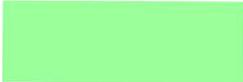


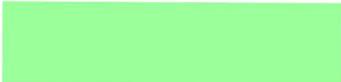
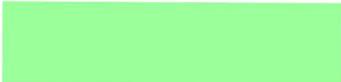


U.S. Citizenship
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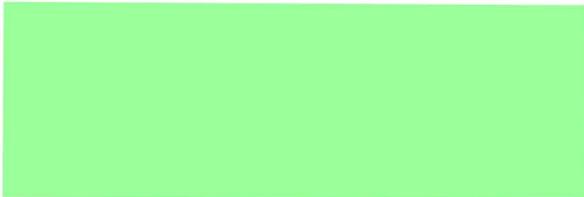


DATE: **FEB 22 2013** OFFICE: VERMONT SERVICE CENTER FILE: 

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:

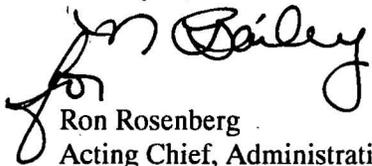


INSTRUCTIONS:

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,



Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: On July 13, 2010, the Director of the Vermont Service Center denied the nonimmigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO) and, on July 3, 2012, the AAO dismissed the appeal. On August 2, 2012, the petitioner filed a joint motion to reopen and reconsider. The joint motion will be dismissed pursuant to 8 C.F.R. § 103.5(a)(1)(iii)(C), (a)(2), and (a)(4).

On the Form I-129 visa petition, the petitioner describes itself as a restaurant established in 1992. In order to employ the beneficiary in what it designates as a chief restaurant 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 is a specialty occupation. Thereafter, 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. Beyond the decision of the director, the AAO determined that the petitioner failed to submit a certified labor condition application (LCA) that corresponded to the petition.¹ The AAO dismissed the appeal.

The petitioner and its counsel subsequently submitted a Form I-290B. As indicated by the check mark at Box F of Part 2 of the Form I-290B, the petitioner filed a joint motion to reopen and reconsider. The joint motion before the AAO contains: (1) the Form I-290B; and (2) the AAO's decision dated July 3, 2012. The AAO reviewed the record of proceeding in its entirety before issuing its decision.

In Part 3 of the Form I-290B, counsel for the petitioner states the following as the basis for the joint motion:

The USCIS and AAO improperly denied the I-129 and consequent I-290B appeal on 07/03/2012. This motion is being timely filed. Chief Restaurant Manager is a specialty occupation. There is precedent "Matter of _____," _____ which held that [an] Executive Pastry Chef where [the] job required a Bachelor's degree and level of complexity and supervisory responsibility was deserving [of an] H1B grant since that was a specialty occupation. Here, similarly, the position of Chief Restaurant Manager is a specialty occupation. The termination of [the beneficiary's] status as an F-1 student was a de minimis lapse in lawful status in the US. The alien had filed an I-539 in the interim asking the USCIS to change his status to a B-2 visa. Thus, the decision in [the] I-129 case denying [the

¹ The AAO notes that it 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, as well as the petitioner's failure to submit a certified LCA that corresponded to the petition.

petitioner's] petition on behalf of [the beneficiary] should have been approved. A separate brief will follow within 30 days.

The AAO notes that no brief was received subsequent to the filing of the instant Form I-290B. Further, the AAO observes that counsel's statement, as reproduced above, is virtually identical to the statement provided in Part 3 of the prior Form I-290B, filed on appeal.

As a preliminary matter (and as previously discussed in the AAO's July 3, 2012 decision), issues relating to the beneficiary's change of status are outside the scope of the AAO's jurisdiction. See 8 C.F.R. §§ 248.3(a) and 248.3(g). The AAO has no jurisdiction over such matters, as issues surrounding a beneficiary's maintenance of nonimmigrant status are within the sole discretion of the director. Accordingly, the AAO will not address the change of status request.

The AAO now turns to the record to determine if the instant joint motion meets the regulatory requirements as a motion to reopen or reconsider.

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.² 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 copy of the AAO's previous decision. In the Form I-290B appeal, counsel references an unpublished decision dated approximately eight years prior to the initial H-1B filing. 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.

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. The motion to reopen will be dismissed.

The AAO will now consider the petitioner's motion to reconsider. 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

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).

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.³

In support of its motion to reconsider, counsel cites an unpublished decision, "Matter of _____," which he erroneously refers to as "precedent." Counsel claims that because the executive pastry chef position in that case was found to be a specialty occupation, the chief restaurant manager position proffered in the instant case must also be found to be a specialty occupation.

The AAO notes that counsel made the identical assertion on appeal. A motion to reconsider that restates the arguments that the AAO previously rejected provides no reason for the AAO to change its prior decision. Merely reiterating an argument previously presented to the AAO does not constitute specifying errors in the application of law or Service policy as required for a successful motion to reconsider.

Nevertheless, the AAO reviewed counsel's statement and the AAO's decision dated July 3, 2012, including the section regarding the unpublished decision cited by counsel. Here, the AAO incorporates and affirms the portion of its prior decision on this topic. In response to counsel's assertion on the instant Form I-290B that the unpublished decision cited above is relevant to the instant petition, the AAO repeats that while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all

³ 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:

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.

USCIS employees in the administration of the Act, unpublished decisions are not. Further, counsel presented no evidence to establish that the facts of the cited case are analogous to the instant petition. Counsel may not rely on an unpublished decision regarding a petition for a different employer to establish eligibility for H-1B classification. The petitioner is required to establish that the proffered position qualifies as a specialty occupation within the meaning of the controlling statutory and regulatory provisions. Thus, for the reasons discussed, the AAO finds that the matter cited by counsel is irrelevant to the instant petition. Counsel states his disagreement with the prior 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.

Upon review of the record of proceeding, the petitioner and counsel have not submitted any evidence that would meet the requirements of a motion to reconsider. Thus, the motion to reconsider must be dismissed.

In addition, the joint motion shall also be dismissed for failing to meet another applicable filing requirement. Specifically, the regulation at 8 C.F.R. § 103.5(a)(1) states the following:

(iii) Filing Requirements—A motion shall be submitted on Form I-290B and may be accompanied by a brief. It must be:

* * *

(C) Accompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding;

In this matter, the submission constituting the motion does not contain a statement as to whether or not the unfavorable decision has been or is the subject of any judicial proceeding as required by 8 C.F.R. § 103.5(a)(1)(iii)(C). Thus, the petitioner and counsel failed to comply with the requirements as set by the regulations for properly filing a motion.

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 does not meet the applicable filing requirement as stated at 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

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.

(b)(6)

Page 6

Title 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the joint 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 joint motion is dismissed.