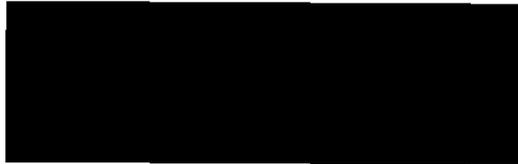




U.S. Citizenship
and Immigration
Services

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Date: **JUL 05 2012** 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The petitioner appealed the director's denial to the Administrative Appeals Office (AAO) and, on February 3, 2010, the AAO dismissed the appeal. The matter is again before the AAO on a combined motion to reopen and motion to reconsider. The combined motion to reopen and reconsider will be dismissed.

On the Form I-129 visa petition, the petitioner described itself as an enterprise engaged in consumer services. In order to employ the beneficiary in what it designates as a project editor position, the petitioner seeks to classify her 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 (1) failed to establish that the proffered position qualifies as a specialty occupation in accordance with the statutory and regulatory provisions; and, (2) failed to demonstrate that there is a reasonable and credible offer of employment. The petitioner submitted an appeal of the director's decision to the AAO. The AAO reviewed the evidence and determined that the record of proceeding contained insufficient evidence to establish that the petitioner would employ the beneficiary in a specialty occupation position. The AAO dismissed the appeal.

Thereafter, counsel for the petitioner submitted a Form I-290B and brief. As indicated by the check mark at Box F of Part 2 of the Form I-290B, counsel stated that the petitioner was filing both a motion to reopen and a motion to reconsider the decision. Counsel claims that the AAO's decision dismissing the appeal and affirming the director's decision was erroneous, asserting that "the AAO erred by not remanding the case to the USCIS [(U.S. Citizenship and Immigration Services)] for a new decision."

The AAO reminds the petitioner and counsel that the AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO reviewed the record in its entirety before issuing its decision to the appeal. As noted in the appeal, the AAO determined that the director's decision contained inaccuracies and, accordingly, the AAO withdrew those portions of the director's decision. However, the AAO found that the director's ultimate conclusion was correct in determining that the petitioner had failed to establish that its proffered position was a specialty occupation in accordance with the applicable statutory and regulatory provisions. The AAO provided a full analysis and discussion of the deficiencies in the record of proceeding that precluded a determination that the proffered position is a specialty occupation. Thus, the director's error was harmless because the AAO conducted a *de novo* review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility, and the director's decision did not result in the improper granting of a benefit in this matter, i.e., the error did not change the outcome of this case. See *Soltane v. DOJ*, 381 F.3d 143; *Black's Law Dictionary* 563 (7th Ed., West 1999) (defining the term "*harmless error*" and stating that it is not grounds for reversal). Furthermore, it is not clear what remedy would be appropriate beyond the motion and appeal process itself. The petitioner has in fact supplemented the record, and therefore it would

serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with additional evidence.

The AAO will now discuss the combined motion to reopen and reconsider submitted by the petitioner and counsel. As will be discussed below, the submission does not satisfy the requirements of either a motion to reopen or a motion to reconsider. A motion that does not meet applicable requirements shall be dismissed. *See* 8 C.F.R. § 103.5(a)(4). Accordingly, this combined motion will be dismissed.

Dismissal of the Motion to Reopen

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 The new facts submitted on motion must be material and previously unavailable, and could not have been discovered earlier in the proceeding. *Cf.* 8 C.F.R. § 1003.23(b)(3).

In this matter, the motion consists of the Form I-290B along with a cover letter and brief from counsel. Upon review of the submission, the AAO notes that the petitioner and counsel have not provided any "new facts" and that the instant motion does not contain any "new" evidence. Thus, it fails to meet the requirements for a motion to reopen at 8 C.F.R. § 103.5(a)(2). Accordingly, the motion to reopen will be dismissed.

Dismissal of the Motion to Reconsider

As will now be discussed, the motion also fails to satisfy the requirements for a motion to reconsider the decision.

A motion to reconsider must state the reasons for reconsideration and be supported by citations to pertinent statutes, regulations, and/or precedent decisions to establish that the decision was based on an incorrect application of law or USCIS 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. *See* 8 C.F.R. § 103.5(a)(3) (requirements for a motion to reconsider) and the instructions for motions to reconsider at Part 3 of the Form I-290B.²

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).

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

As previously mentioned, counsel contends that the AAO's decision dismissing the appeal and affirming the director's decision was erroneous, claiming that "the AAO erred by not remanding the case to the USCIS for a new decision." Counsel states his disagreement with the AAO's decision, but does not cite a statutory or regulatory authority, case law, or precedent decision to establish that the decision was based on an incorrect application of law or USCIS policy. Moreover, counsel does not assert that the AAO's decision was incorrect based on the evidence of record that was before the AAO at the time of its initial decision. In short, the petitioner has not submitted any document that would meet the requirements of a motion to reconsider. Thus, the motion to reconsider must be dismissed.

Additional Basis for Dismissal

Finally, the combined 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 submissions constituting the combined motion do not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). Again, 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 combined motion does 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 also.

Motions for the reopening or reconsideration 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

Requirements for motion to reconsider. 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.

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 for reconsideration, Part 3 of the Form I-290B submitted by the petitioner states:

Motion to Reconsider: The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions.

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

[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.

evidence. *See 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 combined motion, the movant has not met that burden. The motion to reopen and reconsider will be dismissed.

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. Accordingly, the motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decision of the AAO will not be disturbed.

ORDER: The combined motion is dismissed.