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

(b)(6)

Date: OCT 0 1 2014 Office: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner filed the instant Form I-129, Petition for a Nonimmigrant Worker, on October 25, 2012, requesting an extension of the beneficiary's status under section 101(a)(15)(P)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(P)(iii), as an artist or entertainer in a culturally unique program. On the Form I-129, the petitioner indicated that it engages in the business of traditional Korean clothing design and manufacturing, and that the beneficiary is employed as a Korean Clothing Designer.

The director denied the petition, concluding that the petitioner did not establish the following: (1) that the beneficiary is admissible to the United States; (2) that the beneficiary possesses skills in a culturally unique art form pursuant to 8 C.F.R. § 214.2(p)(6)(ii)(A) or (B); (3) that all the beneficiary's performances or presentations will be culturally unique events pursuant to 8 C.F.R. § 214.2(p)(6)(ii)(C); and (4) that she will be performing, teaching or coaching under a program that is culturally unique. The director entered a separate decision denying the petitioner's request for extension of nonimmigrant status.

With respect to the director's findings that the beneficiary engaged in unauthorized employment and is inadmissible to the United States, we found those issues were not properly before the AAO on appeal, because they relate to the petitioner's request to extend the beneficiary's nonimmigrant status, over which we have no jurisdiction. The regulations at 8 C.F.R. § 214.1(c)(5) provide that there is no appeal from the denial of an application for extension of stay, whether filed on a Form I-129 or Form I-539.[1] As such, we did not reach a determination with respect to those particular findings.

With respect to the beneficiary's eligibility for the requested classification, we found that the evidence of record supports the director's finding that the petitioner did not submit required evidence of the beneficiary's culturally unique skills or performances pursuant to 8 C.F.R. § 214.2(p)(6)(ii). The petitioner did not submit any supporting documentation with the initial filing. Additionally, we determined that the documents submitted in response to the director's request for evidence do not constitute testimonials from experts or, in the alternative, published material about the beneficiary's performance, as required under the plain language of 8 C.F.R. §§ 214.2(p)(6)(ii)(A) and (B). We noted that none of the submitted documents referenced the beneficiary individually.

Finally, with respect to the director's finding that all of the beneficiary's performances or presentations will not be culturally unique events, considering the petitioner's apparent involvement in alterations and repairs, we found that the petitioner abandoned this issue by not contesting or addressing this particular finding on appeal. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2

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[1]We determined that, although the director erred by including her findings of unauthorized employment and inadmissibility in her decision on the requested classification instead of in her decision on the request to extend the beneficiary's stay, the director's error does not give us jurisdiction to consider the merits of the petitioner's extension request.

(11th Cir. 2005); *Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO). For all of the above reasons, on May 15, 2014, we dismissed the appeal.

The petitioner filed the instant motion to reopen and reconsider on Wednesday, June 18, 2014, or 34 days subsequent to our 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 a motion to reopen 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). The date of filing is not the date of mailing, but the date of actual receipt. *See* 8 C.F.R. § 103.2(a)(7)(i). The petitioner's cover letter dated June 17, 2014, states, "we are just able to mail the appeal today today [sic] due to travel schedules . . . . In light of 8 C.F.R. § 103.5a(b) [now 8 C.F.R § 103.8; *see* 76 Fed. Reg. 53764 (Nov. 28, 2011)] we ask that our response be considered timely filed so long as it is mailed by Friday, June 20, 2014."

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 pursuant to 8 C.F.R § 103.5(a)(1)(i). The petitioner has offered no explanation as to why its delay should be considered reasonable or beyond the petitioner's control. The petitioner has not explained how "travel schedules" resulted in a delay in filing the appeal, and why such a delay should be considered reasonable or beyond the petitioner's control such that it would exempt it from adhering to the 30-day timeframe for the filing of a motion established by regulations. In addition, while the filing is postmarked June 17, 2014, the petitioner's appellate brief is dated June 16, 2014. The petitioner has not explained why it could not have mailed the appeal on that date. Accordingly, the motion will be dismissed 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.

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 dismissed.