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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536

[redacted]

File: [redacted] (EAC-98-072-52943) Office: Vermont Service Center Date: SEP 15 2003

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)

ON BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision 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.

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 that 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 Bureau of Citizenship and Immigration Services (Bureau) 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 that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on motion. 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 in the arts. The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability. The AAO concurred, finding that the petitioner met only one of the ten regulatory criteria, 8 C.F.R. § 204.5(h)(3)(iv), for the classification sought. An alien must meet at least three of the regulatory criteria to be eligible.

On motion, the petitioner asserts that since the date of filing, he has received additional awards and a higher salary.[1] The new awards, like the awards submitted previously, are limited to New Yorkers or Nepalese individuals residing in the United States. The petitioner also asserted that since the time of filing, he has been hired to perform in a movie for $48,000. The petitioner claims that this salary is "the highest in the industry," an industry that includes the major film stars of Hollywood films. The petitioner also requests that the petition be considered as a petition for the lesser classification, aliens of exceptional ability, pursuant to Section 203(b)(2) of the Act, 8 U.S.C. 1153(b)(2).[2]

8 C.F.R. § 103.5(a)(1)(i) provides, in pertinent part:

> Any motion to reconsider an action by the Service filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before the Service filed by an applicant or petitioner, 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 was beyond the control of the applicant or petitioner.

The AAO dismissed the petitioner's appeal on August 30, 1999. On September 29, 1999, the petitioner requested an extension of the period in which to file a motion, asserting that the delay was reasonable and beyond his control. He stated that he had decided to hire a new attorney, needed to obtain documents from Nepal, and had only received the decision on September 22, 1999. As evidence of when he received the decision, the petitioner submitted an envelope from prior counsel postmarked September 19, 1999. The letter entitled "Motion to Reopen and Reconsider" was received May 2, 2001, more than 20 months after the AAO's decision that the motion seeks to reopen.

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[1] A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

[2] A petitioner may not make a material change to a petition. *See Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998).

We find that the delay was not reasonable or beyond the control of the petitioner. His choice to change attorneys does not alter regulatory deadlines for filing motions to reopen or reconsider. In addition, the fact that prior counsel did not forward the AAO's decision to the petitioner until September 19, 1999, is not persuasive. First, the AAO sent a copy of the decision directly to the petitioner at the same address to which prior counsel forwarded the decision. Second, the motion was filed significantly more than 30 days after September 19, 1999.

Finally, a delay of 20 months is not reasonable. The motion that was eventually submitted does not include any new evidence. The petitioner has not established that a 20 month delay to submit a five-page brief signed by the petitioner and a prospective employer was reasonable. While the petitioner asserted the delay was partially due to obtaining new counsel, the new G-28 designating current counsel was not signed until August 22, 2000, nearly a year after the AAO's decision that the petitioner seeks to reopen. Moreover, the motion itself is signed by the petitioner and a prospective employer, and contains no indication that it was prepared by current counsel.

ORDER: The motion is dismissed.