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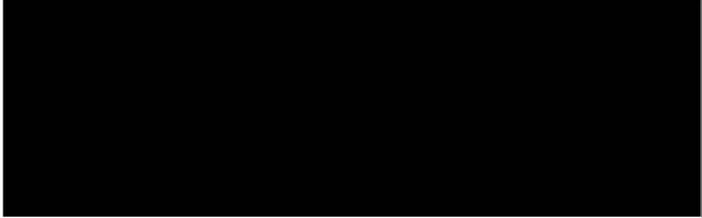
U.S. Department of Homeland Security
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Washington, DC 20529-2090



U.S. Citizenship
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D4



FILE: EAC 07 131 50270 Office: VERMONT SERVICE CENTER Date: FEB 24 2009

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

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, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition and Administrative Appeals Office (AAO) dismissed the petitioner's appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be dismissed.

The petitioner is a heavy machinery manufacturer and distributor that seeks to employ the beneficiary as a trainee for a period of twelve months. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker trainee pursuant to section 101(a)(15)(H)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(iii).

The director denied the petition based on two independent and alternative grounds: (1) that the petitioner had failed to submit evidence explaining how much time the beneficiary will devote to productive employment; and (2) that the petitioner had failed to submit evidence to explain how much time would be spent in classroom instruction, and how much time would be spent in on-the-job training.

The AAO dismissed the petitioner's subsequent appeal in a decision dated June 9, 2008. The AAO concurred with the director's grounds for denial of the petition. The AAO further determined that the petitioner had failed to establish that the proposed training is not available in the beneficiary's home country, as required by 8 C.F.R. § 214.2(h)(7)(ii)(A)(I), and denied the petition for this additional reason.

On motion, counsel for the petitioner provides the following statement on Form I-290B, Notice of Appeal or Motion:

Petitioner respectfully requests that this matter be reconsidered and reopened as the Service has approved the underlying training program, see the attached is the Notice of Approval for [REDACTED]. In that respect petitioner notes that [REDACTED] has left the country.

The petitioner attaches a copy of a Form I-797B, Approval Notice, for another H-3 petition it filed on behalf of another beneficiary, which was approved and valid from October 27, 2006 until October 8, 2007.

The regulation at 8 C.F.R. § 103.5(a)(1)(i) requires that any motion to reopen or reconsider an action by U.S. Citizenship and Immigration Services (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 22, 2008, 43 days after the AAO's decision was issued. Counsel asserts in her cover letter dated July 15, 2008 that the motion was filed late because her spouse had been ill and hospitalized with a serious infection for the preceding two weeks.

The AAO will exercise its discretion and excuse the petitioner's failure to file the motion within the period allowed as beyond the control of the petitioner. However, considering the minimal content of the motion, which consists of a two-sentence statement on Form I-290B and a copy of a USCIS approval notice, the motion will be dismissed and the AAO will not disturb the previous decision.

The AAO notes that the sole argument presented on motion is the fact that another beneficiary was previously granted H-3 classification in order to serve as a nonimmigrant trainee with the petitioning company. Counsel suggests that the copy of the previous approval notice is sufficient proof that the petitioner has a bona fide H-3 caliber training program

Counsel's argument is not persuasive. The prior approval of an H-3 petition on behalf of another beneficiary does not automatically render all subsequent H-3 petitions filed by the petitioner approvable. Each nonimmigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. See 8 C.F.R. § 103.8(d); 8 C.F.R. § 103.2(b)(16)(ii). USCIS is not required to assume the burden of searching through previously provided evidence submitted in support of other petitions to determine the approvability of the petition at hand in the present matter.

Furthermore, if the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988). Despite any number of previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. See section 291 of the Act.

It is noted that counsel makes no direct reference to the detailed findings made in the AAO's 6-page decision dated June 9, 2008 and the specific deficiencies in the petitioner's evidence, which were remarked upon and discussed at length therein. Counsel's sole argument on motion is that USCIS previously approved an H-3 petition filed by the petitioner on behalf of a different beneficiary. With regard to a motion to reconsider, the regulations at 8 C.F.R. § 103.5(a)(3) state the following, 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 [USCIS] 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 instant motion fails to indicate how the decision was based on an incorrect application of law or USCIS policy, nor is it supported by pertinent precedent decisions. Accordingly, the motion fails to meet the regulatory provisions for a motion to reconsider.

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.

With regard to the motion to reopen, it is noted that that the petitioner has failed to submit any fact that can be deemed new. No new facts are discussed in counsel's brief statement on Form I-290B. The prior approval of an H-3 petition filed on behalf of a different beneficiary six months prior to the filing of this petition is not a new fact. Accordingly, had the motion been timely filed, it would fail to meet the regulatory provisions for a motion to reopen.

Motions for the reopening 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. *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 100. With the current motion, the movant has not met that burden.

Finally, 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).

Based on the foregoing discussion, the motion will be dismissed and the AAO's decision dated June 9, 2008 will not be disturbed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motion is dismissed.