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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

DATE: AUG 2 6 2013 OFFICE: VERMONT SERVICE CENTER FILE:

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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

for Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The petitioner appealed the director's denial to the Administrative Appeals Office (AAO) and, on February 4, 2013, the AAO dismissed the appeal. The matter is again before the AAO on a combined motion to reopen and motion to reconsider. The combined motion to reopen and reconsider will be dismissed.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a home health services business established in 2007. In order to employ the beneficiary in what it designates as a quality assurance coordinator, the petitioner seeks to classify her 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, finding that the petitioner failed to establish that the proffered position qualifies as an H-1B specialty occupation in accordance with the controlling statutory and regulatory provisions. The petitioner submitted an appeal of the director's decision to the AAO. The AAO reviewed the evidence and determined that the record of proceeding contained insufficient evidence to establish that the petitioner would employ the beneficiary in a specialty occupation position. Accordingly, the AAO dismissed the appeal.

Thereafter, counsel for the petitioner submitted a Form I-290B, a brief, and additional evidence. As indicated by the check mark at Box F of Part 2 of the Form I-290B, counsel stated that the petitioner was filing both a motion to reopen and a motion to reconsider the decision. Counsel claims that the AAO's decision dismissing the appeal and affirming the director's decision was erroneous.

The AAO will now discuss the combined motion to reopen and reconsider submitted by counsel. As will be discussed below, the submissions constituting this joint motion do not satisfy the requirements of either a motion to reopen or a motion to reconsider. A motion that does not meet applicable requirements shall be dismissed. *See* 8 C.F.R. § 103.5(a)(4). Accordingly, this combined motion to reopen and reconsider will be dismissed.

Along with the Form I-290B and a brief from counsel, the joint motion includes (1) a copy of the petitioner's promotional brochure (previously submitted); (2) copies of pages 1-2 and 13-17 from a document entitled "The Essentials of Baccalaureate Education for Professional Nursing Practice," dated October 20, 2008, by the American Association of Colleges of Nursing; (3) copies of the table of contents and pages xi-xiv, from a document entitled, "Quality Assurance for Home Health Care," by (4) copies of job postings; and (5) a copy of a document entitled "Expert Opinion Evaluation," dated March 1, 2013, prepared by

Dismissal of the Motion to Reopen

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." 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 new facts submitted on motion must be material and previously unavailable, and could not have been discovered earlier in the proceeding. *Cf.* 8 C.F.R. § 1003.23(b)(3).

The AAO reviewed all of the evidence submitted in support of the instant motion. Upon review of those submissions, the AAO finds that the petitioner and counsel have not provided any "new facts" and that the instant motion does not contain any "new" evidence. The AAO notes that even though the "Expert Opinion Evaluation" postdates the AAO's decision on appeal, the evaluation does not center on or present new facts that were not available and could not have been discovered or presented in the previous proceeding. The type of evaluation submitted by for instance, could have been sought and acquired prior to the AAO's decision on appeal. There is no indication that any of the evidence submitted on motion was not available and could not have been discovered or presented in the previous proceeding. Thus, the submissions on motion fail to meet the requirements for a motion to reopen at 8 C.F.R. § 103.5(a)(2). Accordingly, the motion to reopen will be dismissed.

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" of proof. *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden.

Dismissal of the Motion to Reconsider

As will now be discussed, the submissions on motion also fail to satisfy the requirements for a motion to reconsider a decision.

A motion to reconsider must state the reasons for reconsideration and be supported by citations to pertinent statutes, regulations, and/or precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) 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. *See* 8 C.F.R. § 103.5(a)(3) (requirements for a motion to reconsider) and the instructions for motions to reconsider at Part 3 of the Form I-290B.[2]

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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 NEW COLLEGE DICTIONARY 753 (2008) (emphasis in original).

[2] The provision at 8 C.F.R. § 103.5(a)(3) states the following:

> *Requirements for 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

As previously mentioned, counsel contends that the AAO's decision dismissing the appeal and affirming the director's decision was erroneous. The AAO finds, however, that, on motion, counsel basically requests a review of the record of proceeding, based upon counsel's presentation not only of the evidence that was before the AAO on appeal but also of documents, including the newly submitted "Expert Opinion Evaluation," from that were not part of the record of proceeding when the AAO issued its decision dismissing the appeal.[3]

As a motion to reconsider a decision on a petition must, by regulation, establish that the contested decision was incorrect based on the evidence of record at the time of that decision, the AAO will not speculate about what difference, if any, the newly submitted documents might have had upon the AAO's decision if such evidence had been part of the record of proceeding that was before the AAO when it made its decision. *See* 8 C.F.R. § 103.5(a)(3).

Next, the AAO notes that counsel's "Brief in Support of Motion to Reconsider" cites to several unpublished AAO decisions that addressed H-1B specialty occupation positions with the same job title as the petitioner assigned to the position that is the subject of the present petition. Aside from the fact that the motion does not establish that the positions and the associated facts upon which the AAO reached favorable decisions in the cited AAO decisions are substantially the same as those in the instant petition, none of those AAO decisions have been published as precedent decisions. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS

> 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.

This regulation is supplemented by the instructions on the Form I-290B, by operation of the rule at 8 C.F.R. § 103.2(a)(1) that all submissions must comply with the instructions that appear on any form prescribed for those submissions. With regard to motions for reconsideration, Part 3 of the Form I-290B submitted by the petitioner states:

> **Motion to Reconsider:** The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions.

The regulation at 8 C.F.R. § 103.2(a)(1) states in pertinent part :

> [E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission.

[3] Aside from the facts that this professor's submission was not part of the record before the AAO when it dismissed the appeal, and also that the professor had not established himself as one who has been recognized as an authority on the matters upon which his submission opines, the "Expert Opinion Evaluation" does not even specify any statutes, regulations, or precedent decisions, let alone articulate that any one or more of them support a finding that the AAO's decision on appeal was based upon a misapplication of law or service policy to the evidence of record before the AAO when it decided to dismiss the appeal.

employees in the administration of the Act, unpublished decisions are not similarly binding. Accordingly, these decisions have no precedential value, and the AAO is under no obligation to adopt their reasoning. Moreover, as they are not precedent decisions, they do not provide a foundation for a motion to reconsider, even if they were shown to be relevant to the underlying petition – which is not the case here. Again, as noted in the controlling regulation, to be considered a sufficient supportive authority for granting a motion to reconsider, a decision must be a precedent decision. *See* at 8 C.F.R. § 103.5(a)(3).

Further, to merit reconsideration of the AAO's decision to dismiss the appeal, the petitioner must both (1) specifically cite laws, regulations, precedent decisions, and/or binding USCIS policies that the petitioner believes that the AAO misapplied in deciding to dismiss the appeal; and (2) articulate how those standards cited on motion were so misapplied to the evidence before the AAO as to result in a dismissal that should not have been rendered. Here, the submissions on motion fail to articulate how such standards were misapplied to the petitioner's evidence.

Again, 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.

In other words, the purpose of a motion to reconsider is to contest the correctness of the original decision based on the previously established factual record. A motion to reconsider based on a legal argument that could have been raised earlier in the proceedings will be denied. *See Matter of Medrano*, 20 I&N Dec. 216, 219-20 (BIA 1990, 1991). The "reasons for reconsideration" that may be raised in a motion to reconsider should flow from new law or a *de novo* legal determination reached by the AAO in its decision that could not have been addressed by the party. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). Further, a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. *Id.* Instead, the moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *Id.* at 60.

In short, the AAO finds that the submissions on motion neither articulate nor establish that the AAO's decision on appeal was based upon misapplication of any statutory or regulatory authorities, case law, precedent decisions, or binding USCIS policy.

For all of the reasons discussed above, the motion to reconsider will also be dismissed for failure to meet applicable requirements. *See* 8 C.F.R. § 103.5(a)(4).

Additional Basis for Dismissal

In addition, the combined motion shall be dismissed for failing to meet another applicable filing requirement. The regulation at 8 C.F.R. § 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 submissions constituting the combined motion do not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). Again, 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 combined motion does not meet the applicable filing requirement listed at 8 C.F.R. §103.5(a)(1)(iii)(C), it must also be dismissed for this reason also.

Finally, it should be noted for the record that, unless USCIS 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).

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met. Accordingly, the motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decision of the AAO will not be disturbed.

ORDER: The combined motion is dismissed.