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FILE: WAC 04 240 53211 Office: CALIFORNIA SERVICE CENTER Date: APR 05 2007

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.

*for* *Michael T. Kelly*  
Robert P. Wiemarn, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the nonimmigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequently filed appeal. The matter is now before the AAO on a motion to reconsider. The motion will be dismissed.

The petitioner imports, distributes, and markets hardwood flooring. It seeks to employ the beneficiary as a marketing director 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 determining that the petitioner had not established that the position comprised the duties of a specialty occupation. On appeal, counsel submitted a brief, an affidavit from the petitioner's vice-president, and a letter from a business affiliate claiming the beneficiary's duties were more varied than the title of the position suggested. The AAO, upon considering the evidence submitted, dismissed the appeal on January 5, 2005.

On motion, counsel for the petitioner requests that the service center director reopen the matter and consider the documents submitted. Counsel asserts that the petitioner was denied the opportunity for the service center director to consider additional information and documents submitted.

The AAO observes that the official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this matter the AAO. *See* 8 C.F.R. § 103.5(a)(1)(ii). Thus, the service center director has no authority to reopen this matter as the last decision was rendered by the AAO. The AAO also observes that counsel implies that the failure of the service center director to consider the same evidence considered by the AAO on appeal, prior to forwarding the matter to the AAO, has denied the petitioner the opportunity to be heard. The AAO finds the implication unpersuasive.

The AAO considered all the evidence submitted on appeal before rendering its January 5, 2005 decision. The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "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." Neither counsel nor the petitioner has submitted new facts supported by affidavits or other documentary evidence on motion. Thus, the regulations mandate the dismissal of the motion to reopen.

The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

A motion to reconsider must 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 Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Counsel's assertions do not satisfy the requirements for granting a motion to reconsider. As required by 8 C.F.R. § 103.5(a)(3), above, 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.

Counsel has not submitted any pertinent precedent decisions to establish that the AAO's decision was based on an incorrect application of law or CIS policy. The matters submitted on motion do not establish that the AAO's decision was incorrect based on the evidence of record before it at the time of its decision to dismiss the appeal. Thus, the record on motion fails to satisfy the requirements of a motion to reconsider.

The AAO notes that counsel complained in her appeal brief that the director had not issued a request for further evidence and that the failure of the director to issue a request for further evidence denied the petitioner the opportunity to be heard. However, the petitioner in fact supplemented the record on appeal, with evidence that was considered by the AAO prior to rendering its decision. The record does not support counsel's contention that the petitioner has been denied the opportunity to be heard.

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. Accordingly, the motion will be dismissed, and the previous decisions of the director and the AAO will not be disturbed.

**ORDER:** The motion is dismissed. The previous decision of the AAO, dated January 5, 2005, is affirmed. The petition is denied.