U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: WAC 95 222 53273 Office: California Service Center Date: MAY - 9 2001

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(A)

Public Copy

IN BEHALF OF PETITIONER:

[redacted]

identification data deleted to prevent clearly unwarranted invasion of personal privacy.

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen 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 the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and a subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be dismissed.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(A), as an alien of extraordinary ability as an appraiser and buyer of classic automobiles. The director determined the petitioner had not established that he has earned sustained national or international acclaim, or that he would substantially benefit prospectively the United States. The Associate Commissioner affirmed the decision of the director on appeal.

On motion, counsel argues that two auction houses have attested to the petitioner's status within his field, and that the petitioner's work generates millions of dollars in export sales and creates dozens of jobs.

8 C.F.R. 103.5(a)(1)(i) requires that a motion to reopen or reconsider must be filed within thirty days of the underlying decision, except that failure to file during this period may be excused at the Service's discretion when the petitioner has demonstrated that the delay was reasonable and beyond the control of the petitioner.

We cannot find that the appeal was timely filed. The initial appellate decision was issued on July 14, 1997. The appeal brief is dated July 30, 1997, but we cannot determine whether the brief was actually mailed on that day. The California Service Center did not receive the filing fee until September 10, 1997.[1]

The delay in receipt of the filing fee was not reasonable or beyond the control of the petitioner. Rather, the delay resulted from the failure of the petitioner (and counsel) to follow the instruction on the cover of the appellate decision, which indicated that "[a]ny motion must be filed with the office which originally decided your case," i.e. the California Service Center. The petitioner and counsel disregarded this instruction, submitting the motion directly to the Administrative Appeals Office (as demonstrated by a sworn statement in the record from one of counsel's staff

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[1]We acknowledge that the adjudication of this motion has been delayed considerably longer than the standard processing time for comparable motions. Documents in the record show that the record of proceeding remained at the California Service Center as late as April 2000, but the reason for this significant delay is not clear from the record.

members). The appeal was not properly filed until its receipt by the California Service Center.

Even if the appeal had been timely filed, it does not meet the definition of a motion to reopen or a motion to reconsider.

8 C.F.R. 103.5(a)(2) states "[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." No new evidence accompanies the motion.

8 C.F.R. 103.5(a)(3) states, in pertinent part:

> A motion for reconsideration 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 . . . [and] must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The brief on motion consists of five sentences, in which counsel repeats claims which had already been addressed, and asserts in very general terms that the petition ought to have been approved.

8 C.F.R. 103.5(a)(4) states "[a] motion that does not meet applicable requirements shall be dismissed."

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. That burden has not been met, as the petitioner has again not provided any new facts, additional evidence, or new arguments to overcome the previous decision of the Associate Commissioner. Accordingly, the previous decisions of the director and the Associate Commissioner will not be disturbed, and the motion will be dismissed.

ORDER: The decision of the Associate Commissioner dated July 14, 1997 is affirmed. The motion is dismissed.