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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: FEB 27 2014 OFFICE: CALIFORNIA SERVICE CENTER

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,

James Blinzinger, for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: On July 16, 2012, the Director of the California Service Center denied the nonimmigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and the AAO dismissed the appeal on May 29, 2013. On July 1, 2013, the petitioner filed a motion to reconsider the AAO's decision with the California Service Center. The AAO dismissed that motion on August 6, 2013. The petitioner filed the instant motion on August 26, 2013. The motion will be dismissed pursuant to 8 C.F.R. §§ 103.5(a)(1)(iii)(C) and 103.5(a)(2).

I. PROCEDURAL AND FACTUAL BACKGROUND

The Form I-129 visa petition states that the petitioner is a "Social Services for Children Including Day Care Centers" organization. In order to continue to employ the beneficiary in what it designates as a "Day Care Group or Head Teacher" position, the petitioner seeks to extend her classification 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. On appeal, counsel asserted that the director's basis for denial was erroneous and contended that the petitioner had satisfied all evidentiary requirements.

As indicated above, the AAO dismissed the appeal on May 29, 2013, and counsel moved to reconsider the AAO's decision on July 1, 2013. On August 6, 2013 the AAO dismissed the motion to reconsider, finding that the motion did not qualify as a motion to reconsider pursuant to the regulations pertinent to such motions.

On August 26, 2013 counsel filed the instant motion. On the Form I-290B, at Part 2.F., counsel indicated that the instant motion is a combined motion to reopen and motion to reconsider the AAO's August 6, 2013 decision, dismissing the previous motion. On page one of his brief, however, counsel stated that the instant motion is a motion to reopen.¹ The AAO will therefore consider the instant motion as a motion to reopen.²

¹ Specifically, counsel stated, "We would now like to file a **Motion to Reopen**." On the Form I-290B appeal and in his brief, counsel made no arguments pertinent to a motion to reconsider and gave no indication that he wished the motion to be analyzed as a motion to reconsider.

² The AAO observes, however, that if the instant motion were construed as a motion to reconsider it would be dismissed for the same reason the previous motion was dismissed, that is, it fails to comply with the requirements for a motion to reconsider. See 8 C.F.R. § 103.5(a)(3). Among other flaws, the instant motion does not establish that the decision of August 6, 2013 dismissing the previous motion, was incorrect based on the evidence of record before the AAO at the time it issued the decision. In fact, counsel did not even allege that the decision of August 6, 2013, the decision counsel seeks to overturn, was incorrect.

II. LAW AND ANALYSIS

The regulation at 8 C.F.R. § 103.5(a)(2) states 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.³ Generally, the evidence sought to be reviewed as presenting new facts must be material, previously unavailable, and not discoverable earlier in the proceeding. *See* 8 C.F.R. § 1003.23(b)(3).⁴ In this matter, counsel merely reiterated assertions previously made on appeal. Counsel 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.

The regulation at 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Because the motion to reopen does not meet the applicable requirements set forth at 8 C.F.R. § 103.5(a)(2), the motion must be dismissed pursuant to 8 C.F.R. § 103.5(a)(4). The proceedings will therefore not be reopened, and the AAO's previous decision will not be disturbed.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are 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." *INS v. Abudu*, 485 U.S. at 110. The petitioner's submission does not meet that burden, and it therefore does not qualify as a motion to reopen.

³ The provision at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, the following:

Requirements for motion to reopen. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits and/or documentary evidence.

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 to reopen, Part 3 of the Form I-290B submitted by counsel states the following:

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

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

[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 Also, 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 College Dictionary 736 (Houghton Mifflin 2001). Based upon the plain meaning of the word "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.

Further, even if counsel had introduced "new" facts as required, the AAO observes that counsel, in the instant motion, did not address the propriety of the August 6, 2013 decision denying the previous motion. Rather, the instant motion addresses the basis for the May 29, 2013 dismissal of the appeal, which is not the subject of the instant motion and is not now before the AAO. The only issue correctly before the AAO on motion is whether the immediate prior decision, the decision the motion challenges – in this case, the decision dated August 6, 2013 – was correctly decided. Counsel did not address that issue.⁵ The instant motion will be dismissed for this additional reason.

In addition, the motion shall be dismissed for failing to meet another requirement. The regulation at 8 C.F.R. § 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and motions to reconsider, and 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." The instant motion is accompanied by no such statement and must be dismissed for this additional reason.

Finally, it should be noted for the record that, unless USCIS directs otherwise, the filing of a motion to reopen 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.

III. CONCLUSION

Title 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." As the instant motion does not meet those requirements, the 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.

⁵ At Page 2, Part 2 of the Form I-290B, counsel indicated clearly that the instant motion pertained to the AAO's decision dated August 6, 2013. Despite counsel's acknowledgement that the August 6, 2013 decision is the decision counsel seeks to reopen, counsel did not address any aspect of that decision.