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*DA*

JUN 01 2005

[Redacted]

FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: [Redacted]

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

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:  
[Redacted]

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

The petitioner, a corporation engaged in aircraft pilot training, seeks to employ the beneficiary as a flight instructor. 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 1, 2004, the AAO affirmed the director's decision and dismissed the appeal. On April 29, 2004 counsel filed a letter that identified itself as a "Motion to Reopen and Reconsider" and stated that a brief would follow in 30 days.<sup>1</sup> On September 9, 2004, the AAO dismissed the motion because, as constituted at its filing, it specified no legal or factual errors by the director. The critical section of the AAO decision states:

Counsel submitted a motion on April 29, 2004 and indicated that a brief would be submitted to the AAO within 30 days. No evidence was submitted with the motion. Although the regulation at 8 C.F.R. § 103.3(a)(2)(vii) states that a petitioner may be permitted additional time to submit a brief or additional evidence to the AAO in connection with an appeal, no such provision applies to a motion to reopen or reconsider. The additional evidence must comprise the motion. *See* 8 C.F.R. §§ 103.5(a)(2) and (3).

Although not a basis for the decision herein, it is noted that neither the appeal nor the first subsequent motion to reopen established that the director erred in finding that performance of the proffered position does not require at least a bachelor's degree in a *specific specialty* directly related to the position's duties.

In the present motion, counsel asserts her belief that the AAO has the discretion to adjudicate the merits of the earlier motion that the AAO dismissed on a technical basis. Counsel cites no supporting authorities or precedents for that belief. The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).<sup>2</sup>

Counsel's assertions do not satisfy the requirements of either a motion to reopen or a motion to reconsider.

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<sup>1</sup> The record reflects that the brief was filed on May 27, 2004, which exceeded the 30 days from an adverse decision that the regulation at 8 C.F.R. § 103.5(a)(1)(i) allows for filing a motion.

<sup>2</sup> The regulation at 8 C.F.R. § 103.5(a)(1)(i) allows for excusal of a late filing of a motion to reopen, but only "where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner." There is no excusal provision for an untimely motion to reconsider.

A motion to reopen must state the new facts to be provided in the reopened proceeding, and it must be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Generally, the new facts must be material and unavailable previously, and such that they could not have been discovered earlier in the proceeding. *See* 8 C.F.R. § 1003.23(b)(3). The motion does not present such facts.

The matters filed as a motion also fail to satisfy the requirements of 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). The motion does not establish that the AAO's dismissal of the previous motion was based upon an incorrect application of law or policy. The AAO's previous decision correctly implemented the relevant regulations.

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. [REDACTED]*, 502 U.S. 314, 323 (1992)(citing *INS v. [REDACTED]*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. [REDACTED]*, 485 U.S. at 110. With the current motion, the movant has not met that burden. The motion to reopen will 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 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.