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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



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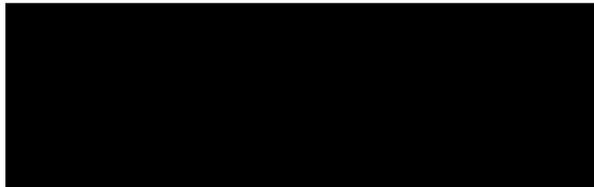
Date: Office: CALIFORNIA SERVICE CENTER File: 

OCT 14 2011

IN RE: Petitioner: 
Beneficiary:

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

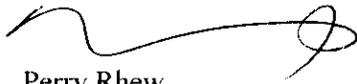
ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on July 18, 2008, the AAO dismissed the appeal. The matter is now before the AAO on a motion to reopen, in accordance with 8 C.F.R. § 103.5. The motion will be dismissed.

The petitioner seeks to employ the beneficiary temporarily in the United States as a horse show groomer pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(H)(ii)(b), from October 26, 2007 through November 14, 2008. The Department of Labor (DOL) determined that the petitioner had submitted sufficient evidence for the issuance of a temporary labor certification (Form ETA 750) on March 24, 2008, 150 days after the filing of the original nonimmigrant visa petition extension.

The director denied the petition concluding that the petitioner submitted the visa petition extension without a certified temporary labor certification from the DOL or notice detailing the reasons why such certification could not be made.

On appeal, counsel for the petitioner asserted that the United States Citizenship and Immigration Services (USCIS) agreed to accept the visa petition extension without the DOL temporary labor certification. Counsel states that USCIS agreed to send a request for evidence (RFE) for Counsel to submit the labor certification when it was received from the DOL.

The AAO dismissed the petitioner's appeal on July 18, 2008. The AAO agreed with the director's decision in that counsel's arguments did not allow USCIS to deviate from the law and regulations, which require the petitioner to obtain a determination from the Secretary of Labor prior to filing the nonimmigrant visa petition accompanied by the labor certification determination and supporting documents, or notice stating why certification may not be made.

The petitioner subsequently filed the instant motion to reopen. The regulation at 8 C.F.R. § 103.5(a)(1)(i) requires that any motion to reopen or reconsider an action by USCIS be filed within 30 days of the decision that the motion seeks to reopen or reconsider, 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 petitioner. If the decision was mailed, the motion must be filed within 33 days. See 8 C.F.R. § 103.5a(b).

In accordance with 8 C.F.R. § 103.2(a)(7)(i), an application received in a USCIS office shall be stamped to show the time and date of actual receipt, if it is properly signed, executed and accompanied by the correct fee. For calculating the date of filing, the motion shall be regarded as properly filed on the date that it is so stamped by the service center. In the present matter, according to the date stamp on the Form I-290B, Notice of Appeal or Motion, the motion was received by the director on July 1, 2011, almost three years after the AAO's decision was issued. Counsel offered the following explanation for the petitioner's failure to file the motion within 33 days of the AAO's adverse decision:

In this case, the delay in filing the Motion to Reopen is reasonable because present counsel was only retained after the time limit for the appeal had elapsed. Furthermore,

the delay was beyond the control of [the beneficiary] because he relied on the representations of prior counsel who he believed was competently pursuing his nonimmigrant petition for him.

Prior counsel provided ineffective assistance by: 1) failing to properly prepare and submit any and all applications for a nonimmigrant visa in a timely and professional manner as paid for and expected by both the Petitioner and the Applicant; 2) failing to adhere to USCIS regulations and law which clearly spell out the requirements for filing a complete I-129 application as well as the eligibility requirements for a P-1 visa; 3) failing to communicate with either [the petitioner] or [the beneficiary] regarding the case; 4) requesting and taking more money to file a frivolous P-1 visa, knowing that [the beneficiary] did not qualify for status as a professional athlete; 5) and abandoning the appeal of the nonimmigrant visas.

[Prior counsel] improperly filed the H2-B visa for [the beneficiary] because she failed to comply with the regulations[,] which require the filing of the certification from the DOL *at the same time* as the filing of the I-129 petition. Instead, prior counsel waited until after the application and an appeal had been filed to send USCIS a copy of the certificate from the [DOL].

Furthermore, around the same time of the filing of the H2-B visa, prior counsel filed a frivolous P-1 visa, for which [the beneficiary] was clearly ineligible. The appeal on this visa was considered abandoned by the Service because of prior counsel's failure to submit the appeal brief. For the above stated reasons, the delay in filing the motion to reopen was beyond the control of [the beneficiary] because it was based on prior counsel's ineffective assistance[,] which was not discovered until the time for the appeal had elapsed.

The regulation at 8 C.F.R. § 103.5(a)(2) states:

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 regulation at 8 C.F.R. § 103.5(a)(4) states, in pertinent part: "A motion that does not meet applicable requirements shall be dismissed."

The instant motion consists of counsel's brief dated June 28, 2011, copies of previous USCIS and AAO decisions, a copy of the California State Bar complaint against prior counsel, a copy of a letter sent to prior counsel (which was returned to sender), and an affidavit from the beneficiary. Although counsel's brief references the findings made in the AAO's decision and the specific deficiencies remarked upon therein, there are no new facts provided to support a motion to reopen given the statutory and regulatory ineligibility of the beneficiary. Accordingly, the motion will be dismissed for failing to meet the applicable requirements.

The purpose of a motion to reopen or motion to reconsider is different from the purpose of an appeal. While the AAO conducts a comprehensive, *de novo* review of the entire record on appeal, a review in the case of a motion to reopen is strictly limited to an examination of any new facts, which must be supported by affidavits

and documentary evidence. The AAO's review in this matter is limited to the narrow issue of whether the petitioner has presented and documented new facts to warrant the re-opening of the AAO's decision issued on July 18, 2008. In the current proceeding, counsel has not overcome the statutory and regulatory deficiencies expressed in the AAO's decision.

The AAO notes that, even if the motion had been timely filed, the AAO would not disturb its previous decision. On motion, counsel fails to submit evidence that a temporary labor certification was obtained prior to filing the nonimmigrant visa extension petition. As such, the beneficiary remains ineligible pursuant to legal statutes and regulations.

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 proceedings 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.