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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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[Redacted]

File: SRC 05 070 50417 Office: TEXAS SERVICE CENTER Date: **NOV 01 2007**

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

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

IN BEHALF OF PETITIONER:
[Redacted]

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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: On November 2, 2005, the Director of the Texas Service Center denied the nonimmigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on March 6, 2007, the AAO summarily dismissed the appeal. On April 11, 2007, counsel to the petitioner filed a Motion to Reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. 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)(3), and 103.5(a)(4).

The petitioner filed this nonimmigrant visa petition seeking to extend the employment of the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized under the laws of the State of Florida and is allegedly engaged in the furniture business. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that (1) the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) the petitioner had been doing business during the previous year.

Citizenship and Immigration Services (CIS) regulations require that motions to reconsider be filed within 30 days of the underlying decision. 8 C.F.R. § 103.5(a)(1)(i). In this matter, the Motion to Reconsider was filed on Wednesday, April 11, 2007, 36 days after the AAO's March 6, 2007 decision. The record indicates that the AAO's decision was mailed to both the petitioner at its business address and to its counsel of record. It is further noted that the petitioner's address to which the AAO sent the decision is the same address identified in the new Form G-28 appended to the instant motion which enters the appearance of the petitioner's current counsel. Therefore, the Motion to Reconsider is untimely and must be dismissed for that reason.¹

¹It is noted that counsel clearly identifies the instant Motion as a motion to reconsider. However, to the extent the Motion could in any way be construed to be a motion to reopen, the Motion does not establish that the failure to file the Motion within 30 days of the decision was reasonable and beyond the affected party's control. CIS regulations require that motions to reopen be filed within 30 days of the underlying decision, except that failure to timely file a motion to reopen may be excused in the discretion of CIS where it is demonstrated that the delay was reasonable and was beyond the affected party's control. 8 C.F.R. § 103.5(a)(1)(i). While the AAO understands that the basis for the Motion is ineffective representation, the Motion does not establish that this ineffective representation prejudiced the petitioner's ability to file the instant Motion on time, especially when the AAO gave notice by mail of its decision to the petitioner at its current business address. When a party receives notice of a decision and fails to take the required action, an untimely motion may be denied even when the underlying unfavorable decision was the product of ineffective, or even fraudulent, representation by an unlicensed immigration consultant or attorney. See generally *Chen v. Gonzales*, [redacted] (unpublished); *Oliveira v. Gonzales*, 127 Fed. Appx. 720 (5th Cir. 2005). Finally, counsel's assertion that the instant Motion in the context of an AAO decision is "not time barred" has no basis in law. While procedural regulations applicable to other tribunals or circumstances may lift time limitations related to certain motions concerning ineffective assistance of counsel, these regulations or rules do not apply to the instant matter. The regulation at 8 C.F.R. § 103.5 clearly sets forth the time limits applicable to motions to reopen and motions to reconsider.

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). 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.

Finally, upon review, the AAO will dismiss the motion for failure to meet the applicable requirements for motions to reconsider set forth in 8 C.F.R. § 103.5(a)(3). This regulation states, in pertinent part, that "[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 [CIS] policy." In this matter, counsel fails to cite to any precedent decisions establishing that the AAO's decision to not consider the brief and additional evidence submitted to the Texas Service Center in violation of both 8 C.F.R. § 103.3(a)(2)(viii) and the instructions to the Form I-290B was an incorrect application of law or CIS policy. As such, the Motion does not meet the applicable requirements and must be dismissed. 8 C.F.R. § 103.5(a)(4).²

Motions for the reopening or reconsideration 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. *See 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 will be dismissed.

Finally, it should be noted for the record that, unless CIS directs otherwise, the filing of a motion 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).

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.

²As indicated above, counsel clearly identifies the instant Motion as a motion to reconsider. However, to the extent the Motion could be construed to be a motion to reopen, it is noted that the Motion also does not meet the applicable requirements in 8 C.F.R. § 103.5(a)(2). This regulation 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." In this matter, the petitioner offers no new evidence. Counsel simply summarizes the evidence previously submitted in support of the appeal. This is an insufficient basis under the regulations to grant a motion to reopen.