**U.S. Department of Homeland Security**
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Washington, DC 20536

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U.S. Citizenship and Immigration Services

B6

[redacted]

MAR 11 2004

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

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, Director
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and came before the Administrative Appeals Office (AAO) on appeal. The appeal was dismissed by the AAO in a decision dated October 30, 2002. The case is again before the AAO on a Motion to Reopen or Reconsider filed December 2, 2002. The motion is timely under 8 C.F.R. §§ 103.5(a) and 103.5a(b) which allow a 30-day period for such motions plus an additional three days where service of the notice of the decision is by mail. The motion will be denied.

The petitioner is a nursing home. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petition was denied by the director after the petitioner had failed to respond to a request for evidence pertaining to the beneficiary's nursing license and to nursing examination results. The director adjudicated the case on the record as it then existed and found that the evidence failed to establish the beneficiary's qualifications for the position and failed to establish the petitioner's ability to pay the proffered wage.

A notice of appeal was filed by the petitioner on January 30, 2002 but was returned by CIS for lack of the proper filing fee. The notice of appeal was resubmitted with proper fee on February 19, 2002. The AAO's decision of October 30, 2002 dismissing the appeal stated that although the notice of appeal indicated that a brief and/or additional evidence would be submitted within 30 days, no additional documentation was yet in the file. The decision on appeal affirmed the findings of the director that the evidence failed to establish the beneficiary's qualifications for the position and failed to establish the petitioner's ability to pay the proffered wage.

The motion seeks to reopen the appeal on the grounds that evidentiary documents submitted in support of the appeal were not considered by the AAO. The petitioner's motions states in relevant part the following:

> The Petitioner . . . submitted a Notice of Appeal, which was received by the Nebraska Service Center on February 1, 2002. The Petitioner indicated on the Notice that a brief and/or additional evidence would be submitted in support of the Appeal. On March 17, 2002, Petitioner mailed the Nebraska Service Center additional evidence in support of the appeal. Attached as Exhibit 1 is the FedEx shipping receipt as verifying delivery.

Concerning motions to reopen the regulation at 8 C.F.R. § 103.5(a)(2) states as follows.

> *Requirements for motion to reopen.* 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. A motion to reopen an application or petition denied due to abandonment must be filed with evidence that the decisions was in error because:
>
> (i) The requested evidence was not material to the issue of eligibility;
>
> (ii) The required initial evidence was submitted with the application or petition, or the request for initial evidence or additional information or appearance was complied with during the allotted period; or
>
> (iii) The request for additional information or appearance was sent to an address other than that on the application, petition, or notice of representation, or that the applicant or petitioner advised the Service, in writing, of a change of address or change of representation subsequent to filing and before the Service's request was sent, and the request did not go to the new address.

Concerning motions to reconsider the regulation at 8 C.F.R. § 103.5(a)(3) states as follows.

> *Requirements for motion to reconsider.* A motion to reconsider 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 or law or [CIS] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The AAO discussed the standards to be used in considering motions to reopen in a decision issued in July 2002 which stated as follows:

> Pursuant to 8 C.F.R. 103.5(a)(2) , a motion to reopen must state the new facts to be proved at the reopened proceedings and be supported by affidavits or other documentary evidence. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. 103.5(a)(4) .
>
> Based on the plain meaning of "new," a new fact is held to be evidence that was not available and could not have been discovered or presented in the previous proceeding. [FN1]
>
> When used in the context of a motion to reopen in analogous legal disciplines, the terminology "new facts" or "new evidence" has been determined to be evidence that was previously unavailable during the prior proceedings. In removal hearings and other proceedings before the Board of Immigration Appeals, "[a] motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing...." 8 C.F.R. 3.2 (1999). In examining the authority of the Attorney General to deny a motion to reopen in deportation proceedings, the Supreme Court has found that the appropriate analogy in criminal procedure would be a motion for a new trial on the basis of newly discovered evidence. INS v. Doherty, 502 U.S. 314, 323 (1992) ; INS v. Abudu, 485 U.S. 94, 100 (1988).
>
> . . .
>
> FN1. The word "new" is defined as "1. having existed or been made for only a short time.... 3. Just discovered, found, or learned <*new* evidence> ...." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984) (emphasis in original).

IN RE: Applicant: [IDENTIFYING INFORMATION REDACTED BY AGENCY], File No. LIN 00 012 52064, , 2002 WL 32079474 (AAO, July 2, 2002).

In the instant case the petitioner submits with its motion a copy of a FedEx shipping confirmation dated November 4, 2002, showing a delivery on March 15, 2002 to "Administrative Appeals Unit, Immigration and Naturalization Service, Nebraska Service Center, Lincoln, ND 68508, US." The petitioner also submits a copy of a State of Illinois license for the beneficiary as a registered nurse with no date of issuance and with an expiration date of 05/31/2004, a copy of State of Ohio license for the beneficiary as a registered nurse issued December 12, 2001, and a copy of a State of Ohio nursing license card for the beneficiary referencing the license issued to her on December 12, 2001 and stating an expiration date of August 31, 2003.

This evidence submitted on motion does not reveal facts that could be considered "new" under 8 C.F.R. 103.5(a)(2). Although the FedEx shipping confirmation is dated November 4, 2002, four days after the date of the AAO decision of October 30, 2002, the information on that document shows a delivery which occurred on March 15, 2002, and nothing in the motion indicates that a shipping confirmation could not have been obtained from FedEx soon after that shipment was made. The State of Illinois nursing license has only a date of expiration, but no date of issue, and nothing in the motion indicates that the license was unavailable prior to the date of the AAO decision. The two nursing license documents from the State of Ohio state or reference a December 12, 2001 date of issue, which was well before the notice of appeal was filed on February 19, 2002.

Counsel's motion in fact makes no claim that the evidence submitted with the motion is new. Rather counsel claims that the evidence was submitted prior to the decision on appeal by mailing the evidence to the Nebraska Service Center. Counsel's assertion that the additional evidence was shipped to the Nebraska Service Center makes a claim similar to one of the alternatives required for motions to reopen after a finding of abandonment pursuant to 8 C.F.R. § 103.5(a)(2)(ii):

> A motion to reopen an application or petition denied due to abandonment must be filed with evidence that the decision was in error because:
>
> . . .
>
> (ii) The required initial evidence was submitted with the application or petition, or the request for initial evidence or additional information or appearance was complied with during the allotted period;

The decision of the AAO was based on the record as it then existed and the decision made no finding that the petitioner had abandoned the petition. But even assuming that the decision of the AAO was in essence a finding that the petitioner had abandoned the petition by failing to submit additional evidence, applicant's motion to reopen fails to satisfy the criteria quoted above.

The instructions to the Form 290B Notice of Appeal require evidence submitted after a Notice of Appeal to be sent directly to the AAO. The instructions state:

> You may submit a brief, statement, and/or evidence *with* this form. Or you may send these materials to the [AAO] within 30 days of the date you sign this form. Or you may sent these materials to the [AAO] within 30 days of the date you sign this form. You must send any materials you submit *after* filing the appeal to:
>
> Administrative Appeals [Office]
> [CIS]
> 425 Eye Street, N.W.
> Washington, D.C. 20536.
>
> If you need more than 30 days, you must explain why in a separate letter attached to this form. The [AAO] may grant more time *only* for good cause.

The above instructions are found on the reverse side of the Form I-290B which counsel filed in the instant case.

Although applicant's evidence shows that a shipment was delivered on March 15, 2002, the address to which that shipment was delivered was the incorrect address, since it was sent to the Nebraska Service Center. Counsel's motion ignores the fact that the instructions on the Form 290B Notice of Appeal clearly state that additional evidence submitted after the filing of the notice of appeal must be sent to 425 Eye Street, N.W.,

Washington, D.C. 20536. Counsel's motion to reopen therefore fails to show that the additional evidence was properly submitted.

Aside from the issue of the beneficiary's qualifications, nothing in the petitioner's motion or in the evidence submitted with it is relevant to the second ground on which the appeal was dismissed, the failure of the petitioner to establish its ability to pay the proffered wage. Therefore, even if the motion were granted and the appeal were reopened to examine the issue of the beneficiary's qualifications, the decision to dismiss the appeal would remain unaffected because the finding that the petitioner had failed to establish its ability to pay the proffered wage would be a sufficient independent reason to dismiss the appeal.

For the above reasons, the motion fails to satisfy the requirements for a motion to reopen.

Counsel's motion has a double caption as a "Motion to Reopen or to Reconsider." The only language in the motion arguably relevant to reconsideration is "the Petitioner's additional evidence specifically identifies the erroneous conclusions of law or statements of fact in [CIS's] initial denial of the employment based visa petition." Nonetheless, nothing in the motion makes any claim that the AAO misinterpreted the Act or applicable regulations in dismissing the appeal based on the evidence then in the record. Therefore the motion also fails to satisfy the requirements for a motion to reconsider.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

This decision is without prejudice to the filing of a new I-140 petition for the same beneficiary.

**ORDER:** The motion to reopen or reconsider is denied.