



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

Date:

MAY 17 2013

Office: VERMONT SERVICE CENTER

FILE: [Redacted]

IN RE:

Petitioner:

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: 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.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. An appeal was submitted, and the Administrative Appeals Office (AAO) dismissed the appeal. The petitioner appealed the AAO's decision, and that appeal was subsequently rejected. The matter is again before the AAO on a combined motion to reopen and a motion reconsider. The motion to reopen and the motion to reconsider will be dismissed.

The director denied the nonimmigrant visa petition on April 1, 2009. An appeal filed on May 4, 2009, was considered on the merits and dismissed by the AAO on November 3, 2010. On December 3, 2010, the petitioner filed an appeal of that decision. The AAO rejected that appeal on April 5, 2012, because, as was fully explained in that decision, the AAO does not exercise appeal power over its own decisions. The instant Form I-290B indicates that it is a combined motion to reopen and motion to reconsider the AAO's April 5, 2012 decision rejecting the petitioner's appeal of the AAO's November 3, 2010 decision.

With the instant motion, the petitioner submitted only a letter dated April 30, 2012, the body of which reads, in its entirety:

At this time your office has not accepted our appeal of the denial notice dated April 1, 2009. The reason for not accepting the appeal appears to be solely based upon procedural reasons.

The (Form I-290) Notice of Appeal or Motion is now being filed as a motion to reconsider the decision dated on April 1, 2009.

To be clear this office only hires paralegals with undergraduate degrees and experience. We will not hire paralegals that do not have degrees because of our need and requirement to have skilled employees. The Beneficiary in this application is qualified for the position of paralegal at this office. His degree has been evaluated and demonstrates that he is in fact qualified.

Therefore it is requested that this application be reviewed again and the decision be changed and the application be approved. Please note that this application if approved was filed prior to the cap being reached.

Please feel free to contact this office should you have any questions or comments regarding this matter.

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." The new facts 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). 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.¹

The petitioner has not stated any new facts on motion, nor has it provided any affidavits or other documentary evidence; thus, there is no basis for the AAO to reopen the proceeding.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *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 to reopen will therefore be dismissed.

Furthermore, as to the motion to reconsider, 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

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. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The petitioner did not submit any document that would meet the requirements of a motion to reconsider. The petitioner did not state any reasons for reconsideration nor did it cite any precedent decisions in support of a motion to reconsider. The only reference the petitioner made to the basis of the decision from which the instant motion was taken was the petitioner's statement that it was procedural, which is insufficient to establish that the decision was incorrect.

The regulation at 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." As the petitioner has failed to both (1) state the reasons for reconsideration that are "supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy," and (2) establish that the decision of the AAO "was incorrect based on the evidence of record at the time of [that decision]," the instant submission does not meet the requirements for a motion to reconsider contained in 8 C.F.R. § 103.5(a)(3). Accordingly, it must be dismissed pursuant to 8 C.F.R. § 103.5(a)(4).

Yet further, even if the petitioner submitted the instant combined motion to reopen and motion to reconsider the AAO's November 3, 2010 decision on appeal that discussed the merits of the case, the motion would be dismissed as untimely.

The regulation at 8 C.F.R. § 103.5(a)(1)(i) states, in pertinent part:

¹ 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 NEW COLLEGE DICTIONARY 753 (3d ed. 2008).

Any motion to reconsider an action by [USCIS] filed by an applicant or petitioner must be filed within 30 days of the decision that motion seeks to reconsider. Any motion to reopen a proceeding before [USCIS] filed by an applicant or petitioner, must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires, may be excused in the discretion of [USCIS] where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner.

The instant motion was filed on May 4, 2012, which is approximately one and a half years after the AAO's November 3, 2010 decision. The regulation at 8 C.F.R. § 103.5(a)(1)(i) accords the AAO no discretion to excuse the untimely filing of motion to reconsider; thus, the motion to reconsider would be dismissed.

While the AAO has discretion to excuse the untimely filing of a motion to reopen, it can only do so if the delay is demonstrated to be reasonable and beyond the control of the petitioner. However, no reason establishes that the delay was reasonable and beyond the petitioner's control; therefore, even if the instant motion is considered as a motion to reopen the AAO's November 3, 2010 decision, it would be dismissed as untimely.

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). 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 requirement listed at 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

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.