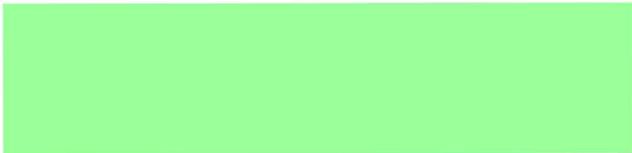


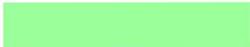


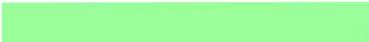
U.S. Citizenship
and Immigration
Services

(b)(6)



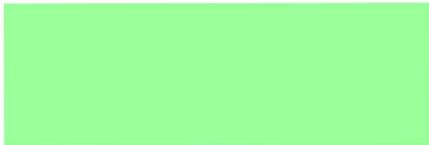
JUL 16 2013

DATE: 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:

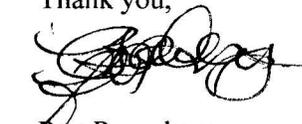


INSTRUCTIONS:

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,



Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The petitioner submitted an appeal of the denial of the petition to the Administrative Appeals Office (AAO). The AAO dismissed the appeal. The petitioner subsequently submitted a joint motion to reopen and reconsider to the AAO. The AAO dismissed the motion as untimely filed. The matter is again before the AAO on a motion to reconsider. The motion will be dismissed.

On the Form I-129 visa petition, the petitioner describes itself as a semiconductor testing company established in 1999. In order to continue to employ the beneficiary in what it designates as a staff software engineer 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 eligibility for the benefit sought when the petition was filed. More specifically, the director found that the petitioner: (1) failed to provide evidence of a Labor Condition Application (LCA) valid for the requested employment period that complies with the applicable statutory and regulatory provisions; and (2) failed to provide evidence that the beneficiary was in a valid non-immigrant status at the time the request for an extension of stay was filed.

Counsel for the petitioner submitted an appeal of the denial of the petition. The AAO reviewed the submission and dismissed the appeal. Thereafter, counsel submitted a combined motion to reopen and motion to reconsider. The AAO reviewed the submission and dismissed the joint motion as untimely filed.¹ The AAO noted that even if the joint motion had been timely filed (which it was not), the submission did not meet the requirements for a motion to reopen or a motion to reconsider.

The matter is once again before the AAO. As indicated by the check mark at box E of Part 2 of the Form I-290B, counsel elected to file a motion to reconsider. On motion, counsel submits a brief and supporting evidence.

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 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) and the instructions for motions to reconsider at Part 3 of the Form I-290B.²

¹ The AAO noted that a motion to reopen and a motion to reconsider "must be filed within 30 days of the decision that the motion seeks to reconsider." *See* 8 C.F.R. § 103.5(a)(1)(i). The AAO further noted that the joint motion to reopen and reconsider was received approximately three years and five months after the decision was issued.

² The provision at 8 C.F.R. § 103.5(a)(3) states the following:

In the brief submitted with the motion, counsel acknowledges that the petitioner failed to submit an LCA in support of the petition in compliance with the statutory and regulatory provisions and claims that "an LCA done belatedly in ignorance of the law should be given some latitude." Additionally, counsel claims that the "denial of this motion to this particular beneficiary is unusually harsh."³

Although counsel states his disagreement with the prior decision, counsel 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. The petitioner and counsel have not established that the decision was incorrect based on the evidence of record at the time of the decision. In short, 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.

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.

³ On motion, counsel claims that "[t]he motion [to reopen and reconsider] was framed specifically as a Sua Sponte motion." Counsel further claims that "[t]here is no deadline to file a Sua Sponte motion." Counsel asserts that "the Service has erred on the law because a Sua Sponte motion does not have a deadline." The AAO notes that counsel requests that the AAO *sua sponte* reopen/reconsider the proceeding to make a new decision favorable to the petitioner. The AAO reviewed counsel's request and finds that the record of proceeding does not warrant such action. The AAO also notes that USCIS does not have the discretion to disregard its own regulations, even if it would benefit a petitioner (or a beneficiary). *See Reuters Ltd. v. F.C.C.*, 781 F.2d 946 (C.A.D.C. 1986) (an agency must adhere to its own rules and regulations; ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned).

Furthermore, a review of the record and the prior decisions indicates that the director and the AAO properly applied the statute and regulations to the petitioner's case. Counsel's primary complaint is that the director denied the petition; however, both the director and the AAO have provided the petitioner with detailed statements regarding the requirements to establish eligibility for the benefit sought. As previously discussed, the petitioner has not met its burden of proof and the denial was the proper result under the applicable statutory and regulatory provisions. Accordingly, the claim is without merit. Thus, the motion to reconsider must be dismissed.

Moreover, the motion will 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 submission constituting 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 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.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the motion will be dismissed, the proceedings will not be reconsidered, and the previous decision of the AAO will not be disturbed.

ORDER: The motion is dismissed. The previous decision of the AAO, dated December 21, 2012, shall not be disturbed. The petition is denied.