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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

DATE: DEC 02 2013

OFFICE: VERMONT SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

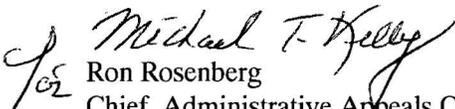
SELF-REPRESENTED

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, and the Administrative Appeals Office (AAO) dismissed the petitioner's subsequent appeal. Next, the AAO dismissed the petitioner's subsequent motion to reopen. The matter is again before the AAO, on another motion to reopen. The motion will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a company that designs, manufactures, wholesales and retails clothing. It claims to employ three people and to have been established in 2006. In order to employ the beneficiary in what it designates as a web designer 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 law, facts, and procedural history of this case were fully discussed in the AAO's prior decisions, and it will only repeat certain law and facts here as necessary. The director denied the petition on November 21, 2011 on the basis of his determination that the petitioner had failed to demonstrate that the proffered position qualifies for classification as a specialty occupation. The petitioner, through counsel, filed a timely appeal. In its March 4, 2013 decision dismissing the petitioner's appeal, the AAO concurred with the director's decision.

In response to the AAO's decision to dismiss the appeal, the petitioner, through counsel, filed a timely motion to reopen. The AAO dismissed the motion, thus affirming its prior decision dismissing the appeal. In its June 26, 2013 decision dismissing the motion, the AAO found that counsel's submissions failed to meet the requirements of a motion to reopen as set forth at 8 C.F.R. 103.5(a)(2). The AAO also found that the motion must be dismissed for failing to include the required notice about whether the petition was the subject of litigation. As noted by the AAO, the regulation at 8 C.F.R. § 103.5(a)(4) mandates dismissal of a motion that does not meet the applicable requirements.

The AAO will now discuss the motion to reopen that it is now before us. As will be discussed below, the submissions constituting this motion do not satisfy the requirements of a motion to reopen. A motion that does not meet applicable requirements shall be dismissed. *See* 8 C.F.R. § 103.5(a)(4). Accordingly, this motion to reopen will be dismissed.

The petitioner filed the present motion to reopen on April 5, 2012. At Part 2 of the Form I-290B, Notice of Appeal or Motion, the petitioner stated that it is seeking review of the AAO's June 26, 2013 decision to dismiss the previous motion to reopen.

Now on motion, the petitioner submits the Form I-290B; a letter from the petitioner, dated July 24, 2013; a photocopy of a visa issued to another alien with no connection to the petitioner or this petition; a copy of that alien's resume; and a letter discussing that alien's employment in the United States with a company unrelated to this petition.

As noted above, in its June 26, 2013 decision at issue here, the AAO found that the submissions in support of the motion to reopen and reconsider the AAO's earlier, March 4, 2013 decision

dismissing the appeal (which submissions will hereinafter be referred to as the “April 1, 2013 submissions”) failed to meet the requirements of a motion to reopen.

As noted by the AAO in its June 26, 2013 dismissal of the previous motion, the April 1, 2013 submissions constituting that motion consisted of the following: the Form I-290B; a brief; a cover letter from counsel; a copy of a document entitled “Expert Opinion and Educational Evaluation,” dated December 21, 2010; a copy of an unpublished AAO decision from 2002; and a copy of the decision in *Young China Daily v. Chappell*, 742 F. Supp. 552 (N.D. Cal. 1989). The AAO noted that all of the evidence submitted on that motion was dated prior to the conclusion of the proceedings before the director. Thus, that evidence was not new, and it was previously available.

As will be discussed below, the AAO finds no error in its June 26, 2013 finding that the April 1, 2013 submissions failed to meet the requirements of a motion to reopen or a motion to reconsider.

In the context of the above background, the AAO will now explain why it is dismissing the motion to reopen.

The AAO will first address its finding that the April 1, 2013 submissions failed to meet the requirements of a motion to reopen as 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. Additionally, pursuant to 8 C.F.R. § 103.5(a)(1), to merit reopening, the motion must show proper cause for doing so. The motion before us does not meet those thresholds.

As noted by the AAO in its decision on the previous motion, 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.¹

However, the AAO finds that nothing submitted on the present motion indicates that the AAO erred in its determination that the April 1, 2013 submissions submitted on the previous motion did not meet the standard imposed by 8 C.F.R. 103.5(a)(2) for motions to reopen.

With regard to the evidence submitted about Ms. [REDACTED] approved visa, the AAO specifically finds that, even if the evidence were “new” within the meaning of a motion to reopen - which it is not the case here - the petitioner has not established that it would be probative with regard to the proper determination of the motion before us.

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 College Dictionary* 736 (Houghton Mifflin 2001)(emphasis in original).

Also, the AAO notes, neither the submissions on the previous motion nor the submissions on the present motion establish why any of the evidence could not have been discovered or presented in the proceeding prior to the one at issue here. Nor did the brief that accompanied counsel's April 1, 2013 submission 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).

The present motion does not itself present new facts or evidence as needed to merit reopening a proceeding pursuant to 8 C.F.R. § 103.5(a)(2). Consequently, the present motion does not meet the requirements of a motion to reopen. As for the additional grounds for dismissal, the petitioner did not provide new evidence establishing why it failed to include the required information about pending litigation in its prior motion.

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 March 24, 2010 submissions did not meet that burden, and consequently the present motion also does not establish grounds for reopening.

Accordingly, the AAO affirms its June 26, 2013 decision to not reopen the proceeding.

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. 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 combined motion is dismissed