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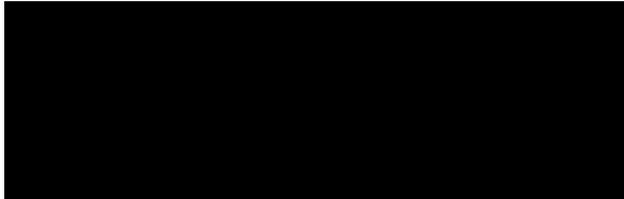


FILE: SRC 02 244 51905 Office: TEXAS SERVICE CENTER Date: **APR 29 2005**

IN RE: Petitioner: 
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(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

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 AAO also dismissed a motion to reopen or reconsider its dismissal. The matter is again before the AAO on motion to reconsider its decision to dismiss the previous motion. This motion also will be dismissed.

The petitioner is an air transport company. In order to employ the beneficiary as a pilot-in-command, the petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation 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). The director denied the petition on the basis that the proffered position did not meet the definition of a specialty occupation.

In a decision dated April 21, 2003, the AAO affirmed the director's September 16, 2002 decision to deny the petition for failure to establish that the proffered position is a specialty occupation. Counsel then filed a timely motion to reopen. In a decision dated June 24, 2004, the AAO dismissed the motion on the basis that the motion failed to present facts that were not previously available and could not have been discovered earlier in the proceeding. Counsel now contends that the AAO decision to dismiss the previous motion was erroneous. Counsel asserts that the regulations on motion practice with regard to H-1B nonimmigrant visa petitions do not require the type of evidence described by the AAO in its previous decision:

The AAO's decision dismissed the prior Motion to Reopen by citing regulations that are inapplicable to the present petition or our motion. Specifically, the AAO states from Part 1003 [of 8 C.F.R.]:

Generally, the new facts must be material and unavailable previously, and could not have been discovered earlier in the proceeding. *See* 8 C.F.R. § 1003.23(b)(3). Here, the motion fails to present facts that were previously unavailable.

The AAO has misapplied regulatory language. The present petition requests H-1B classification under 8 C.F.R. § 214.2. The above-referenced language contained in part 1003 is not applicable to the present petition because the appellate jurisdiction at 8 C.F.R. § 1003.1(b) does not include petitions filed under 8 C.F.R. § 214.2.

The AAO may only consider the regulatory language under Part 103, as the present petition falls under the appellate authority of Part 103 at 8 C.F.R. § 103.1(3)(iii)(J). No language under Part 103 indicates that the AAO cannot consider new evidence in a Motion to Reopen [unless it was] "unavailable previously, and could not have been discovered earlier in the proceeding."

Counsel misconstrues the basis of the previous AAO decision. The AAO did not cite 8 C.F.R. § 1003.23(b)(3) as a regulation that governs motions before the AAO: it used the introductory signal "*See*" to indicate that the regulation was cited as an authority supporting, but not directly controlling, the AAO's reading of 8 C.F.R. § 103.5(a)(2). Rather, in dismissing the previous motion for failing to meet the evidentiary standard of presenting facts that were "unavailable previously, and could not have been

discovered earlier in the proceeding,” the AAO relied upon the plain meaning of the word “new” in the controlling regulation, at 8 C.F.R. § 103.5(a)(2): “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.” (Italics added.) The AAO employed a natural and reasonable reading of the regulatory language.¹ Accordingly, the AAO’s evidentiary standard was not erroneous.

Furthermore, the AAO’s previous decision accords with the regulatory constraint to grant motions only for good cause shown in the motion. In pertinent part, 8 C.F.R. § 103.5(a)(1) states: “[W]hen the affected party files a motion, the official having jurisdiction *may, for proper cause shown, reopen* the proceeding or reconsider the prior decision.” (Emphasis added.) The documents presented on the previous motion did not show good cause: the documentary information was previously available and could have been presented prior to the director’s decision.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a “heavy burden.” *INS v. Abudu*, 485 U.S. at 110.

The AAO also finds that the evidentiary standard identified in the AAO’s previous decision was correctly applied: the job postings and the excerpts from additional sources of information about aviation careers did not constitute new evidence as required for a motion to reopen. These additional documents did not present information that was previously unavailable and could not have been discovered for presentation in the previous proceeding.

Counsel also argues that CIS acted in an arbitrary and capricious manner because it has approved other H-1B petitions filed by the petitioner for the same position that is proffered here. The record indicates that CIS approved the previous petition that the petitioner had filed on behalf of this beneficiary.

Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. If the previous nonimmigrant petition was approved based on substantially the same evidence as contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485

¹ At WEBSTER’S II NEW COLLEGE DICTIONARY 736 (1995), 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> . . .”

U.S. 1008 (1988). A prior approval does not preclude CIS from denying an extension of an original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Counsel's assertions do not satisfy the requirements for granting a motion to reconsider. 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 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).

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.