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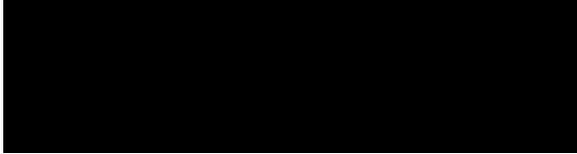
U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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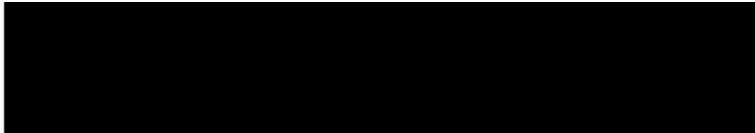


FILE: EAC 04 009 53707 Office: VERMONT SERVICE CENTER Date: **MAY 30 2008**

IN RE: Petitioner: 
Beneficiary:

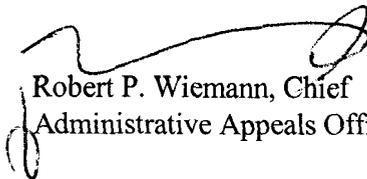
PETITION: Petition for a Nonimmigrant Worker under Section 101(a)(15)(O)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(O)(i)

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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition, and the Administrative Appeals Office (AAO), dismissed the petitioner's subsequent appeal. The petitioner subsequently filed a late motion to reopen or reconsider, which the AAO dismissed as untimely filed pursuant to the regulation at 8 C.F.R. § 103.5(a)(1)(i). The matter is now before the AAO on a second motion to reopen and reconsider. The AAO will reject the motion as untimely filed.

The petitioner, an art studio, filed this petition seeking to classify the beneficiary as an O-1 nonimmigrant pursuant to section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), as an alien with extraordinary ability in the arts. The petitioner seeks to employ the beneficiary in a part-time position as a painter for a three-year period.

The petition was filed on October 14, 2003, and was ultimately denied on February 13, 2004.¹ The director concluded that the petitioner had failed to establish that the beneficiary satisfied the regulatory criteria for an alien with extraordinary ability in the arts. In denying the petition, the director noted that the consultation letter provided by the petitioner did not meet the criteria set forth at 8 C.F.R. § 214.2(o)(5)(ii). The director determined that the submitted consultation letter addressed whether the beneficiary met the standards for "cultural uniqueness" rather than discussing his qualifications as a painter of extraordinary ability.

The petitioner filed a timely appeal on March 5, 2004, at which time it filed a new consultation letter, but no other additional evidence. The AAO dismissed the petitioner's appeal on May 25, 2005. The AAO acknowledged that the petitioner submitted a consultation letter that correctly addressed the issue of whether the beneficiary is an alien of extraordinary ability in the arts, and thus overcame one of the director's objections to approving the petition. However, the AAO determined that the petitioner failed to address the director's finding that the petitioner had not established that the beneficiary met the evidentiary criteria set forth at 8 C.F.R. § 214.2(o)(3)(iii).

The petitioner subsequently filed a motion to reconsider on July 20, 2005, 56 days after the AAO issued its decision. On March 20, 2006, the AAO dismissed the motion as untimely filed without addressing the merits of the petitioner's claims.

The petitioner filed the instant motion to reopen on February 15, 2007, or 631 days subsequent to the AAO's decision dismissing the petitioner's appeal. Counsel for the petitioner fully acknowledges that the motion is filed well outside the time period established by regulation.

The regulation at 8 C.F.R. § 103.5(a)(1)(i) requires that any motion to reopen or reconsider an action by Citizenship and Immigration Services (CIS) 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 CIS

¹ The director initially denied the petition on February 2, 2004, noting that the petitioner had failed to respond to a request for evidence issued on October 22, 2003. The director subsequently re-opened the matter in order consider additional evidence submitted by the petitioner on February 3, 2004.

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).

Here, counsel argues that the petitioner has “good cause” for the untimely filing of the motion. Counsel explains as follows:

The appeal was denied on May 25, 2005. The delay in filing this motion since that time was as a result of the fact that the Petitioner filed a motion to reconsider and then, while that motion was pending, filed a new O-1 visa petition on April 3, 2006. The latter petition was approved on October 2, 2006. We received the decision on November 12, 2006, and began working on the instant motion immediately thereafter.

We petitioned for the new O-1 classification in good faith, attaching only evidence that was already on record from the original petition and the appeal. . . .

The attached approval notice therefore helps to establish that the beneficiary is in fact an alien who possesses extraordinary ability in the field of fine arts painting. We ask that you accept this new evidence into consideration and make a decision accordingly.

The petitioner submits a copy of a Form I-797B Approval Notice for an O-1 classification I-129 petition filed on behalf of the instant beneficiary by Gibco, Inc., which was approved on October 2, 2006, with validity dates of September 27, 2006 through June 1, 2009.

Upon review, counsel’s argument is not persuasive, and the motion will be rejected as untimely filed. The petitioner's failure to file the motion within the period allowed will not be excused as either reasonable or beyond the control of the petitioner.

Contrary to counsel’s statement, the petitioner did not have a motion pending at the time the second I-129 petition was filed on behalf of the beneficiary. The AAO dismissed the petitioner’s previous untimely motion on March 20, 2006, and a different petitioner, Gibco Inc., filed an I-129 petition on the beneficiary’s behalf on April 3, 2006. The second nonimmigrant petition was filed two and one-half years subsequent to the filing of the instant petition. The petition was approved six months later, and the instant motion was filed more than four months after the petition approval. The petitioner has offered no explanation as to why this delay should be considered reasonable or beyond the petitioner’s control, or why the approval of a second petition filed by a different petitioner would exempt the instant petitioner from adhering to the 30-day timeframe for the filing of a motion established by regulations. Accordingly, the motion will be rejected as untimely filed.

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 CIS 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).

The petition will remain denied and the appeal dismissed for the previously stated reasons, with each considered as an independent and alternative basis for the decision. 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 rejected as untimely filed.