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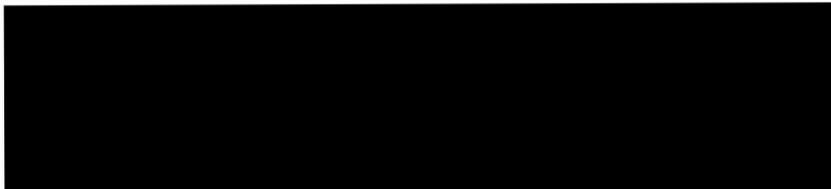
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FILE: LIN 03 027 50854 Office: NEBRASKA SERVICE CENTER Date: **SEP 28 2006**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The AAO also dismissed a motion to reconsider its dismissal decision. The matter is again before the AAO on motion to reconsider its decision to dismiss the previous motion. This motion also will be dismissed.

The petitioner is a state government agency that seeks to employ the beneficiary as an information technology applications specialist. The petitioner endeavors to classify the beneficiary 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 on the basis that the proffered position did not meet the definition of a specialty occupation.

In a decision dated September 30, 2004, the AAO affirmed the director's decision and dismissed the appeal. On November 12, 2004, counsel submitted a motion in the form of a letter "RE: Motion to Reconsider Service Decision." The letter stated that a brief would be submitted in 30 days. The following paragraph is the letter's only discussion of the director's denial:

We believe the evidence of record at the time of the denial established qualification for the H-1 visa at issue in this case. Our review of your denial, however, makes clear that certain details need to be clarified. We further understand from your denial letter that the only remaining issue surrounds the petitioner's requirements for the position.

Counsel's next and last submission prior to the AAO's dismissing the motion was an August 9, 2005 letter requesting an extension of time, until September 1, 2005, to submit a brief and evidence. On November 1, 2005, the AAO dismissed the previous motion on the basis of regulations at 8 C.F.R. § 103.5 that govern motions for reconsideration and reopening.

To merit relief, a motion to reconsider must: (1) 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 Citizenship and Immigration Services (CIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

A motion to reopen must state the new facts to be provided in the reopened proceeding, and it must be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Generally, the new facts must be material and unavailable previously, and such that they could not have been discovered earlier in the proceeding. *See* 8 C.F.R. § 1003.23(b)(3).

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.

Although the regulation at 8 C.F.R. § 103.3(a)(2)(vii) states that a petitioner may be permitted additional time to submit a brief or additional evidence to the AAO in connection with an appeal, no such provision applies to

a motion to reopen or reconsider. The additional evidence must comprise the motion. See 8 C.F.R. §§ 103.5(a)(2) and (3).

A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The instant motion, timely filed on November 30, 2005, consists of the following documents: (1) a November 29, 2005 letter from counsel, "RE: Motion To Reconsider AAO decision"; (2) a Form I-290B signed by counsel; (3) a copy of the AAO's November 1, 2005 decision dismissing the previous motion; (4) a copy of a Form I-797B (Notice of Action) reflecting that on November 16, 2005 the service center director approved an H-1B petition filed by the instant petitioner on behalf of the same person who is the beneficiary of the petition that is the subject of the instant proceeding; (5) an undated, one-page "Summary" document; (6) a November 10, 2005 letter from the petitioner, which includes copies of the following documents as enclosures: (a) a two-page excerpt from a publication entitled "Occupational Information Service – Forecast"; (b) a two-page Internet printout entitled "Special Reports"; (c) a divider sheet containing the wording: "Documents Regarding the Position"; (d) a previously submitted position classification questionnaire used by the petitioner; (e) a previously submitted July 11, 2003 opinion letter by an associate professor of computer science, with the author's resume; and (f) the section on Computer Software Engineers at the 2004-2005 edition of the Department of Labor's *Occupational Outlook Handbook*.¹

For the reasons stated below, the AAO shall dismiss the present motion.

The matters presented upon the present motion do not merit reconsideration of the AAO's decision on the previous motion. None of these matters establish that the AAO's dismissal of the previous motion was based upon an incorrect application of law or CIS policy to the evidence that was before the director at the time of his decision.

In its decision on the previous motion, the AAO determined that that the matters submitted on that motion (1) did not "state any new facts, supported by affidavits or documentary evidence, as required in a motion to reopen," and (2) did not "state any reasons for reconsideration, supported by precedent decisions, to establish that the [director's] decision was based on an incorrect application of law or policy, as required in a motion to reconsider." On the previous motion, counsel had submitted only one statement about the merits of the director's decision: "We believe the evidence of record at the time of the denial established qualification for the H-1 visa at issue in this case." No evidence or further explanation was provided.

The instant motion presents no evidence that the AAO's decision on the previous motion was not based upon the matters presented in that motion, or that the AAO's decision incorrectly applied law or CIS policy to those matters. Further, the AAO's decision on the previous motion accorded with the regulatory standards governing motions to reconsider. Thus, the instant motion does not satisfy the grounds at 8 C.F.R. § 103.5(a)(3) for granting a motion to reconsider.

¹ It appears that counsel is submitting the documents listed at (5) and (6) as copies of submissions that were presented in support of the petition that was approved.

The AAO further finds that the matters presented on the present motion do not contain new evidence bearing on the issue now before the AAO, namely, whether the AAO's decision to dismiss the previous motion was an incorrect application of the law or CIS policy concerning motions to reopen or reconsider. The matters submitted on the present motion pertain solely to the issue of whether the proffered position is a specialty occupation. As the petitioner did not make evidence on that issue a subject of the previous motion, it is not within the scope of review of the present motion. The instant motion does not satisfy the grounds at 8 C.F.R. § 103.5(a)(2) for granting a motion to reopen.

The merits of the proffered position as a specialty occupation is not before the AAO on the present motion, and the director's decision on the other petition is not probative on the instant motion. Nevertheless, as an advisory comment, the AAO notes that this record of proceeding does not contain all of the supporting evidence submitted to the service center in the other case. In the absence of all of the corroborating evidence contained in that record of proceeding, the documentation presented by counsel is not sufficient to enable the AAO to determine whether the position offered in the other petition was similar to the position in the instant petition.

Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether a later case is similar to the proffered position or was approved in error, no such determination may be made without review of the original record in its entirety. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of approvals in other cases that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Furthermore, a director's decision on a different petition does not constitute either law, CIS policy, or a precedent decision binding CIS officers in accordance with the regulation on precedent decisions at 8 C.F.R. § 103.3(c).

As the matters presented on motion do not satisfy the requirements of either a motion to reopen or a motion to reconsider, the motion shall be dismissed in accordance with the directive at 8 C.F.R. § 103.5(a)(4) that a motion that does not meet applicable requirements shall be dismissed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion is dismissed.