

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

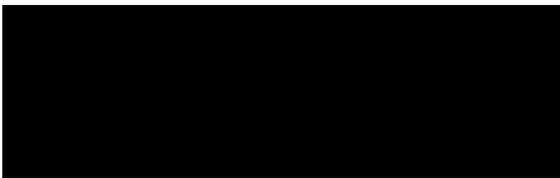
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D2



FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUL 06 2010

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 BENEFICIARY:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is an Islamic parochial school with a reported gross income of approximately \$651,000. It seeks to employ the beneficiary as a teacher/lecturer. The petitioner, therefore, 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, finding that the petitioner failed to establish a reasonable and credible offer of employment, and that the petitioner violated the terms and conditions of the approved petition through its failure to pay the proffered wage listed on the petition and the labor condition application (LCA). The AAO affirmed the director's findings, entering the additional finding that the petitioner also failed to establish that the proffered position is a specialty occupation. On motion, newly retained counsel for the petitioner submits a brief and additional evidence.

Counsel for the petitioner contends on motion that "the AAO erred in law and on facts." In response to the finding that the petitioner failed to establish a reasonable and credible offer of employment, counsel refers to the beneficiary's personal tax returns and Forms W-2 as evidence that the beneficiary was working and earned a salary as a teacher. Moreover, counsel contended that the director and the AAO erred by considering the beneficiary's eligibility to work as an Imam as opposed to a teacher/lecturer. In response to the second ground for the denial, which relates to the petitioner's failure to pay the proffered wage, counsel contends that the beneficiary voluntarily accepted a wage reduction, and that contrary to the AAO's findings, the beneficiary's housing constituted a permissible deduction under the "benefit of the employee" standard. In support of these contentions, counsel submits a curriculum overview for the petitioner's Islamic studies, as well as a statement by the beneficiary, dated February 12, 2009, attesting that he voluntarily agreed to a \$1,000 deduction from his salary. Finally, with regard to the specialty occupation, counsel argues that the AAO abused its discretion to deny the petition on this ground as counsel claims that it is acknowledged fact that a teacher position qualifies as a specialty occupation.

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."

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). Despite counsel's submission of the overview of the Islamic studies curriculum and the beneficiary's statement regarding his voluntary election to decrease his salary, neither of these documents can be considered "new" for purposes of meeting the requirements for a motion to reopen. 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 Both the curriculum overview and the

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).

beneficiary's statement were previously available and could have been discovered or presented in the previous proceeding.

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 motion to reopen will therefore be dismissed.

Furthermore, 8 C.F.R. § 103.5(a)(2) states, in pertinent part:

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.

Although counsel has submitted a motion entitled "Motion to Reopen and Reconsider," counsel does not submit any document that would meet the requirements of a motion to reconsider. Counsel does not state any reasons for reconsideration nor cite any precedent decisions in support of a motion to reconsider. Counsel does not argue that the previous decisions were based on an incorrect application of law or Service policy. Other than the title of the motion, counsel does not assert that a motion to reconsider should be considered as an alternative to the motion to reopen.² Assuming, *arguendo*, that the petitioner intended to file a motion to reconsider, the petitioner's motion will be dismissed.

In addition, the motion shall be dismissed for failing to meet another applicable filing requirement. The regulation at 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). 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 did not meet the applicable filing requirement listed at 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

Finally, 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).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. §

² Based on a review of the motion, it appears that counsel for the petitioner has submitted a simple motion to reopen which is erroneously titled "Motion to Reopen and Reconsider." Counsel does not explicitly claim that there are two motions made in the alternative, nor does counsel cite to any regulation that would clarify the intended motion.

1361. The petitioner has not sustained that burden. The regulation at 8 C.F.R. § 103.5(a)(4) states “[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.