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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



B7

DATE: JUN 22 2012

Office: CALIFORNIA SERVICE CENTER

FILE:



IN RE: Petitioner:



PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center denied the employment-based immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will summarily dismiss the appeal.

The petitioner filed the Form I-526, Immigrant Petition by Alien Entrepreneur, on November 12, 2010, seeking classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5).

After providing the petitioner the opportunity to submit additional evidence, the director denied the petition on September 20, 2011. The director concluded that the petitioner: (1) failed to establish that he had invested or was actively in the process of investing the required amount of capital within the new commercial enterprise, or that the capital invested was at risk, and (2) failed to meet the regulatory requirements related to job creation.

In the decision, the director acknowledged former counsel's request for additional time to respond to a request for additional evidence (RFE). The director issued the RFE on May 10, 2011. The record shows that the petitioner timely submitted an incomplete response to the RFE on August 2, 2011. Contrary to the director's request, the petitioner failed to provide evidence that the petitioner had additional funds available for investment and further declined to submit the required business plan.<sup>1</sup> Instead, the petitioner's former counsel requested an additional 30 days to submit the requested evidence. The director denied the petition, observing that the regulation at 8 C.F.R. § 103.2(b)(8) bars U.S. Citizenship and Immigration Services (USCIS) from granting an extension of time in which to respond to a request for evidence.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner acknowledges that the regulation at 8 C.F.R. § 103.2(b)(8)(iv) prohibits USCIS from granting additional time to respond to a request for evidence. Nevertheless, counsel requests that the AAO either conduct a *de novo* review of the complete response to the RFE, or remand the matter to the service center for re-adjudication. In support of this request, counsel asserts that the instructions to Form I-290B, Notice of Appeal or Motion, allow for submission of additional evidence in support of an appeal. With respect to the substantive issues raised by the director, counsel asserts "we do not elaborate on each point raised in the denial," but rather counsel requests a review of the petitioner's two-part response to the RFE and a determination of eligibility based upon the "now-complete record."

Regulations at 8 C.F.R. § 103.3(a)(1)(v) state, in pertinent part:

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

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<sup>1</sup> The record reflects that the petitioner's former counsel subsequently requested fifteen (15) additional days to submit evidence and ultimately submitted the comprehensive business plan and additional information regarding the petitioner's financial resources on September 16, 2011.

Upon review, the AAO agrees with the director's decision and affirms the denial of the petition. The petitioner's appeal is essentially a second attempt to submit a late response to the RFE issued on May 10, 2011. Counsel has not identified any erroneous conclusion of law or statement of fact on the part of the director as a basis for the appeal. In fact, counsel readily acknowledges that the director was prohibited from granting the petitioner an extension of time to submit its response to the RFE. Counsel does not contest the director's findings nor does he claim that the petition was approvable based on the initial evidence and partial RFE response. The director correctly concluded that the evidence of record failed to establish that the petitioner had invested or was actively in the process of investing the required amount of capital or that the capital invested was at risk. *See* 8 C.F.R. § 204.6(j)(2). Further, the evidence before the director did not include a comprehensive business plan and failed to establish that petitioner's investment in the new commercial enterprise would create the necessary jobs. *See* 8 C.F.R. § 204.6(j)(4)(i)(B).

The AAO cannot grant counsel's request to review the late response to the RFE on appeal. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. *See* 8 C.F.R. § 103.2(b)(8). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Counsel correctly observes that the petitioner may submit additional evidence in support of an appeal in accordance with the Instructions to Form I-290B and the regulation at 8 C.F.R. § 103.2(a)(1). However, as in the present matter, where the director put the petitioner on notice of a deficiency in the evidence and gave the petitioner an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted a complete and timely response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the evidence submitted on appeal.

Further, the petitioner has raised no error on the part of the director that would warrant a withdrawal of the decision and remand of the petition to the service center. Counsel emphasizes that the late response to the RFE was submitted prior to the issuance of the director's decision, and implies that the service center had access to the complete response prior to rendering the decision. However, review of such late-filed evidence would be tantamount to granting an extension of time to respond to the RFE beyond the 12-week deadline established by regulation and was in fact prohibited pursuant to 8 C.F.R. § 103.2(b)(8).

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. Inasmuch as the petitioner has failed to identify specifically an erroneous conclusion of law or a statement of fact in support of the appeal, the petitioner has not sustained that burden.

**ORDER:** The appeal is summarily dismissed.