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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 21 2014**

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director of the Vermont Service Center denied the nonimmigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO) and we dismissed the appeal. The petitioner subsequently filed a combined motion to reopen and reconsider our decision, which was dismissed. The petitioner now files a second combined motion to reopen and reconsider. The instant combined motion will be dismissed.

I. PROCEDURAL HISTORY

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner described itself as a retail business established in 2005. In order to employ the beneficiary in what it designates as an accountant 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, 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 a specialty occupation in accordance with the statutory and regulatory provisions. Thereafter, on December 7, 2012, counsel for the petitioner submitted a Notice of Appeal or Motion (Form I-290B), indicating that he was submitting an appeal of the director's denial of the petition to the AAO. We reviewed the evidence and determined that the record of proceeding contained insufficient evidence to establish eligibility for the benefit sought and dismissed the appeal. On August 19, 2013, the petitioner's counsel submitted a combined motion to reopen and reconsider. We dismissed the combined motion on January 31, 2014, noting that the submission did not meet the requirements for either a motion to reopen or a motion to reconsider.

The petitioner's counsel subsequently submitted the instant Form I-290B. As indicated by the check mark at Box F of Part 2 of the Form I-290B, the petitioner filed a combined motion to reopen and reconsider. The joint motion before us contains: (1) the Form I-290B; (2) our decision dated January 31, 2014; (3) a brief prepared by counsel; (4) the petitioner's profit and loss statement and balance sheet for 2013; and (5) the petitioner's quarterly tax statements for the first three quarters of 2013. We reviewed the record of proceeding on motion in its entirety before issuing our decision.

II. FILING REQUIREMENTS

Although the requirements to file a motion were thoroughly discussed in our January 31, 2014 decision, the petitioner has again failed to comply with the regulatory filing requirements for motions to reopen and motions to reconsider. We again note that 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 and counsel 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 be dismissed for this reason.

Although the motion will be dismissed for the petitioner's failure to comply with the filing requirements, we nonetheless reviewed the second motion, and find that even if the petitioner had complied with the requirements of 8 C.F.R. § 103.5(a)(1)(iii)(C), both the motion to reopen and the motion to reconsider would have been dismissed, as discussed below.

III. 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." This provision is supplemented by the related instruction at Part 3 of the Form I-290B, which states:¹

Motion to Reopen: The motion must state new facts and must be supported by affidavits and/or documentary evidence.

Further, the new facts must possess such significance that, "if proceedings . . . were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case." *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992); see also *Maatougui v. Holder*, 738 F.3d 1230, 1239-40 (10th Cir. 2013).

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

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, such instructions are incorporated into the regulations requiring its submission.

We have reviewed all of the evidence submitted in support of the instant motion. Upon review of the submission, we observe that the petitioner and counsel have not provided any new, material facts. Thus, it fails to meet the requirements for a motion to reopen at 8 C.F.R. § 103.5(a)(2).

More specifically, we find that the quarterly tax documents provided in support of the instant motion were previously submitted and considered in a prior proceeding in this matter. Counsel also provided a balance statement and a profit and loss sheet for 2013. While these documents are submitted for the first time on motion, counsel has not established that these documents contain new, material facts that are relevant to the issue here.² Notably, the petitioner provided similar documents for 2012 during the prior proceeding. In short, these documents have little or no probative value towards establishing the proffered position as satisfying the statutory and regulatory provisions for a specialty occupation when the petition was filed. As such, the petitioner has not established that these documents would change the outcome of this case if the proceeding were reopened to consider them. We reviewed all of the documentation submitted on motion, but find that it does not provide new, material facts upon which to reopen the instant petition.

"There is a strong public interest in bringing [a case] to a close as promptly as is consistent with the interest in giving the [parties] a fair opportunity to develop and present their respective cases." *INS v. Abudu*, 485 U.S. 94, 107 (1988). 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 petitioner and its counsel have not met that burden. As stated above, the instant motion will be dismissed for the petitioner's failure to comply with the filing requirements provided at 8 C.F.R. §103.5(a)(1)(iii). However, had the motion to reopen been properly filed, it would nonetheless have been dismissed pursuant to the above analysis for the petitioner's failure to establish new, material facts in support of the motion.

IV. MOTION TO RECONSIDER

In regard to the petitioner's motion to reconsider, we again note that as the motion was not properly filed pursuant to 8 C.F.R. §103.5(a)(1)(iii), it will be dismissed for that reason. However, we reviewed all the evidence submitted in support of the motion to reconsider, and find that even if the petitioner had complied with the filing requirements, we nonetheless would have dismissed the motion. 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 a 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*

² Furthermore, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). Accordingly, the petitioner has not established the relevance of the balance statement and a profit and loss sheet for 2013 when the petition in this matter was filed September 14, 2011.

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.³ In his brief, counsel reiterates, nearly verbatim, arguments made in the prior proceeding.⁴ Counsel has not established that the prior decision was based on an incorrect application of law or USCIS policy.

A motion to reconsider that merely reiterates arguments previously presented to us does not constitute specifying errors in the application of law or USCIS policy as required for a successful motion to reconsider. Moreover, counsel does not assert, and the record does not demonstrate, that our decision was incorrect based on the evidence of record that was before us at the time of our previous decision. Thus, the petitioner and counsel have failed to comply with the requirements of a motion to reconsider. Therefore, had the motion to reconsider been properly filed, it would nonetheless be dismissed for this reason.

V. CONCLUSION

The petitioner should note 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).

³ 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.

⁴ We note that the same arguments were also made in response to the director's request for additional evidence and again on appeal. We thoroughly considered counsel's assertions regarding the proffered position, and for the reasons discussed in our prior decisions, find that they are not persuasive.

As previously discussed, the instant motion does not meet the applicable filing requirement. 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 combined motion will be dismissed, the proceedings will not be reopened or reconsidered, and our previous decision will not be disturbed.

ORDER: The joint motion is dismissed.