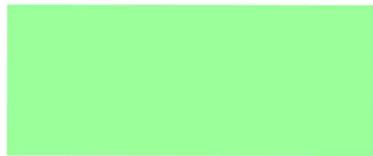


(b)(6)

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

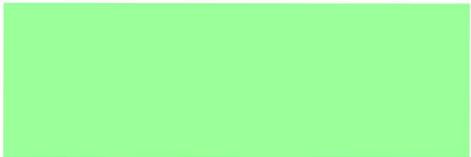


DATE: **APR 08 2013** Office: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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)

ON BEHALF OF PETITIONER:



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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The director granted the petitioner's subsequent motion to reopen and reconsider, and affirmed his decision to deny the petition on April 3, 2008. The petitioner, through former counsel, subsequently filed a late appeal, which the director rejected as untimely filed on August 21, 2008. On July 21, 2009, the petitioner, through current counsel, filed a motion to reopen and reconsider. The director dismissed the motion as untimely filed on September 18, 2009. The petitioner filed an appeal with the Administrative Appeals Office (AAO), which denied the appeal. The petitioner now submits a motion to reopen the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's employment 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, a Texas corporation established in 2005, states that it is engaged in the retail sale of gift items and cell phone accessories. It claims to be a subsidiary of [REDACTED] located in Karachi, Pakistan. The beneficiary was granted one year in L-1A status in order to open a new office in the United States and the petitioner now seeks to extend her status for three additional years so that she may continue to serve in the position of Director/President.

The director denied the petition on November 13, 2007, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. Former counsel for the petitioner filed a motion to reopen and reconsider on December 17, 2007. The director granted the motion, and affirmed his decision to deny the petition in a decision dated April 3, 2008.

On May 20, 2008, the former counsel filed an appeal. The director determined that the appeal was untimely filed. Pursuant to 8 C.F.R. § 103.2(a)(2)(v)(B), the director reviewed the appeal to determine if it met the requirements of a motion to reopen or a motion to reconsider. The director found that the appeal, which consisted solely of counsel's statement on Form I-290B, did not meet the requirements of a motion. Therefore, the director rejected the appeal as untimely filed on August 21, 2008.¹

The petitioner, through current counsel, filed a motion to reopen and reconsider on July 21, 2009. On the Form I-290B, Notice of Appeal, the petitioner indicated that it was seeking reconsideration of a decision made with respect to the instant petition on August 20, 2007. The AAO notes that this petition was pending adjudication as of that date and was initially denied on November 13, 2007. In a brief submitted on motion, counsel indicated that "the instant motion is based upon the fraudulent

¹ The AAO notes that the director should have forwarded the untimely appeal to the AAO after determining that it did not meet the requirements of a motion to reopen or reconsider or otherwise warrant favorable action. See 8 C.F.R. § 103.3(a)(2)(iv). Had the director forwarded the appeal to the AAO, the AAO would have rejected the late appeal as improperly filed pursuant to 8 C.F.R. § 103.3(a)(v)(B)(1).

acts perpetrated by individuals associated with the [REDACTED] against the Petitioner and the Beneficiary." Counsel indicated that "the fraud perpetrated by the non-lawyer against the Petitioner and Beneficiary should constitute circumstances beyond the control of the Petitioner and should excuse the failure of the Petitioner to file earlier."

In a decision dated September 18, 2009, the director noted that the petitioner seeks the reopening or reconsideration of the decision rendered by USCIS on August 21, 2008. The director emphasized that, pursuant to 8 C.F.R. § 103.5(a)(1)(i), any motion to reopen a proceeding 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 director determined that the motion was not filed within the required time period and dismissed it pursuant to 8 C.F.R. § 103.5(a)(4).

The petitioner filed a timely appeal on October 16, 2009. On appeal, counsel for the petitioner stated that the USCIS erred by using the wrong date in its calculation that the previous appeal was untimely. It stated that the appeal filed July 21, 2009 was submitted for a decision issued on June 22, 2009, not a decision rendered on August 21, 2008, as stated by the USCIS. Counsel also asserted that the petitioner never had an opportunity for a review due to the misrepresentations of the prior preparers. The AAO dismissed the appeal on November 17, 2011, finding that the appeal did in fact correspond to the August 21, 2008 decision. The AAO further stated that the petitioner failed to present the evidence necessary to establish an ineffective assistance of counsel claim. *See Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003); *Matter of Grijalva*, 21 I&N Dec. 472 (BIA 1996); *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

Any appeal or motion that is based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada, supra*.

The petitioner now files a motion to reopen / reconsider the AAO's dismissal. In a brief accompanying the motion, the petitioner contends that the fraud perpetrated by the [REDACTED] must be investigated and that, in the alternative, the matter must be reopened and reconsidered.

The regulation at 8 C.F.R. § 103.5(a)(2) sets forth 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." 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.

As new evidence, the petitioner submits documents summarized in its brief as follows:

The Petitioner and the Beneficiaries submit the following documents in support of this motion to reopen / reconsider to further document the fraud perpetrated by the [REDACTED] against them:

1. Affidavit of [the beneficiary] with attachments, namely:
Exhibit AA – Composite exhibit containing the expert handwriting analysis
Exhibit BB – Complaint with the State Bar of Texas
Exhibit CC – Complaint to the Texas Attorney General
2. Affidavit: [the petitioner] – Formal Notice of Withdrawal of Petition by the Petitioner for [REDACTED]

Although counsel describes the new evidence submitted in her brief, she does not explain why this evidence could not have been provided previously. A review of the evidence that counsel now submits reveals no document that the petitioner could not have previously produced. Similarly, the evidence does not establish any fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2). On the contrary, counsel submits the documents as *further* evidence of the previously alleged fraudulent conduct of the petitioner's former representative.

The brief and the documents submitted do not meet the standard of a motion to reopen above. Counsel appears to be using the forum of a motion to reopen as an opportunity to appeal an unfavorable decision issued by the AAO. A motion to reopen is not the proper forum to present arguments and evidence that could have been available at the time of the prior proceeding. Rather, the purpose of a motion to reopen is to submit new and previously unavailable evidence and explain why this evidence was previously unavailable and how it will overcome the adverse decision. As a result, the evidence submitted cannot be considered a proper basis for a motion to reopen.

The regulation at 8 C.F.R. § 103.5(a)(3) sets forth 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 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. "

In her brief, counsel identifies one alleged mistake of law, citing the following statement made in the AAO's dismissal: "There is no remedy available for a petitioner who assumes the risk of authorizing an unlicensed attorney or unaccredited representative to undertake representations on its behalf." Criticizing the use of this proposition, the petitioner states: "Nowhere in the evidence or

affidavits presented by the Petitioner or the Beneficiary did either state that they knowingly assumed the risk of working with an unlicensed attorney." However, this seems an irrelevant criticism given that the AAO's statement does not include a knowing assumption of risk. More importantly, however, as stated in the AAO's decision, the rationale for the dismissal was the untimeliness of the motion and the petitioner's failure to satisfy the requirements for an ineffective assistance of counsel claim. The petitioner fails to identify a mistake of law that relates to either of these two deficiencies. The petitioner therefore fails to identify a mistaken application of law that caused the petition to be dismissed. As a result, the petitioner's submission does not satisfy the requirements for a motion to reconsider

For the above stated reason, the petitioner does not satisfy the requirements of either a motion to reopen or a motion to reconsider. The motion is therefore denied and the AAO does not have jurisdiction to further consider the merits of the appeal or petition.

ORDER: The motion is denied.