

(b)(6)

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: FEB 06 2014

OFFICE: CALIFORNIA 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)

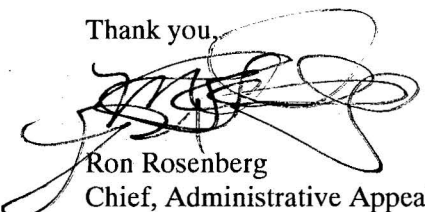
ON BEHALF OF PETITIONER:

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 service center director denied the nonimmigrant visa petition. The petitioner and its counsel appealed this denial to the Administrative Appeals Office (AAO) and, the AAO dismissed the appeal. The petitioner and its counsel filed a motion to reconsider, which the AAO subsequently dismissed. Thereafter, the petitioner and its counsel filed a second appeal. The AAO rejected the second appeal for lack of jurisdiction. The matter is again before the AAO on a joint motion to reopen and reconsider. The joint motion will be dismissed.

On the Form I-129 visa petition, the petitioner describes itself as a technology manufacturer, distributor, and retailer established in 2007. In order to employ the beneficiary in what it designates as an accountant position, 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 on May 15, 2009, 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 June 17, 2009, the petitioner and its counsel submitted an appeal of the decision. 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. The AAO dismissed the appeal. On May 5, 2011, the petitioner and its counsel filed a motion to reconsider the decision. The AAO dismissed the motion on February 1, 2013. Subsequently, on March 1, 2013, the petitioner and its counsel filed a second appeal. The AAO rejected the second appeal for lack of jurisdiction on September 12, 2013.

On October 15, 2013, the petitioner submitted a fourth Form I-290B, Notice of Appeal or Motion, and checked box F to indicate that it was filing a combined motion to reopen and motion to reconsider. On motion, counsel for the petitioner submits a brief and additional documentation. The AAO reviewed the record of proceeding in its entirety before issuing its decision. The AAO notes that the subject of the instant motion to reopen and motion to reconsider is the AAO's September 12, 2013 decision, rejecting the second appeal for lack of jurisdiction.

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. Where, as here, the subject of a motion to reconsider is an AAO decision to reject an appeal to the AAO, the motion must, when filed, establish that the decision was incorrect based on the evidence of record at the time of that 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.¹

¹ 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

The AAO finds, however, that, on motion, the petitioner and counsel fail to establish that the AAO's September 12, 2013 decision to reject the second appeal for lack of jurisdiction was based on an incorrect application of law or USCIS policy. The petitioner and its counsel has not established that the decision was incorrect based on the evidence of record that was before the AAO at that time of its decision.

In the instant case, counsel's primary argument on motion is that the proffered position is a specialty occupation. The AAO notes that counsel states his disagreement with the service center director's initial decision dated May 15, 2009. However, counsel does not cite a statutory or regulatory authority, case law, or precedent decision to establish that the AAO's September 12, 2013 decision was based on an incorrect application of law or Service policy. Moreover, the petitioner and counsel do not assert that the AAO's September 12, 2013 decision was incorrect based on the evidence of record at the time of the decision. In short, the petitioner and counsel have not articulated how any particular aspect of the AAO's September 12, 2013 decision misapplied any statute, regulation, precedent decision, or binding policy in rejecting the second appeal for lack of jurisdiction. Thus, the motion to reconsider must be dismissed.

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.² 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).

In this matter, the motion consists of the Form I-290B along with counsel's brief, as well as the following documents: (1) a copy of *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012); (2) documents referred to by counsel as samples of work product from the petitioner's employees; and (3) the petitioner's tax returns.

The AAO reviewed the information presented but notes that the petitioner has not submitted factual information or changed factual circumstances that were not considered and could not have been presented in the previous proceeding. Here, the evidence submitted on motion does not contain material, new facts that were previously unavailable and could not have been discovered earlier in the proceeding. Thus, there is no

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 benefit request or other document submitted to DHS [U.S. Department of Homeland Security] must be executed and filed in accordance with the form instructions . . . and such instructions are incorporated into the regulations requiring its submission.

² 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).

basis for the AAO to reopen the proceeding. The submission fails 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. The motion to reopen will be dismissed.

In addition, the joint 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 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 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).

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 joint motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decision will not be disturbed.

ORDER: The joint motion is dismissed.