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

(b)(6)

[redacted]

Date: SEP 04 2013 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

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:

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: On March 29, 2011, the Director of the California Service Center denied the nonimmigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on May 6, 2013, the AAO dismissed the appeal. On June 6, 2013, the petitioner filed a combined motion to reopen and a motion to reconsider the AAO's decision. The combined motion will be dismissed.

On the Form I-129 visa petition, the petitioner stated that it is a costume jewelry and accessories distributor with seven employees. In order to employ the beneficiary in what it designates as a graphic designer position, the petitioner seeks to classify him 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 it would employ the beneficiary in a specialty occupation position and failed to demonstrate that the beneficiary is qualified to work in the proffered position. On appeal, counsel asserted that the director's bases for denial were erroneous and contended that the petitioner satisfied all evidentiary requirements. As indicated above, the petitioner appealed, and the AAO dismissed the appeal.

The matter is once again before the AAO on a combined motion to reopen and motion to reconsider. As indicated by the check mark at box F of Part 2 of the Form I-290B, the petitioner elected to file a combined motion to reopen and motion to reconsider. On motion, counsel submits, *inter alia*, a brief and a letter from the petitioner's president. The AAO reviewed the record of proceeding in its entirety before issuing its decision.

The regulations at 8 C.F.R. § 103.5(a)(2) state, 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 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).

On motion, counsel provided a letter, dated June 3, 2013, from the petitioner's president. The petitioner's president states in the letter that the "majority of [its] clients prefer web based communications[] and digital images for their use today" and that the petitioner needs a full-time graphic designer to "provide constantly changing visual contents and well generated image samples for clients and our needs." Nothing in that document can be construed as "new" evidence, within the meaning of 8 C.F.R. § 103.5(a)(2), as it has not been shown to have been previously unavailable and undiscoverable.

---

[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).

The petitioner 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. 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. The motion to reopen will be dismissed.

As will now be discussed, the combined motion also fails to satisfy the requirements for a motion to reconsider.

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 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]

Although counsel states that the decision to deny the petition was an incorrect application of the law, she does not support this assertion with any pertinent precedent decisions, nor does she establish that

---

[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 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.

the director misinterpreted the evidence that was in the record when the decision on appeal was issued.

As to the decisions cited by counsel on motion, the AAO observes that counsel cited three unpublished AAO decisions. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. Further, counsel's references to AAO non-precedent decisions have no persuasive impact. While 8 C.F.R. § 103.3(c) provides that USCIS precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. As the unpublished decisions have no value as precedent, they do not satisfy the requirement at 8 C.F.R. § 103.5(a)(3) that a motion to reconsider be supported by pertinent statutes, regulations, and/or precedent decisions.

Counsel also cited *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012). Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*.[3] The AAO also notes that, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

It is noted that the petitioner is seeking the beneficiary's services as a graphic designer. While a graphic designer does not, by virtue of its classification, qualify as a specialty occupation, based on the information provided in DOL's *Occupational Outlook Handbook (Handbook)*, a specialty occupation-level graphic designer would require a bachelor's or higher degree in graphic design for entry into that position. *See* U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Graphic Designers," http://www.bls.gov/ooh/Arts-and-Design/Graphic-designers.htm#tab-1 (last visited August 30, 2013).

Although a true graphic designer position might require a minimum of a bachelor's degree in a specific specialty or its equivalent, in the decision on appeal, the AAO found that the petitioner had not demonstrated that the proffered position actually is a graphic designer position. As stated in the AAO's May 6, 2013 decision, the petitioner submitted *one* brochure containing photographs of belts and belt buckles, and the AAO determined that "this single document does not establish the substantive nature of the work to be performed by the beneficiary and that the proffered position

[3] It is noted that the district judge's decision in that case appears to have been based largely on the many factual errors made by the service center in its decision denying the petition. The AAO further notes that the service center director's decision was not appealed to the AAO. Based on the district court's findings and description of the record, if that matter had first been appealed through the available administrative process, the AAO may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied by the AAO in its *de novo* review of the matter.

qualifies as a specialty occupation." Because the petitioner did not submit sufficient corroborating evidence that the proffered position substantially reflects the duties of a graphic designer, the AAO found that the petitioner had not demonstrated that the duties of the proffered position require a minimum of a bachelor's degree in a specific specialty or its equivalent.

Further, the decision on appeal observed that the beneficiary has a bachelor's degree in cinema and television arts, with an emphasis in film, and a minor in art. Counsel asserted that various degrees may qualify one for a graphic designer position, but provided no argument for the proposition that, when the appeal decision was issued, the evidence of record demonstrated that the beneficiary's bachelor's degree in cinema and television Arts, with an emphasis in film, and a minor in art, is one such degree.

Counsel and the petitioner have failed to both (1) state the reasons for reconsideration that are "supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy," and (2) establish that the initial decision of the AAO "was incorrect based on the evidence of record at the time of [decision]"; therefore, the instant submission does not meet the requirements for a motion to reconsider contained in 8 C.F.R. § 103.5(a)(3). Accordingly, it must be dismissed pursuant to 8 C.F.R. § 103.5(a)(4).

In addition, the combined motion shall also be dismissed for failing to meet another applicable filing requirement. Specifically, the regulation at 8 C.F.R. § 103.5(a)(1) states the following:

> (iii) Filing Requirements—A motion shall be submitted on Form I-290B and may be accompanied by a brief. It must be:
>
> * * *
>
> (C) Accompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding;

In this matter, the submission constituting the motion does not contain a statement as to whether or not the unfavorable decision has been or is the subject of any judicial proceeding as required by 8 C.F.R. § 103.5(a)(1)(iii)(C). Thus, the petitioner failed to comply with the requirements as set by the regulations for properly filing a motion.

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 does not meet the applicable filing requirement as stated at 8 C.F.R. §103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

It should be noted for the record that, unless USCIS directs otherwise, the filing of a motion to reopen or reconsider 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. Accordingly, the combined motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.