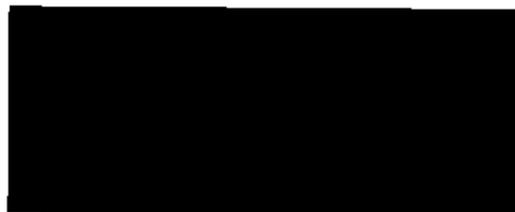


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20520-2090



U.S. Citizenship
and Immigration
Services



D2

Date: **OCT 06 2011** Office: CALIFORNIA SERVICE CENTER FILE:

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 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 \$630. 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 of the California Service Center denied the nonimmigrant visa petition. The Administrative Appeals Office (AAO) dismissed the subsequently filed appeal and affirmed the director's decision to deny the petition. The matter is now before the AAO on a combined motion to reopen and motion to reconsider. The motion will be dismissed.

In the Form I-129, the petitioner alleges that it is a textile business. It seeks to employ the beneficiary as an Industrial Designer 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 concluding that the petitioner failed to establish: 1) that the proffered position is a specialty occupation; and 2) that the beneficiary is qualified to perform the duties of a specialty occupation. The AAO affirmed these determinations on appeal.

On motion, counsel briefly asserts that the director and the AAO misinterpreted the position offered as well as the beneficiary's qualifications for that job. Counsel then states that he is away from the office on his annual holiday and will provide a brief and additional evidence within 30 days.

Unlike an appeal, there are no provisions either in the regulations or on the Form I-290B to separately submit a brief and/or evidence in support of a motion. *See generally* 8 C.F.R. § 103.5. In fact, the Form I-290B specifically states next to the combined motion to reopen and motion to reconsider the following: "My brief and/or evidence is attached." Counsel simply crossed out this language and chose to ignore the motion requirements and separately submit at a later date a brief and additional evidence in support of the motion. Given their improper submission, however, the AAO may not consider the separately submitted brief and evidence as part of the record of proceeding.

As such, counsel's brief statement on motion is clearly insufficient to meet the requirements of either a motion to reopen or a motion to reconsider and must be dismissed for this reason. Even assuming the late and separately submitted brief and evidence were part of the record, however, the AAO would have to dismiss the combined motion for failure to meet the pertinent filing requirements.

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

Counsel for the petitioner is not arguing that the facts have changed, but only that the AAO did not take into account evidence already in the record. On motion, counsel for the petitioner has submitted an opinion letter from Nadine W. Leichter, Instructor at the Fashion Institute of Technology. A review of the evidence that the petitioner submits on motion reveals no fact that

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).

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 in the previous proceeding. It is further noted that the petitioner has submitted evidence with this motion that could have been submitted in support of the petitioner's appeal. As the petitioner was provided with a reasonable opportunity to provide the required evidence both in response to the RFE and in support of its appeal, the evidence ultimately submitted in support of the motion may not be considered "new" and will not be considered a proper basis for a motion to reopen.²

² Even if the AAO were to accept the letter written by [REDACTED] Instructor at the Fashion Institute of Technology in [REDACTED] into evidence, this letter does not demonstrate that the proffered position is a specialty occupation. Ms. [REDACTED] resume indicates that she holds an Associate degree in Applied Science Certificate (Accessories Design) from the Fashion Institute of Technology as well as a Bachelor of Science degree from San Jose State University in international marketing, biology, and Spanish.

Ms. [REDACTED] states that:

The duties of the Industrial Designer will be focused in the specific areas of design engineering, fashion design marketing research, cutting room management, and inspection management; the position is thus a hybrid between a fashion designer (who designs the clothing) and a manufacturing/industrial designer (who designs and constructs the mechanical means of producing the clothing). The prescribed duties for the position . . . describe a professional-level position in fashion design, with duties that require the application of the knowledge attained via completion of a bachelor's degree (or the functional equivalent) in fashion design, fashion marketing, or a closely related field. Indeed, the professional application of a bachelor's curriculum in Fashion Design is to prepare a student for professional employment designing garments or accessories; a clear nexus exists between such programs and professional duties in fashion design.

Furthermore, I find that [the beneficiary] has completed professional credentials – including over twenty-five years of clearly documented and verified years of progressive, professional employment in fashion design and marketing – equivalent to the attainment of a Bachelor of Arts Degree in Fashion Design and Fashion Marketing. (The bachelor's equivalence is based upon his years of progressive employment.) Thus, it is evidence that he is well-qualified to assume the specialty occupation of Industrial Designer with [the petitioner].

Ms. [REDACTED] further states that:

Through my academic and professional advising and application of curriculum standards, I have gained experience in assessing and evaluating academic as well as experience qualifications in varying fashion design fields in connection with credit issued and assigned by the Institute. . . .

The letter from Ms. [REDACTED] has no probative value with regard to establishing the proffered position as a specialty occupation. At the outset, neither Ms. [REDACTED] evaluation document nor any other evidence in the record of proceeding establishes that Ms. [REDACTED] is an authority in the area in which she pronounces her opinion, namely, the hiring requirements for a hybrid position involving the design of both clothing and machinery.

First, Ms. [REDACTED] does not have at least an advanced degree, or even a bachelor's degree, in fashion design or industrial design. Second, Ms. [REDACTED] has not presented any evidence that she has expertise, or even a

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 be dismissed.

Furthermore, 8 C.F.R. § 103.5(a)(3) 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 argue or otherwise provide evidence that the previous decisions were based on an incorrect application of law or Service policy.

As counsel did not provide any evidence to establish that the decision was based on an incorrect application of law or Service policy, the motion to reconsider the AAO's prior decision with respect to this petition must be dismissed.

In addition, the motion shall be dismissed for failing to meet an applicable filing requirement. The regulation at 8 C.F.R. § 103.5(a)(1)(iii) lists the general filing requirements for motions to

background, in industrial design, or that she has been recognized as an authority on judging whether a particular position meets the educational requirements of a specialty occupation. Next, Ms. [REDACTED] does not cite studies, surveys, any empirical evidence, or any reference materials in support of her opinion about the educational requirements for the proffered position. Accordingly, this evaluator's opinion lacks a factual foundation supporting her conclusions. The AAO further notes that Ms. [REDACTED] does not address the authoritative, statistics-based information in the *Handbook* about the educational credentials of fashion designers.

Further, Ms. [REDACTED] focuses on duty descriptions provided by the petitioner, which, the AAO finds, do not correspond with the petitioner's business operations or the petitioner's failure to demonstrate it has the resources to expand its business beyond dry cleaning and tailoring. Further, Ms. [REDACTED] does not address the authoritative information in the *Handbook* about the educational credentials of fashion designers.

Therefore, Ms. [REDACTED] evaluation has no significant evidentiary weight and is not probative evidence on the specialty occupation issue. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

reopen and motions to reconsider. Section 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) 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 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. § 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, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.