

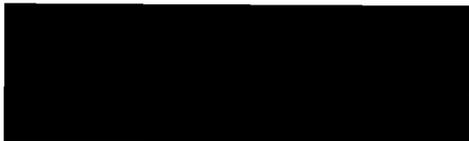
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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Date: **MAY 09 2012**

Office: CALIFORNIA SERVICE CENTER

FILE: 

IN RE:

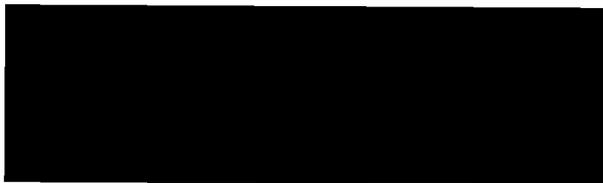
Petitioner:

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 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: On May 13, 2009, the Director, California Service Center, denied the nonimmigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO) and, on December 6, 2010, the AAO dismissed the appeal. The matter is again before the AAO on a motion to reopen. The motion will be dismissed.

The petitioner claims to be a food manufacturer and distributor with 39 employees and a gross annual income of \$4,315,592.70. It seeks to continue to employ the beneficiary as an accountant and to classify him 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 that the proffered position is a specialty occupation. The AAO affirmed the director's denial and dismissed the appeal.

As indicated by the check mark at box D of Part 2 of the Form I-290B, counsel for the petitioner elected to file a motion to reopen. Accordingly, the matter is once again before the AAO on a motion to reopen.

On motion, counsel for the petitioner submits a brief accompanied by documentary evidence, and contends that the proffered position is a specialty occupation. Further, counsel contends that this is evident by the service center's consistent approval of the prior H-1B extension petitions filed by the petitioner on behalf of the beneficiary since 2002.¹

¹ As discussed in greater detail *infra*, approvals of H-1B petitions that pre-date the filing of the petition in this matter are clearly not new evidence that would support the granting of a motion to reopen. It is noted, however, that such evidence would also not support a motion to reconsider, if one had been filed. Specifically, prior petitions approved by a service center director are irrelevant to whether the AAO erred as a matter of law or policy in dismissing an appeal, especially when such evidence, e.g., copies of the petitions, were not part of the record of proceeding at the time the AAO's decision was issued. See 8 C.F.R. § 103.5(a)(3).

Nevertheless, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g., *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). If the previous nonimmigrant petitions were approved based on the same description of duties and assertions that are contained in the current record, they would constitute material and gross error on the part of the director. It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. See *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL

In this matter, the motion consists of the Form I-290B, a brief in support of the motion, and copies of the following documents: (1) Transcript of Records from the University of the East for the previous accountant; (2) Form W-2 for the previous accountant; (3) an original newspaper ad for the proffered position posted by the petitioner; (4) Internet job postings for the proffered position posted by the petitioner; (5) 11 job announcements from other food manufacturing firms; (6) affidavits and statements from other food manufacturing firms; (7) an excerpt entitled "Accountants and Auditors" from the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*), 2010-11 edition; (8) sample product costing reports prepared by the beneficiary; (9) the petitioner's support letter dated January 21, 2009; (10) the petitioner's income tax returns for 2003 through 2009; comparative analysis of annual sales by customer for 2004 through 2009; and (11) comparative annual sales by product category for 2003 through 2010.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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.²

On motion, counsel submits only evidence that was previously available and could have been submitted in the prior proceedings. For example, the Transcript of Records and W-2 for the previous accountant could previously have been submitted with the petition, in response to the director's RFE issued on March 2, 2009, or in support of the appeal filed on June 3, 2009. Moreover, the newspaper ad, Internet job postings, and affidavits and statements from other food manufacturing firms could also have been submitted with the petition or in response to the RFE. Further, the sample product costing reports could also have been submitted with the petition or in response to the RFE.

Again, a motion to reopen must state the new facts that will be proven if the matter is reopened and must be supported by affidavits or other documentary evidence. The new facts 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). Here, the evidence submitted on motion does not contain new facts that were previously unavailable. As the documentation submitted on motion was previously available prior to the motion, and as none of it is therefore "new" or supports new facts, there is no basis for the AAO to reopen the 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 will be dismissed.

282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

² 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).

Finally, the motion shall also 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.

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 proceeding will not be reopened, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed. The previous decision of the AAO, dated December 6, 2010, is affirmed. The petition is denied.