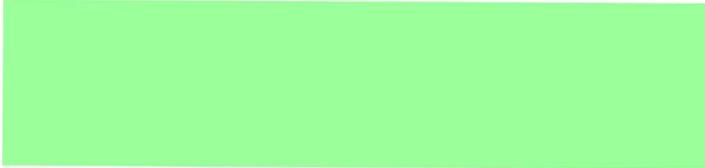
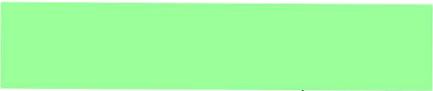


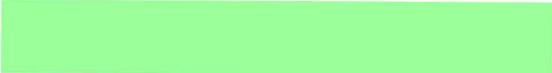
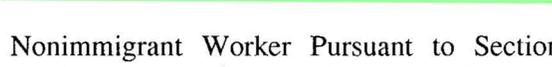


U.S. Citizenship
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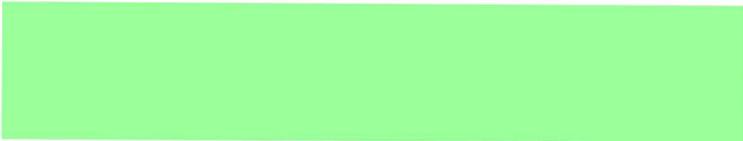


DATE: **AUG 29 2013** OFFICE: CALIFORNIA SERVICE CENTER 

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:

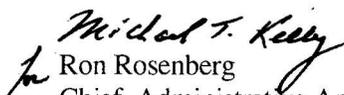


INSTRUCTIONS:

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,


Ron Rosenberg
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 May 1, 2013, 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 Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a dental office established in 1992. In order to employ the beneficiary in what it designates as a medical records and billing manager 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, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The petitioner, through counsel, 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, a brief in support of the motion, and additional evidence. 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.

The AAO will now discuss the combined motion to reopen and reconsider submitted by counsel. As will be discussed below, the Form I-290B, brief, and accompanying documents submitted as the joint motion do 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 to reopen and reconsider 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).

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 NEW COLLEGE DICTIONARY 753 (2008)(emphasis in original).

In this matter, the motion consists of the Form I-290B along with a brief from counsel. In addition, the petitioner and counsel submitted copies of documents that were previously submitted by the petitioner, or issued by U.S. Citizenship and Immigration Services (USCIS), in the prior proceeding (which, in the interest of brevity and judicial economy, the AAO will not list here).

The AAO reviewed all of the documents submitted as the joint motion. Upon review of the submissions, 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. More specifically, the AAO finds that the petitioner and counsel have failed to submit material evidence that was previously unavailable. Evidence that was in the record of proceeding cannot be considered "new facts" or "new" evidence. Thus, the submissions fail 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.

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" of proof. *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden.

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

² 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.

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:

As previously mentioned, counsel contends that the AAO's decision dismissing the appeal and affirming the director's decision was erroneous. Specifically, counsel's primary arguments on motion are that the proffered position qualifies as a specialty occupation (1) "due to the demanding, complex duties of the position and O*Net's classification of Medical and Health Services Managers as needing a minimum of a bachelor's degree for this type of occupation"; (2) due to the U.S. Department of Labor's *Occupational Outlook Handbook's (Handbook)* description of the educational requirements for "Medical and Health Services Managers"; and (3) "through precedent decisions [in which] [USCIS] has recognized occupations as specialty occupations by evaluating the responsibilities, duties, tasks, demands, and actual requirements of the profession" and "based on the complexity of the duties alone."

At the outset, the AAO will address why the two decisions cited on motion carry no probative weight within the context of this motion to reconsider.

Counsel errs in the status that he attributes to what he cites as "*In Re X*, 93 245 51412, 12 INA Rept. B2-200 (AAU, Int. Dec. 3-28-94)." Contrary to counsel's description, that decision has not been published as a precedent decision. For a list of the precedent decisions, see the Executive Office of Immigration Review Internet site at http://www.justice.gov/eoir/vll/intdec/ao_comm.html. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Therefore, as a non-precedent decision, it does not qualify as a foundation for a motion to reconsider under 8 C.F.R. § 103.5(a)(3).³

Also, counsel's reliance upon *Hong Kong T.V. Video Program, Inc. v. Ilchert*, 685 F. Supp. 712 (N.D. CA. 1988), cited as holding that "a position may be considered a profession based on the complexity of the duties alone," is not relevant. The visa classification which that decision addressed (that is, for a temporary worker of "distinguished merit and ability" pursuant to section 101(a)(15)(H)(i) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)) predated the H-1B visa classification for

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.

³ As an administrative comment, the AAO notes that, aside from the fact that the referenced decision carries no precedential weight, the petitioner did not include a copy of the decision for the AAO's review, but only provides a citation to what appears to be an unofficial reporter that is not known to the AAO.

temporary workers in a specialty occupation, which is addressed at section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).⁴

Furthermore, that case dealt with whether the beneficiaries were members of the professions as defined in section 101(a)(32) of the Act. The issue before the AAO, however, is whether the petitioner's proffered position qualifies as a nonimmigrant H-1B specialty occupation and not whether it is a profession. Moreover, *Hong Kong T.V. Video Program, Inc. v. Ilchert*, does not have precedential status with regard to the matter now before the AAO. In this regard, the AAO also notes that, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising even within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Finally, while counsel asserts that the position is a specialty occupation, refers to the O*NET and the *Handbook's* descriptions of the educational requirements for the occupational classification, and reiterates some of the arguments from the previous proceeding, the motion does not cite a statutory or regulatory authority, case law, or precedent decision to establish that the AAO's decision to dismiss the appeal was based on an incorrect application of law or USCIS policy.

Moreover, even considered in their totality, the documents constituting this motion do not articulate how 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.

However, it behooves the AAO to also offer the following comments regarding counsel's references to the *Handbook* and to the O*NET. On motion, counsel states his interpretation of pertinent sections of the *Handbook* and the O*NET, thus continuing assertions made on appeal. However, to merit reconsideration of the AAO's decision to dismiss the appeal, the petitioner must both (1) specifically cite laws, regulations, precedent decisions, and/or binding USCIS policies that the petitioner believes that the AAO misapplied in deciding to dismiss the appeal; and (2) articulate how those standards cited on motion were so misapplied to the evidence before the AAO as to result in a dismissal that should not have been rendered. Here, the submissions on motion fail to articulate how such standards were misapplied to the petitioner's evidence.

Again, the regulation at 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

⁴ The AAO notes that the applicable language from *Hong Kong T.V. Video Program, Inc. v. Ilchert* states that "the position of *company president* may be considered a profession based on the complexity of the duties alone." *Hong Kong T.V. Video Program, Inc. v. Ilchert*, 685 F. Supp. at 716. (Emphasis added.)

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.

In other words, the purpose of a motion to reconsider is to contest the correctness of the original decision based on the previously established factual record. A motion to reconsider based on a legal argument that could have been raised earlier in the proceedings will be denied. *See Matter of Medrano*, 20 I&N Dec. 216, 219-20 (BIA 1990, 1991). The "reasons for reconsideration" that may be raised in a motion to reconsider should flow from new law or a *de novo* legal determination reached by the AAO in its decision that could not have been addressed by the party. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). Further, a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. *Id.* Instead, the moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *Id.* at 60.

Additional Basis for Dismissal

In addition, 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.

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).

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). Here, that burden has not been met. 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.