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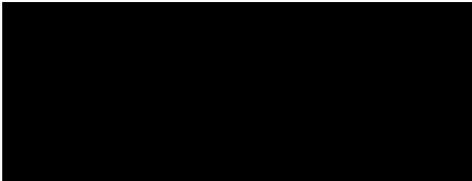


FILE: EAC 02 287 53184 Office: VERMONT SERVICE CENTER Date:

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

**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 an electrical subcontracting company, and seeks to employ the beneficiary as a contract administrator. It endeavors to classify him 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 seeks an additional sixty days to submit proof of beneficiary qualifications. The regulation at 8 C.F.R. § 103.5(a)(2) requires that 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." The regulation does not allow for the supplementation of evidence and statement of facts at a future date when filing a motion. Moreover, the motion did not state the reasons for reconsideration and was not supported by pertinent precedent decisions to establish that the decision as to the beneficiary's qualifications or the AAO's finding that the position was a cost estimator/construction manager were based on an incorrect application of law or Citizenship and Immigration Services (CIS) policy. For this reason, the motion to reopen must be dismissed.

Counsel subsequently submitted evidence previously submitted concerning the beneficiary's work history and qualifications for the position. In addition thereto, the beneficiary submitted documentation from former employers concerning the beneficiary's employment, job responsibilities, and performance.

Even were the AAO to consider the late submitted evidence, which is not allowed by the regulation, counsel's submission of additional evidence would 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 have been discovered earlier in the proceeding. 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, the previously unsubmitted evidence from the beneficiary's prior employers was provided to the petitioner prior to the filing of the Form I-129 petition and rendering of decisions by the director and the AAO. All such evidence pre-dates the filing of the petition. The late filed evidence does not contain any evidence or facts that were previously unavailable to the petitioner. As such, the evidence submitted would not constitute "new facts to be proved" and the motion to reopen would accordingly be dismissed.

The late filed evidence would also fail to satisfy the requirements of a motion to reconsider. The supplemental brief in support of 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 supplemental brief 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, were the supplemental brief to be considered with the motion, would also be dismissed.

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 December 17, 2003 is affirmed. The petition is denied.