

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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



**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY

B6

[REDACTED]

FILE:

[REDACTED]

Office: NEBRASKA SERVICE CENTER

Date: MAR 30 2011

IN RE:

Petitioner:

[REDACTED]

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner appealed the director's decision and, on April 28, 2010, the Administrative Appeals Office (AAO) dismissed the appeal. On May 26, 2010, counsel to the petitioner filed a Motion to Reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The Motion will be dismissed pursuant to 8 C.F.R. §§ 103.5(a)(1)(iii)(C), 103.5(a)(3), and 103.5(a)(4).

The petitioner is an optometry clinic. It seeks to employ the beneficiary permanently in the United States as an eye care specialist. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the minimum requirements reflected on the labor certification exceed the requirements of the classification sought. The director denied the petition accordingly.

The AAO dismissed the subsequently filed appeal, finding that the position, as described in the Form ETA 750, requires at least two years of training or experience and thus does not support classification as an "other" worker under Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii).

On motion, counsel states that, although the ETA 750 states that the proffered position requires four years of college and one year of experience in the proffered position, the advertisements and job postings done as part of the labor certification application process stated only that "some college" was required. Counsel notes that the Form ETA 750 was filed by prior counsel.

Upon review, the motion shall be dismissed for failing to meet applicable requirements.

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 be dismissed for this reason.

Furthermore, upon review, the AAO will dismiss the motion for failing to meet the applicable requirements for motions to reconsider set forth in 8 C.F.R. § 103.5(a)(3). This regulation states, in pertinent part, that "[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 [U.S. Citizenship and Immigration Services] policy." *Id.* As noted, the AAO dismissed the appeal because the requirements for the position as listed on the Form ETA 750 did not support the classification requested on the Form I-140. Counsel has failed to cite to any precedent decisions that establish that the AAO's decision was based on an incorrect application of law or policy.

As such, the motion does not meet the applicable requirements and must be dismissed. 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)). 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 be dismissed.

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 will be dismissed, the proceedings will not be reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.