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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

Date: **MAY 29 2014** Office: VERMONT SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Michael T. Kelly
for Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, revoked the approval of 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 law firm specializing in immigration law.¹ Pursuant to the petition approval whose revocation is the subject of this petition, the beneficiary was classified as an H-1B temporary worker in a specialty occupation in accordance with 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), to perform services in a position to which the petitioner assigned the job title of Administrative Assistant.

After initiating revocation-on-notice proceedings in accordance with the provisions at 8 C.F.R. § 214.2(h)(11)(iii)(A), the director revoked the petition's approval on September 16, 2010. The director concluded that the approval must be revoked because the director determined that the evidence of record at the time when the approval was issued was insufficient to establish the proffered position as a specialty position, and that this aspect required revocation under 8 C.F.R. § 214.2(h)(11)(iii)(A)(5), which requires revocation if "[t]he approval of the petition violated paragraph h [of 8 C.F.R. § 214.2] or involved gross error."

The petitioner filed an appeal which was subsequently dismissed by the AAO. The matter is once again before the AAO on a combined motion to reopen and reconsider.

As we shall now discuss, the motion was filed late and therefore must be dismissed.

I. REGULATORY FRAMEWORK

As stated in the provision at 8 C.F.R. § 103.5(a)(4), *Processing motions in proceedings before the Service*, "[a] motion that does not meet applicable requirements shall be dismissed."

The pertinent section of the motion regulations, 8 C.F.R. § 103.5(a)(1)(i), states:

[A]ny motion to reconsider an action by the Service filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before the Service 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 the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner.

¹ The petitioner filed the petition as [REDACTED] PC, but attests that it is "now known as [REDACTED], PC."

Emphasis added.

The date of filing is not the date of mailing, but the date when U.S. Citizenship and Immigration Services (USCIS) receives the intended motion (1) completed, signed, and accompanied by the required fee as specified by the Form I-290B instructions; and (2) at the location that those instructions designate for filing motions.²

II. MOTION FILED LATE

As noted above, an affected party has 30 days from the date of an adverse USCIS decision to file a motion to reopen the proceeding or to reconsider the decision. 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). Also, any motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Neither the Act nor the pertinent regulations grant the AAO authority to extend the 33-day time limit for filing a motion to reconsider.

The regulations do permit USCIS, in its discretion, to excuse the untimely filing of the motion-to-reopen component of this joint motion were it demonstrated that the delay was both (a) reasonable and (b) beyond the control of the petitioner. 8 C.F.R. § 103.5(a)(1)(i). However, upon review of all of the submissions constituting the motion we find no basis for finding that the untimely filing was either reasonable or beyond the control of the petitioner.

The AAO issued the decision that is the subject of this motion on May 17, 2013.

According to the date stamp on the Form I-290B, the petitioner's motion was received by the Vermont Service Center on Tuesday, June 25, 2013, or 39 days after the AAO's May 17, 2013 decision was issued. Accordingly, the motion was untimely filed.³

² See 8 C.F.R. §§ 103.2(a)(1) ("every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions" and with whatever fees are required by regulation); 103.2(a)(6) (form instructions specify filing location).

³ The record now includes a July 22, 2013 letter from the petitioner to the Vermont Service Center with a four-page print-out from the Internet site www. This submission is not a matter for our consideration on this joint motion, as all the matters constituting a motion must be submitted within the aforementioned 30-day window after the decision which is the subject of the motion. However, we note that consideration of the referenced Internet material would not have altered the outcome of the motion, as it does not bear upon the late-filing aspect that requires dismissal of the motion. Additionally, we see nothing in the Internet submission that would merit probative weight towards granting either the motion to reconsider or the motion to reopen that are before us on this joint motion.

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.

For the reasons stated above both the motion to reconsider and the motion to reopen components of this joint motion will be dismissed as untimely filed.

It should be noted for the record that, unless USCIS directs otherwise, the filing of a motion to reopen or reconsider does not stay the execution of any decision in a case or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

As the joint motion was untimely filed, it must be dismissed pursuant to 8 C.F.R. § 103.5(a)(4) for failure to meet applicable filing requirements. Accordingly, we dismiss this joint motion as untimely filed.

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 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). Again, 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.

Although the late filing of the joint motion is dispositive of the motion, requiring the motion's dismissal, we shall also address in summary fashion why the joint motion would have to be dismissed even if it had been timely filed.

The provision at 8 C.F.R. § 103.5(a)(1)(i) includes the following statement limiting a USCIS officer's authority to reopen or reconsider to instances where "proper cause" has been shown for such action:

[T]he official having jurisdiction may, for proper cause shown, reopen the proceeding or reconsider the prior decision.

Thus, to merit reopening or reconsideration, the submissions on motion must not only meet the formal requirements for filing (such as, for instance, submission of a Form I-290B that elects the motion(s) by checkmark at the appropriate box, is properly executed and signed, and is accompanied by a current Form G-28 if needed), but those submission must also show a proper cause for granting the motion.

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." It is not clear that any of the documents submitted on motion evidence new facts that would be proved if the proceeding were reopened. Further, the new facts must possess such significance that, "if proceedings . . . were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case." *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992); *see also Maatougui v. Holder*, 738 F.3d 1230, 1239-40 (10th Cir. 2013). The submissions constituting this motion do not satisfy the applicable requirements. Accordingly, the motion-to-reopen component of this joint motion would not meet applicable requirements and would have to be dismissed, even if it had not been filed late. 8 C.F.R. § 103.5(a)(4).

The provision at 8 C.F.R. § 103.5(a)(3), *Requirements for motion to reconsider*, states:

A motion to reconsider must [(1)] state the reasons for reconsideration and [(2)] 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 [(3)], [(a)] when filed, also [(b)] establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The provision is augmented by the instructions on the Form I-290B which state:

Motion to Reconsider: The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions.

The submissions on motion simply do not, as filed, establish that the AAO's decision "was incorrect based on the evidence of record at the time of the initial decision." As such, the motion-to-reconsider component of the joint motion would also have to be dismissed even if it had not been untimely filed. 8 C.F.R. § 103.5(a)(4).

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met. 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. The previous decision of the AAO, dated May 17, 2013, is affirmed. The approval of the petition remains revoked.