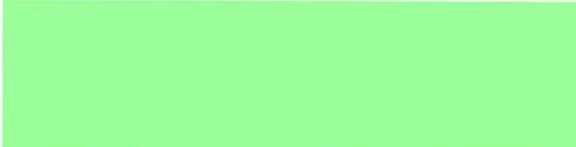


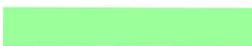
(b)(6)

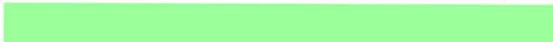
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Service  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

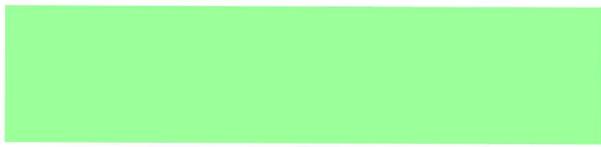


DATE: **AUG 06 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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:

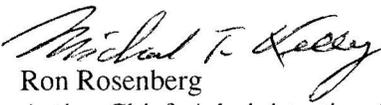


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

*for*   
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition, and the Administrative Appeals Office (AAO) summarily dismissed a subsequent appeal. The matter is again before the AAO on a combined motion to reopen and reconsider. The motion will be dismissed. The petition will remain denied.

On the Form I-129 visa petition, the petitioner describes itself as a consulting, training, and staffing solutions company established in 2008. In order to employ the beneficiary in what it designates as an ETL database developer position, the petitioner seeks 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 on July 7, 2012, concluding that the petitioner failed to demonstrate that the proffered position is a specialty occupation, and the petitioner filed a timely appeal. The AAO summarily dismissed the appeal on March 5, 2013. In that decision, the AAO found that because the petitioner failed to specifically identify any erroneous conclusion of law or statement of fact made by the director in her decision denying the petition,<sup>1</sup> 8 C.F.R. § 103.3(a)(1)(v) mandated the summary dismissal of the appeal.

Newly-retained counsel filed the instant matter on April 4, 2013. On the Form I-290B, counsel requests that the AAO reopen and reconsider its March 5, 2013 decision summarily dismissing the appeal. The scope of the AAO's review in the present matter, therefore, is limited to the narrow issue of whether counsel has documented sufficient reason to warrant reopening and reconsideration of the AAO's March 5, 2013 decision. Counsel, however, identifies no factual or legal error by the AAO in its decision.<sup>2</sup> As will be discussed below, counsel's submission does not meet the requirements of a motion to reopen or a motion to reconsider.

The AAO will first address the issue of whether counsel's submission meets the requirements of a motion to reopen described at 8 C.F.R. § 103.5(a)(2).

The regulation at 8 C.F.R. § 103.5(a)(2) states that 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.<sup>3</sup>

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<sup>1</sup> As noted by the AAO in its March 5, 2013 decision, although the petitioner marked the Form I-290B, Notice of Appeal or Motion to indicate that a brief and/or additional evidence would be submitted within 30 days, the AAO received neither.

<sup>2</sup> Although counsel requests the reopening and reconsideration of the AAO's March 5, 2013 decision, his brief and the evidence submitted in its support address the director's July 7, 2012 decision only. As indicated, counsel does not argue that the AAO's March 5, 2013 decision was issued in error.

<sup>3</sup> The provision at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, the following:

*Requirements for motion to reopen.* 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 . . . .

Generally, the evidence sought to be reviewed as presenting new facts must be material, previously unavailable, and not discoverable earlier in the proceeding. *See* 8 C.F.R. § 1003.23(b)(3).<sup>4</sup> However, both documents submitted by counsel on motion predate the AAO's March 5, 2013 decision, and counsel fails to explain why either could not have been discovered or presented in the previous proceeding.<sup>5</sup> Nor does counsel's brief constitute new evidence in and of itself, as the unsupported statements of counsel on appeal or in a motion are not evidence and therefore are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Accordingly, counsel's submission contains no facts or evidence that could be considered *new* pursuant to 8 C.F.R. § 103.5(a)(2).

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are 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. Counsel's submission does not meet this burden.

For all of these reasons, counsel's submission does not meet the filing requirements of a motion to reopen.

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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 to reopen, Part 3 of the Form I-290B submitted by counsel states the following:

**Motion to Reopen:** The motion must state new facts and must be supported by affidavits and/or documentary evidence.

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

[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.

<sup>4</sup> Also, 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 College Dictionary* 736 (Houghton Mifflin 2001). Based upon the plain meaning of the word "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.

<sup>5</sup> The petitioner filed the appeal on August 7, 2012 and, as noted above, the AAO issued its decision summarily dismissing the appeal on March 5, 2013. The Contractor Agreement submitted by counsel on motion is dated April 2, 2012 and was signed by both affected parties on that date. The Statement of Work submitted by counsel on motion is also dated April 2, 2012, and it was also signed by both affected parties on that date.

Next, the AAO will address the issue of whether counsel's submission meets the requirements of a motion to reconsider described at 8 C.F.R. § 103.5(a)(3).

A motion to reconsider must state the reasons for reconsideration and be supported by citations to pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (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).<sup>6</sup> Counsel's submission does not meet these requirements.

First, counsel states no reasons for reconsideration of the AAO's March 5, 2013 decision. As noted above, counsel identifies no factual or legal error by the AAO in that decision. Nor, in the absence of such allegation of error, does his submission establish that the AAO's March 5, 2013 decision was incorrect based on the evidence of record at the time of the decision. To the contrary, counsel's submission expressly relied upon the statements and evidence constituting the submission. Furthermore, counsel cites no pertinent precedent decisions, statutes, or regulations to establish that the AAO's decision summarily dismissing the appeal was based on an incorrect application of law or USCIS policy.

For all of these reasons, counsel's submission does not meet the requirements of a motion to reconsider.

Nor does counsel's submission contain the statement mandated by 8 C.F.R. § 103.5(a)(1)(iii)(C) with regard to whether the unfavorable decision has been, or is, the subject of any judicial proceeding. Both motions to reopen and motions to reconsider must contain this statement. *See id.* For this additional reason, the submissions constituting the joint motion do not meet the requirements of a motion to reopen or a motion to reconsider.

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<sup>6</sup> The provision at 8 C.F.R. § 103.5(a)(3) states the following:

*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.

Again, 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 counsel states the following:

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

The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. As counsel's submission meets the requirements of neither a motion to reopen nor a motion to reconsider, it must be dismissed in accordance with 8 C.F.R. § 103.5(a)(4).

It should also 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).

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).

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not sustained that burden. 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.