The AAO, therefore, dismissed the appeal on June 4, 2009.

On July 7, 2009, the petitioner filed a motion to reconsider the AAO's June 4, 2009 decision. The issue then before the AAO was whether the AAO's June 4, 2009 decision was correct. As was noted above, that AAO decision on appeal was that the director's October 5, 2007 decision, i.e., that the previous motion had been filed late, was correct. Whether the June 4, 2009 AAO decision was correct was the only issue properly before the AAO.

In the motion to reconsider, however, counsel made no reference to the validity of the determinations made by the AAO in its June 4, 2009 decision. Rather, counsel focused on the

director's October 30, 2006 decision, which was not relevant to that proceeding.[1] The AAO dismissed that motion on March 7, 2012, finding, *inter alia*, that the motion did not challenge the rectitude of the AAO's June 4, 2009 decision, as it must, pursuant to 8 C.F.R. § 103.5(a)(3). The instant combined motion to reopen and motion to reconsider was filed on April 6, 2012.

As a preliminary matter, the AAO finds that the instant motion must be dismissed as it was not filed by an affected party. The regulation at 8 C.F.R. § 103.5(a)(1)(i) provides that "when the affected party files a motion, the official having jurisdiction may, for proper cause shown, reopen the proceeding or reconsider the prior decision." In addition, the filing requirements for motions listed at 8 C.F.R. § 103.5(a)(1)(iii)(A) state that the motion must be "signed by the affected party or the attorney or representative of record, if any." Attorney filed the instant motion on behalf of the beneficiary as established by (1) the new Form G-28, Entry of Appearance as Attorney or Representative submitted with the Form I-290B that was signed by the beneficiary and Mr. (2) Part I of the Form I-290B providing the name of the beneficiary, not the petitioner, in the block seeking information about the person or organization for whom counsel is appearing, and (3) the brief filed in support of the motion, dated April 5, 2012, stating that the "Beneficiary respectfully requests that [U.S. Citizenship and Immigration Services (USCIS)] consider the merits of her case and asks that USCIS not prejudice her case because of the previously filed motions and appeals in her case."

For purposes of 8 C.F.R. § 103.5, the regulations at 8 C.F.R. § 103.3(a)(1)(iii)(B) specifically state that a beneficiary of a visa petition is not an affected party and does not have any legal standing in a proceeding. The AAO therefore concludes that, as the beneficiary and her representative have no legal standing in the proceeding, counsel for the beneficiary is not authorized to file the motion on behalf of the petitioner, and the motion must be dismissed for failing to meet this applicable filing requirement. 8 C.F.R. § 103.5(a)(4).

Furthermore, the regulations at 8 C.F.R. § 103.5(a)(2) state, 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.[2] The new facts submitted on motion must be material and previously unavailable, and could not have been discovered earlier in the proceeding. *Cf.* 8 C.F.R. § 1003.23(b)(3).

In this matter, no facts or evidence were submitted on motion that may be considered both "new" under 8 C.F.R. § 103.5(a)(2), and relevant to the issue at hand, i.e., the rectitude of the AAO's March

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[1] Counsel contended that the petitioner's September 22, 2006 submission should have been treated as a timely appeal because counsel made a "good faith effort to submit the appeal in a timely manner . . . ."

[2] 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).

7, 2012 decision. The instant motion does not meet the requirements of a motion to reopen, and it must therefore be dismissed. 8 C.F.R. § 103.5(a)(2); 8 C.F.R. § 103.5(a)(4).

The AAO turns next to the motion to reconsider. 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 Service policy and must establish that the contested decision was incorrect based on the evidence of record at the time of that decision. 8 C.F.R. § 103.5(a)(3).

As noted above, the instant motion does not challenge the rectitude of the AAO's March 7, 2012 decision, as it must, pursuant to 8 C.F.R. § 103.5(a)(3). There is no assertion that the March 7, 2012 decision was based on an incorrect application of law or USCIS policy. Therefore, the instant submission does not meet the requirements for a motion to reconsider contained in 8 C.F.R. § 103.5(a)(3), and it must be dismissed for this reason pursuant to 8 C.F.R. § 103.5(a)(4).

Finally, the motion shall also be dismissed for failing to meet another applicable filing requirement. The regulation at 8 C.F.R. § 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); therefore, it must be dismissed for this reason pursuant to 8 C.F.R. § 103.5(a)(4).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here that burden has not been met. Accordingly, the motion will be dismissed for the above stated reasons, 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.