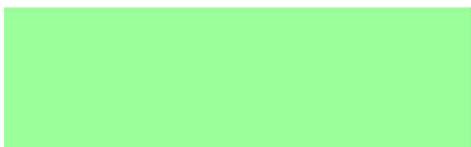


(b)(6)

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

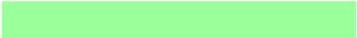


U.S. Citizenship
and Immigration
Services



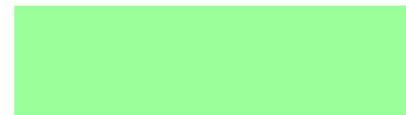
DATE: **MAR 09 2013** Office: CALIFORNIA SERVICE CENTER

FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker Pursuant to 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:

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.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa, and the Administrative Appeals Office (AAO), rejected the petitioner's subsequent appeal as untimely filed. The matter is now before the AAO on a motion to reopen. The motion will be rejected as untimely filed.

The petitioner, an Indian specialty restaurant, filed the instant petition seeking to classify the beneficiary pursuant to section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), as an alien of extraordinary ability in the arts. The petitioner seeks to employ the beneficiary in the position of executive chef for a period of three years.

The director denied the petition on October 14, 2009, concluding that the petitioner failed to submit the required written advisory opinion from an appropriate consulting entity, pursuant to 8 C.F.R. § 214.2(o)(2)(ii)(D).

The petitioner filed a late appeal, which the AAO rejected as untimely filed pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(I) on October 8, 2010. The petitioner, through current counsel, filed the instant motion to reopen on July 25, 2012, or 656 days subsequent to the AAO's decision dismissing the petitioner's appeal.

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. § 103.8(b).

Here, although current counsel for the petitioner does not specifically acknowledge that the motion is filed well outside the period established by regulation, current counsel asserts as the basis for the motion ineffective assistance of prior counsel which "was not discovered until recently." Current counsel explains the basis for the claim of ineffective assistance of prior counsel as the "prior attorney's negligence in [not] filing the appropriate documents in a timely manner resulted in a denial of a visa extension and of an appeal."

Current counsel submits a statement from the petitioner explaining, in pertinent part, as follows:

* * *

7. The visa petition was denied because the attorney failed to provide all of the necessary documents.
8. The attorney filed an appeal but mistakenly sent the appeal to the wrong location, resulting in a denial due to untimely submission.

* * *

10. Although the denial letters were sent to me, I did not understand the explanation for the denial or the additional requirements of filing a timely appeal.

* * *

16. Had it not been for subsequent meetings with other attorneys, I never would have found out about [prior counsel's] negligence.

* * * *

Upon review, current 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.

Firstly, the petitioner has not submitted any evidence in support of its assertion that it only recently discovered the basis for the director's denial of the nonimmigrant visa petition and the AAO's rejection of the appeal. The instant motion was filed more than one year and nine months after the appeal was rejected. The petitioner has offered no explanation as to why this delay should be considered reasonable, such as circumstances beyond the petitioner's control that would exempt the 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.

Secondly, it is noted that 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*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The petitioner has failed to fulfill the requirements listed above. Specifically, petitioner failed to provide an affidavit describing the agreement with the representative, evidence that the prior representative was informed of the allegations and given an opportunity to respond, and information regarding whether a complaint has been filed with disciplinary authorities. Therefore, petitioner is found not to have established a claim of ineffective assistance of counsel.

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).

The petition will remain denied and the appeal dismissed for the previously stated reasons. 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.