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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

PUBLIC COPY

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[redacted]

FILE: SRC 05 190 51706 Office: TEXAS SERVICE CENTER Date: OCT 05 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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition by decision dated August 31, 2005. The matter was then appealed to the Administrative Appeals Office (AAO). By decision dated November 28, 2006, the AAO withdrew the director's decision and remanded the matter to the director for entry of a new decision, which would address the issue of whether the beneficiary is qualified to serve in the pertinent specialty occupation in accordance with the relevant regulations on establishing a beneficiary as qualified for an H-1B visa. In response to the AAO's decision to remand, the director requested additional evidence from the petitioner on April 17, 2007. The petitioner did not respond to the director's request and so the director denied the Form I-129 petition on October 24, 2007 due to abandonment. On November 21, 2007, the petitioner filed a second Form I-290B with a request for a Motion to Reopen. The director then certified the matter to the AAO for review on May 12, 2009.

The record reflects that the petitioner was properly served with a notice of the director's certification to the AAO of his decision to deny the petition, and that the notice apprised the petitioner of its option to submit a brief in response to the certification within 30 days. As no brief has been received by the AAO, the record is considered complete and ready for review.

The director based his certified decision on each of two independent grounds: (1) abandonment of the petition, based on the petitioner's failure to respond to the request for evidence (RFE), in accordance with the regulation at 8 C.F.R. § 103.2(b)(13); and (2) failure of the evidence of record to establish that the beneficiary satisfies the regulatory requirements for qualification to serve in the pertinent specialty occupation.

Upon review, it is first noted that the petitioner's motion to reopen must be dismissed for failure to provide any evidence that the decision was in error. *See* 8 C.F.R. § 103.5(a)(2). 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). In addition, § 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." The petitioner's motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). Motions for the reopening 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. *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 motion will therefore be dismissed pursuant to 8 C.F.R. §§ 103.5(a)(1)(iii)(C), 103.5(a)(2), and 103.5(a)(4).

Moreover, even if the motion to reopen had been properly filed, the director's underlying decision to deny the petition due to abandonment was not in error. If the petitioner had wanted USCIS to make a decision based on the record (as the petitioner claims in the motion to reopen), then the petitioner should have at least sent a letter in response to the April 17, 2007 RFE, requesting that a decision be made based on the record instead of not responding at all. *See* 8 C.F.R. **§ 103.2(b)(11). By its utter failure to reply to the director's request for** evidence, the petitioner has abandoned the petition. This fact alone compels denial of the petition, in accordance with 8 C.F.R. § 103.2(b)(13). Further, the findings articulated in the director's decision on the beneficiary qualification issue are supported by the evidence of record, and the director's decision to deny the petition on the beneficiary qualification issue comports with the relevant regulations.

An applicant must demonstrate by a preponderance of the evidence that he is eligible for the benefit sought. Section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, places the burden of proof upon the applicant to establish that eligibility. Here, that burden has not been met. The director's decision will be affirmed. The petition will be denied without prejudice.[1]

ORDER: The petitioner's motion to reopen is dismissed. The director's October 24, 2007 decision is affirmed. The petition is denied.

[1] The AAO notes that in its decision to remand this case on November 28, 2006, the AAO made clear the reasons why the evidence submitted by the petitioner was not sufficient to demonstrate that the beneficiary achieved recognition of expertise in the specialty evidenced by at least one of the five types of documentation listed under 8 C.F.R. § 214.2(h)(4)(iii)(D). Ample opportunity was provided to the petitioner to submit additional evidence to demonstrate that the beneficiary qualifies to perform the duties of the specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C); however, the petitioner requested in its November 20, 2007 Motion to Reopen that the AAO make a decision based on the evidence already in the record, which the AAO previously found to be deficient.