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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

D2

[redacted]

FILE: WAC 05 200 51567 Office: CALIFORNIA SERVICE CENTER Date: APR 03 2009

IN RE: Petitioner: [redacted]
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:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: On March 13, 2006, the Director of the Vermont Service Center denied the nonimmigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on September 26, 2007, the AAO dismissed the appeal. On October 25, 2007, counsel to the petitioner filed a combined motion to reopen and reconsider. The motion will be dismissed pursuant to 8 C.F.R. §§ 103.5(a)(1)(iii)(C) and 103.5(a)(4).

The petitioner is a home healthcare provider. To employ the beneficiary as a part-time auditor, the petitioner filed this nonimmigrant visa petition to classify the beneficiary as an H-1B 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's decision to deny the petition is based upon his determination that the evidence of record did not establish the proffered position as a specialty occupation. The AAO dismissed the appeal on concluding that the director's determination that the petitioner failed to establish a specialty occupation was correct.

As indicated by the check mark at box F of Part 2 of the Form I-290B, the petitioner has elected to file a combined motion to reopen and reconsider. The motion consists of the Form I-290B; a brief entitled "Motion to Reopen/Reconsider Denial on Appeal"; and copies of the following documents, tabbed as Exhibits A through D: (A) the AAO's decision dismissing the appeal; (B) the petitioner's U.S. Corporation Income Tax Report (IRS Form 1120) for the year 2005; (C) the Accountant and Auditors chapter of the 2004-2005 edition of the Department of Labor's *Occupational Outlook Handbook* (*Handbook*); and (D) a total of three printouts of Internet advertisements of job openings for internal auditors, issued by [redacted] and [redacted]

The motion shall be dismissed for its failure to meet an applicable requirement imposed by the regulation at 8 C.F.R. § 103.5(a)(1)(iii), which 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 requirement listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must be dismissed for this reason.

As will be discussed below, even if it were not subject to dismissal for failure to comply with the filing provision, the motion would not merit any relief for the petitioner.

The following statutory and regulatory framework governs whether a proffered position qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184 (i)(l), defines the term "specialty occupation" as an occupation that requires:

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [1] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [2] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States."

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(3) The employer normally requires a degree or its equivalent for the position; or

(4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), United States Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The AAO will now address why the matter would not merit relief as a motion to reconsider, even if it had met the aforesaid filing requirement at 8 C.F.R. § 103.5(a)(1)(iii)(C).

To merit relief from an adverse decision, a motion to reconsider must: (1) state the reasons for reconsideration; (2) be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy; and (3) 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). As indicated in the discussion below, the reasons that the motion states for reconsideration are not supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy, and those stated reasons fail to establish that the decision was incorrect based on the evidence of record at the time of the initial decision. Consequently, the matter now before the AAO would be dismissed as a motion to reconsider. A motion that does not meet the applicable requirements must be dismissed. 8 C.F.R. § 103.5(a)(4).

As general reasons for the motion, counsel's brief contends that USCIS "failed to consider evidence previously submitted" and "made wrongful assumptions as to the financial status of the company, which has a direct bearing in determining the scale and complexity of the business operations of the petitioner's business." Even if the motion to reconsider had been properly filed, as counsel does not specify the evidence claimed to have been disregarded or the assumptions claimed to have been wrongfully made, these statements would not merit reconsideration of the AAO's prior decision.

The brief specifically asserts that USCIS failed to properly consider the financial information that the petitioner had submitted into the record. Counsel asserts in particular that USCIS did not give proper consideration to the record's information about the estimated gross revenue for 2005 (now reported as $2,722,435 in gross sales for 2005 in the petitioner's U.S. Corporation Income Tax Return submitted on motion) and the petitioner's gross sales of $2,325,941 for 2004, as indicated in the record's copy of the petitioner's U.S. Corporation Income Tax Return for 2004. Counsel argues that the petitioner's sales figures make it "crystal clear" that the petitioner "has substantial and complex business operations particularly in providing a high level of comprehensive and integrated health care to patients under home care." Counsel also states:

> [I]t is apparent that the Petitioner offers a wide range of services including management and patient care rendered by nurses and other caregivers. It also bolsters the fact that the Petitioner has grown tremendously the last four (4) years and based on the scale and complexity of the petitioner's business operations there is a genuine need for the company to hire the services of a part time and temporary auditor.

Counsel further contends that the specialty occupation nature of the proffered auditor's position is established by the "million-dollar scale" of its operations:

> [T]he petitioner's business operations are on a million-dollar scale. Hence, it is but common sense, that you will not rely on a person with lesser expertise or education in the matter of handling or analyzing financial matters[,[particularly the duties of an auditor.
>
> The petitioner is a home health agency, which is regularly subject to audits by government agencies such as Medicare and/or MediCal. It is involved in substantial contracts with various clients, which requires careful analysis, auditing and management in order for the company to render its functions at its highest level and at the same time maintain profitability. To ensure this company objective, it is imperative to hire an Auditor whose main function is to collect and analyze data to detect deficient controls, duplicated effort, extravagance, fraud or non-compliance with laws, regulations, and management policies.

Counsel also presents a description of the proposed duties that was included in the record prior to the director's decision.

Counsel does not cite any precedent decision that would support a finding that the AAO's decision on appeal was based on an incorrect application of law or USCIS policy.

The AAO acknowledges that the petitioner has documented the sales and revenue figures stated on motion. The AAO also notes that the motion accurately portrays the proposed duties as previously described in the record. However, the brief on motion contains a number of factual assertions that carry no evidentiary weight because they are not supported by documents in the record. 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). The record lacks documentary evidence establishing the specific range of care provided by the petitioner, the types of care providers that it employs, the range of clients it services, and the substantive nature of its contracts. Consequently, the AAO rejects as uncorroborated the brief's assertions that the petitioner "engages in the type of business with operations of the scale or complexity that would require the services of an auditor"; that the petitioner "has substantial and complex business operations particularly in proving a high level of comprehensive and integrated health services to patients under home health care"; that petitioner offers a wide range of services"; and that the petitioner's contracts are "substantial" and require "careful analysis, auditing, and management."

Counsel's contention on motion that the AAO did not properly consider the financial information submitted into the record is inconsistent with the content of the AAO's decision, which directly and correctly addressed the weight of that information. In this regard, the AAO also finds that there is no basis in the record for counsel's assessment that the records on the petitioner's sales and income establishes the "scale and complexity" of the petitioner's business operations and that the scale and complexity is such as to require the auditing services of a person with at least a bachelor's degree in accounting or a related specialty.

The AAO decision on appeal clearly articulates the AAO's determinations that insufficient evidence on the petitioner's organizational structure, its operations, and the specific financial matters upon which the beneficiary would work was fatal to the petitioner's attempts to establish a specialty occupation under the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), and (4). The AAO finds that the evidence of record before the AAO when it rendered the decision on the appeal supports these determinations, that these determinations were proper and sufficient grounds for denying the appeal, and that the matters on motion do not demonstrate that the decision on appeal was incorrect based on the evidence of record at the time of the initial decision. The AAO also finds nothing in the motion that undermines the AAO decision's conclusion that the evidence was not sufficient to satisfy the remaining criterion, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

As the matter now before the AAO does not merit relief in accordance with the criteria at 8 C.F.R. § 103.5(a)(3), it would be dismissed as a motion for reconsideration in accordance with the mandate at 8 C.F.R. § 103.5(a)(4) to dismiss motions that do not meet the applicable requirements.

The AAO will now address how the AAO would address the matter as a motion to reopen if the motion had not failed to meet the requirements at 8 C.F.R. § 103.5(a)(1)(iii)(C). As discussed below, even if the AAO were to reopen the proceedings for consideration of the petitioner's U.S. Corporation Income Tax Return for 2005, this new evidence does not have sufficient evidentiary value to merit overturning the AAO's previous decision. When reviewed in tandem with the other financial evidence in the record, this newly submitted tax return does indicate an established trend of growth in gross sales and annual income. However, the record provides no evidentiary basis for the AAO to extrapolate or deduce from that information either the level of complexity of the underlying

business operations or the level of practical and theoretical applications of specialized knowledge that those operations may require of the beneficiary. Therefore, supplementation of the record by the new evidence in the form of the U.S. Corporation Income Tax Return for 2005 does not remedy the evidentiary deficiencies upon which the AAO properly based its decision to dismiss the appeal. Accordingly, if the motion to reopen were granted and the new evidence were considered, the AAO's decision on appeal would not have been disturbed. However, as noted above, the motion to reopen did not meet the basic requirements set forth in 8 C.F.R. § 103.5(a)(1)(iii)(C) and, as such, it will be dismissed in accordance with 8 C.F.R. § 103.5(a)(4).

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)). Further, a party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. The matters comprising the current motion have not met that burden.

Finally, it should be noted for the record that, unless CIS directs otherwise, the filing of a motion does not stay the execution of any decision in a case or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

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.

ORDER: The motion to reconsider is dismissed. The motion to reopen is dismissed. The decisions of the director and the AAO will not be disturbed.