(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

Date: DEC 0 5 2012 Office: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on combined motion to reopen or reconsider. The motion to reopen or reconsider will be dismissed.

United States Citizenship and Immigration Services (USCIS) regulations require that motions to reopen or reconsider be filed within 30 days of the underlying decision. 8 C.F.R. § 103.5(a)(1)(i). Both motions were timely filed.

Motion to Reopen

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, that "[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." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.[1]

The matter sought to be reopened is the AAO decision dated June 17, 2009 which states in pertinent part:

> ...the petitioner did not establish with regulatory-prescribed evidence the beneficiary's prior at least two years of experience as an upholsterer, and further failed to establish that the beneficiary is qualified for the proffered position.

In support of the motion, counsel asserts that the beneficiary worked for the petitioner in 2003 through 2005 and submitted a support letter (not an affidavit) from the petitioner stating the beneficiary worked for the petitioner during the period of 2003 and 2005 and also submitted copies of Internal Revenue Service Form W-2 issued by the petitioner to the beneficiary for the years 2003, 2004, and 2005.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). Here the original Form ETA 750 was accepted on January 5, 1999 and requires two years of experience as an upholsterer. Counsel is attempting to rely on experience that the beneficiary purportedly gained after the priority date; however, all qualifying experience must be gained before the priority date. *See Matter of Wing's Tea House.*

In this matter, counsel presented no facts or evidence on motion that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen. The evidence submitted on motion is not new evidence of the beneficiary's work experience before the priority date of January 5, 1999. The evidence submitted on motion was previously available at the time this office

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[1]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> . . . ." *Webster's II New Riverside University Dictionary* 792 (1984)(emphasis in original).

issued its Notice of Derogatory Information on March 20, 2008 and could have been discovered or presented earlier in the proceeding. Therefore, the evidence submitted on motion will not be considered "new" and will not be considered a proper basis for a motion to reopen.

The motion to reopen will be dismissed.

Motion to Reconsider

The regulation at 8 C.F.R. § 103.5(a)(3) provides:

> *Requirements for a motion to reconsider.* 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 asserts that this office incorrectly concluded that the petitioner failed to establish that the beneficiary met the requirements of at least two years of experience as an upholsterer and that the beneficiary is not qualified for the proffered position. However, counsel's assertion is not supported by any precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy.

The motion to reconsider does not qualify for consideration under 8 C.F.R. § 103.5(a)(3) because counsel's assertion is not supported by any precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy.

The motion to reconsider will be dismissed.

Furthermore, the motion shall be dismissed for failing to meet an applicable requirement. The regulation at 8 C.F.R. §§ 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and motions to reconsider. Section 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See 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. With the current motion, the movant has not met that burden.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the motion to reopen or reconsider will be dismissed. The proceedings will not be reopened or reconsidered, and the previous decision of both the director and the AAO will not be disturbed.

ORDER: The motion to reopen or reconsider is dismissed. The petition remains denied.