U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

U.S. Citizenship and Immigration Services

D2

[redacted]

FILE: EAC 07 252 50269 Office: VERMONT SERVICE CENTER Date: AUG 6 2009

IN RE: Petitioner:
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:

[redacted]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

for

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition, and the Administrative Appeals Office (AAO) dismissed the subsequently filed appeal. The matter is once again before the AAO on a combined motion to reopen and reconsider. The motion will be dismissed.

The petitioner is a retail convenience store/gas station and claims to have nine employees. It seeks to employ the beneficiary as an accountant. Accordingly, 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 (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition determining that the proffered position was not a specialty occupation. The AAO affirmed this determination and dismissed the appeal of the director's decision.

Upon review of the combined motion to reopen and reconsider filed on the AAO's prior decision, the motion shall be dismissed for failing to meet applicable filing 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. Title 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." In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). Moreover, the regulation at 8 C.F.R. § 103.5(a)(1)(iii)(D) requires that motions be "[a]ddressed to the official having jurisdiction." While the motion was properly submitted to the office maintaining the record of proceeding, i.e., the Vermont Service Center, it was not addressed to the AAO, the office with jurisdiction over the motion. *See* 8 C.F.R. §§ 103.5(a)(1)(ii) and 103.5(a)(1)(iii)(E). 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, as the instant motion did not meet all of the applicable filing requirements listed in 8 C.F.R. **§ 103.5(a)(1)(iii)(C), it must be dismissed for this reason.**

In addition, the motion must be dismissed for failure to meet the applicable requirements for motions to reopen set forth in 8 C.F.R. § 103.5(a)(2). More specifically, 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.[1]

On motion, counsel for the petitioner has submitted copies of corporate stock certificates, copies of corporate records obtained from the online database of the Texas Comptroller of Corporate Accounts, and copies of U.S. Income Tax Returns for an S Corporation for the years 2005, 2006, 2007 and 2008 for the petitioner and other legal entities. As argument, counsel merely states: "[The petitioner] is not a small company by any means and clearly can afford the services of the accountant. (See attached tax and corporate documentation)."

A review of the evidence that the petitioner submits on motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2). All evidence submitted was previously available and could have been discovered or presented at some point during one of the previous proceedings, i.e., submitted together with the petition, in

[1] 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).

response to the director's request for evidence (RFE), or in support of the appeal. The evidence submitted on motion, therefore, will not be considered "new" and will not be considered a proper basis for a motion to reopen.[2]

Finally, the AAO must also dismiss the motion for failure 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 [USCIS] policy." In this matter, counsel fails to cite to any precedent decisions establishing that the AAO's decision to uphold the findings of the director was an incorrect application of law or USCIS policy. It is noted that counsel once again relies on the decision in *Young China Daily v Chappell,* 742 F. Supp. 552 (N.D. Cal. 1989), in support of his contention that the AAO erroneously focused on the size of the petitioner and its past hiring practices in reaching its decision. However, as discussed in the May 29, 2009 decision, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district, in contrast to the broad precedential authority of the case law of a United States circuit court. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Therefore, the decision in *Young China Daily* is not a pertinent precedent decision for purposes of this analysis. 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 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." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. The combined motion to reopen and reconsider will therefore be dismissed.

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

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

---

[2] Even if the AAO were to consider the 2008 tax returns to be "new" based on their unavailability until 2009, as the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition, this evidence would have no bearing on a petition filed in 2007. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Regardless, as the petitioner failed to comply with the mandatory filing requirements for motions, the motion to reopen could not be granted even if new evidence had been submitted, rendering further discussion of this issue moot.