



U.S. Citizenship  
and Immigration  
Services

FILE: EAC 01 120 54511 Office: VERMONT SERVICE CENTER Date:

**AUG 31 2004**

IN RE: Petitioner:   
Beneficiary:

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

ON BEHALF OF PETITIONER:

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.

for Robert P. Wiemann, Director  
Administrative Appeals Office

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prevent clearly unwarranted  
invasion of personal privacy

**DISCUSSION:** The service center director denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen or reconsider. The motion will be dismissed.

The petitioner is a software consulting firm, and seeks to employ the beneficiary as an accountant. It endeavors to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition on the ground that the beneficiary was not qualified to perform the duties of a specialty occupation. The AAO affirmed the director's findings.

On motion, counsel submits an affidavit dated October 29, 2002 from a prior employer (Sudarshan V. Loyalka, director of the Colaba Land and Mill Co.) of the beneficiary. That affidavit indicates that the employer had previously submitted a letter verifying the beneficiary's employment in March of 2000, and that a more detailed letter setting forth the beneficiary's specific job responsibilities was prepared at the beneficiary's request on September 3, 2001. Counsel also included with the motion statements from two other employers, and an experiential evaluation from International Credentials Evaluation and Translation Services that was already a matter of record. Counsel states that the aforementioned employment letters detailing the beneficiary's job experience had been submitted to the evaluator who prepared the experiential evaluation, with copies also submitted to the AAO, but that the AAO noted in its decision of October 10, 2002, that there was nothing in the record supporting the expanded version of the beneficiary's duties relied on by the evaluator who prepared the experiential evaluation. Counsel states that the September 3, 2001, letter from Colaba Land and Mill Co. should be considered by the AAO in rendering its decision on the beneficiary's qualifications to perform the duties of the proffered position, and that any failure to place that letter into the record, if in fact the letter had not been previously submitted, was inadvertent, unintentional, and excusable.

Counsel's submission of additional evidence does not satisfy either the requirements of a motion to reopen or a motion to reconsider. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Generally, the new facts to be proven must be material, previously unavailable, and could not be discovered earlier in the proceeding. 8 C.F.R. § 1003.23(b)(3). A motion to reconsider must: (1) 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 CIS policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). In this instance, no evidence in the motion contains new facts that were previously unavailable. The experience letter which counsel wants considered was dated September 3, 2001, and in the petitioner's possession at that time. It is now being submitted to the AAO for consideration for the first time. The letter does not constitute "new facts to be proved" and the motion to reopen must accordingly be dismissed.

The evidence also fails to satisfy the requirements of a motion to reconsider. The motion to reconsider states the reasons for reconsideration, but is not supported by pertinent precedent decisions to establish that the decision was based on an incorrect application of law or CIS policy. Furthermore, the motion does not establish that the prior decision was incorrect based on the evidence of record at the time of the initial decision. The motion to reconsider shall accordingly be dismissed.

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A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). In visa petition proceedings, the burden of proving eligibility remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The motion is dismissed. The previous decision of the AAO dated October 10, 2002 is affirmed. The petition is denied.