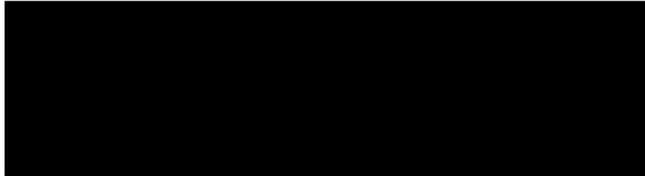


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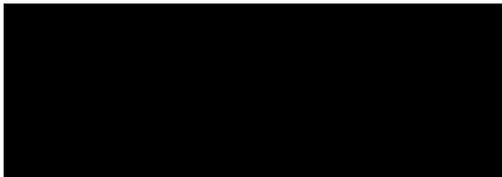
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FILE: WAC 04 261 50279 Office: CALIFORNIA SERVICE CENTER Date: OCT 29 2007

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, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and on May 2, 2006, the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion will be dismissed and the AAO decision, dated May 2, 2006, will be affirmed.

The petitioner is an international express courier and transportation services business¹ that seeks to employ the beneficiary as an assistant operations manager. 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 a specialty occupation. The AAO determined that although the beneficiary was qualified to perform the duties of the proffered position, the petitioner had failed to establish that the proffered position was a specialty occupation, and dismissed the appeal accordingly.

An affected party has 30 days from the date of an adverse decision to file a motion to reopen or reconsider a proceeding before Citizenship and Immigration Services (CIS). 8 C.F.R. § 103.5(a)(1)(i). If the adverse decision was served by mail, an additional three-day period is added to the 30-day period. 8 C.F.R. § 103.5a(b). Any motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The petitioner's motion does not meet applicable requirements because it was not timely filed. The AAO mailed its decision to the petitioner on May 2, 2006. CIS received the petitioner's motion 41 days later on June 12, 2006. Neither counsel nor the petitioner presents any evidence for CIS to consider regarding the delay in timely filing the motion. 8 C.F.R. § 103.5(a)(1)(i).

Further, the AAO notes that counsel's assertions on motion would have no merit had they been timely submitted because they do not satisfy either the requirements of a motion to reopen or a motion to reconsider. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). 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 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).

¹ A October 11, 2007 search of the California Business Portal website at <http://kepler.sos.ca.gov/corpdata> finds a "suspended" status, filing date of January 12, 2005, for "[REDACTED] c." at [REDACTED] with \$ [REDACTED] listed as the agent. Thus the petitioner's status as a U.S. employer has not been established.

On motion, counsel states that the AAO's decision is incorrect. Counsel's statement, however, is not persuasive. As previously stated, 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. The Master of Business Administration in International Business degree that counsel submits on motion pertains to the beneficiary's qualifications and was issued to the beneficiary after the filing date of the petition. First, the AAO did not conclude that the beneficiary was not qualified for the proffered position and, second, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

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 contains no evidence entailing new facts that are material and were previously unavailable. Further, the record does not contain affidavits or other documentary evidence in support of a motion to reopen. 8 C.F.R. § 103.5(a)(2). As referenced above, counsel's letter in support of the motion is not evidence but simply assertions and as mere assertions are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. at 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 503. Accordingly, the motion will be dismissed.

As always, 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 AAO's decision dated May 2, 2006 is affirmed. The petition is denied.