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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services



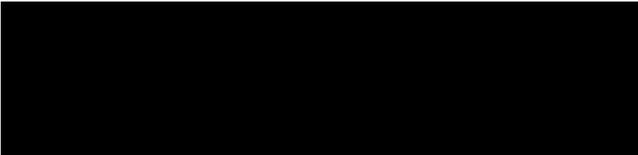
FILE: EAC 00 284 53990 Office: VERMONT SERVICE CENTER

Date: SEP 02 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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.

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 AAO granted a subsequent motion to reopen and reconsider, and affirmed its previous decision. The matter is again before the AAO on a second motion to reopen or reconsider. The motion will be dismissed.

The petitioner is a furniture store that seeks to employ the beneficiary as a manager. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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 basis that the proffered position did not meet the definition of a specialty occupation. The AAO affirmed the director's findings.

On second motion, counsel states that the decision to deny the petition was "mistaken as a matter of law and as a matter of fact." Counsel submits "expert testimony" to demonstrate that the proffered position qualifies as a specialty occupation.

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). 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 Citizenship and Immigration Services (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).

On motion, counsel submits an opinion from Globe Language Services, Inc., dated October 24, 2001, and references a letter that was previously submitted by the petitioner's president, asserting that this extensive testimony confirms that the proffered position is a specialty occupation. Counsel's statement, however, is not persuasive. As previously stated, a motion to reopen must state the new facts that will be proven if the matter is reopened, and must be supported by affidavits or other documentary evidence. Generally, the new facts must be material and unavailable previously, and could not have been discovered earlier in the proceeding. Here, no evidence in the motion contains new facts that were previously unavailable. The letter from the petitioner's president, dated March 16, 2001, is the same document that the petitioner submitted in response to the director's request for additional evidence, and on appeal. In addition, the opinion from Globe Language Services, Inc., dated October 24, 2001, could have been submitted in the motion filed by counsel on May 3, 2002. Accordingly, the AAO is not persuaded by counsel's claim that this evidence is now "new" for the purpose of a motion to reopen. Furthermore, the opinion from Globe Language Services, Inc. discusses an industrial production manager position, which is found primarily in manufacturing industries. The petitioner's industry, however, is not in manufacturing. Thus, even if the opinion were considered to be "new" evidence, it is not material.

The evidence also fails to satisfy the requirements of a motion to reconsider. Although counsel states that the decision to deny the petition was an incorrect application of the law, he does not support his assertion by any pertinent precedent decisions, or establish that the director misinterpreted the evidence of record.

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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 for the benefit sought 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 decisions of the AAO, dated April 3, 2002 and May 29, 2003, are affirmed. The petition is denied.