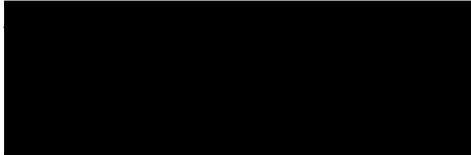


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**U.S. Citizenship
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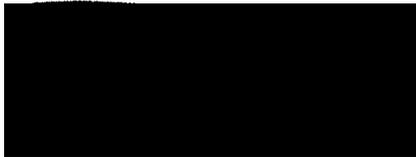
D2

FILE: EAC 02 095 50023 Office: VERMONT SERVICE CENTER Date: **SEP 07 2005**

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.

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 matter is again before the AAO on motion to reopen or reconsider. The motion will be dismissed.

The petitioner is a restaurant that seeks to employ the beneficiary as a sous chef. 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 (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 and the beneficiary was not qualified to perform the duties of a specialty occupation. The AAO affirmed the director's findings.

On motion, counsel states that the proffered position qualifies as a specialty occupation and the beneficiary is qualified to perform the duties of a specialty occupation. Counsel submits previously submitted supporting documentation in addition to copies of the petitioner's menu and a 1996 newspaper article about the petitioner.

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 evidence previously submitted and other evidence that could have been submitted previously. As discussed above, 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. *See* 8 C.F.R. § 1003.23(b)(3). Here, no evidence in the motion contains new facts that were previously unavailable. The majority of the documents submitted on motion have been previously submitted, and the remaining evidence was not previously unavailable. Accordingly, this evidence is not "new" for the purpose of a motion to reopen.

The evidence also fails to satisfy the requirements of a motion to reconsider. Although counsel asserts that CIS should have approved the instant petition, he does not support his assertion by any pertinent precedent decisions, or establish that the director misinterpreted the evidence of record.

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 decision of the AAO, dated January 27, 2004, is affirmed. The petition is denied.