



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **JUN 18 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)

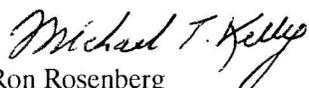
ON BEHALF OF PETITIONER:  
[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) 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,

*for*   
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The service center director revoked the approval of the nonimmigrant visa petition. The petitioner appealed the director's revocation to the Administrative Appeals Office (AAO) and, on June 27, 2012, 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 an environmental consulting, testing assessment, remediation, and restoration company established in 2005. In order to continue to employ the beneficiary in a position to which it assigned the job title of "environmental analyst," 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 revoked the approval of the petition based on the petitioner's failure to establish (1) that the beneficiary was performing the job duties as attested in the initial petition; and (2) that it met the regulatory definition of an intending United States employer. Section 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(ii).

The petitioner, through counsel, submitted an appeal of the director's decision to the AAO.

On appeal, the AAO reviewed the evidence and determined that petitioner had failed (1) to demonstrate that the beneficiary was performing the job duties that were attested to in the initial petition; and (2) to establish that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the AAO dismissed the appeal.

Thereafter, counsel for the petitioner submitted the joint motion now before the AAO, consisting of the Form I-290B with its annotations, a brief, and allied documentation. 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 motion to reconsider submitted by counsel. As will be discussed below, the submissions constituting this combined motion do not satisfy the requirements of either a motion to reopen or a motion to reconsider. A motion that does not meet the 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.<sup>1</sup> The new facts submitted on motion must be material and previously unavailable, and such that they could not have been discovered earlier in the proceeding. *Cf.* 8 C.F.R. § 1003.23(b)(3).

Upon review of the submission, the AAO notes that the petitioner has not provided any "new facts" and that the instant motion does not contain any "new" evidence. There is no indication that the evidence submitted was not available and could not have been discovered or presented in the previous proceeding.<sup>2</sup> 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.

#### **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.<sup>3</sup>

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<sup>1</sup> 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).

<sup>2</sup> The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). In the instant case, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents with the initial petition or in response to the director's request for evidence. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988).

<sup>3</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

As previously mentioned, counsel for the petitioner states that the AAO's decision dismissing the appeal was erroneous. Specifically, counsel's primary arguments on motion are that (1) the inconsistencies in the petition and in the reply to the director's Notice of Intent to Revoke (NOIR) are "de minimis" and are only explanations of the job duties that are contained in the petition; (2) the petitioner and the beneficiary have an employer-employee relationship; (3) the AAO erred when they refused to consider the Employment Agreement document for purposes of differentiating [the beneficiary's] status; and (4) the beneficiary possesses the proper qualifications to obtain an H-1B visa.

First, counsel did not establish that the AAO erred in its application of law or USCIS policy with respect to the inconsistencies in the petition and in response to the NOIR relating to the beneficiary's job duties. In this regard, the AAO notes, in particular, that the petition had been approved for a position for which the petition had stated no managerial or supervisory duties. The petition that was approved neither stated, nor provided any documentary evidence indicating, that the duties and the terms and conditions of the beneficiary's employment included supervisory or management duties. Further, on motion, the petitioner presents no evidence that the AAO erred in its decision on appeal by not accepting as "de minimis" the fact that the actual performance of the position included expansion of the position to include supervision and management duties. Further, the AAO finds that the motion presents no evidence corroborating counsel's unsupported argument on motion that, on appeal, the AAO erred by not accepting the proposition – unsupported by any persuasive documentary evidence – that management and supervisory duties were naturally implied, although not specified in the petition. Further, the AAO finds that these factors alone preclude the petitioner from meeting the requirements of a motion to reconsider.

Next, counsel did not establish that the AAO erred in its application of law or USCIS policy with respect to whether the petitioner and the beneficiary have an employer-employee relationship.

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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.

In this matter, counsel argues, in part, that an employer-employee relationship exists even if the beneficiary “is a Stakeholder in the corporation.” Counsel further claims that the “focus on eligibility for an intended statutory benefit makes [*Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 124 S.Ct. 1330 (2004) (hereinafter *Yates*)] much more relevant to the question of whether a working owner is eligible for an intended benefit under the Act than *Clackamas*. . . .”

The AAO notes that in *Yates*, the U.S. Supreme Court held that the working owner of a business (in *Yates*, the sole shareholder and president of a professional corporation) could qualify as a “participant” in a pension plan covered by ERISA, if the plan covers one or more employees other than the business owner and the owner’s spouse. Here, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Yates*. Moreover, throughout the record of proceeding, counsel states that the beneficiary is not an owner of the business. Thus, even if counsel had established that the *Yates* case was applicable in this matter, counsel himself has distinguished the facts in the present matter from those in *Yates*.

That being said, the AAO finds, more fundamentally, that, taking into account all of the documentation submitted in support of the motion – including the Mr. [REDACTED] affidavit – and considering all of that documentation as a totality with all of the other evidence pertaining to the employer-employee issue, the petitioner has failed to persuasively show the extent of whatever actual control the petitioner exercised, or even had power to exercise, over the beneficiary and over the scope of whatever day-to-day work the beneficiary performed, commencing with the date of the approval of the petition. Thus, the AAO finds that the petitioner has not satisfied the requirements of a motion to reconsider on this issue. The motion does not establish that the AAO’s decision on whether the petitioner and the beneficiary have an employer-employee relationship was based on an incorrect application of law or USCIS policy to the facts in the record of proceeding before it.

Also, counsel did not establish that the AAO erred in its application of law or USCIS policy when the AAO refused to consider the Employment Agreement document that was submitted for the first time on appeal despite the director’s request for evidence in the NOIR to establish that a valid employer-employee relationship exists between the petitioner and the beneficiary. In any event, the AAO finds, in response to this aspect of the motion, that the Employment Agreement document merits little evidentiary weight either as an indication of the actual working relationship between the beneficiary and the petitioner, or as an indication of whatever actual control the petitioner may have over the latitude and scope of the beneficiary’s day-to-day activities, as this Employment Agreement, failed to even mention that the beneficiary would exercise management and supervisory roles. As such, the AAO finds that the AAO’s consideration of the Employment Agreement document would not have benefited the petitioner.

Additionally, although this issue is not material to the validity of the revocation action now before us, the AAO also finds that the submissions constituting this motion do not establish that the AAO erred in alerting the petitioner and the director to the fact that the petition was apparently approved in error (that is, without evidence establishing the beneficiary as qualified to serve in a specialty occupation), as the evidence in the record of proceeding appears to indicate that, at the time of the petition’s approval, the petitioner in fact had not established that the beneficiary had attained the education, or educational

equivalency, required to qualify for service in an H-1B specialty occupation. Indeed, the fact that it appears that the beneficiary lacked the necessary qualifications when the petition was approved would behoove the director to initiate additional revocation-on-notice proceedings if the petitioner had prevailed on appeal: the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(A)(5) indicates that revocation-on-notice proceedings should be initiated when “[t]he approval of the petition violated paragraph (h) of this section [(that is, any provision of the H-1B regulations at 8 C.F.R. § 214.2(h))].”

In this regard, the AAO also finds that the submissions on motion did not establish that the AAO erred either in finding that the evaluator of the beneficiary’s credential evaluation is not “an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit,” as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), or in not entering a determination that the beneficiary’s education, experience, and/or training qualified the beneficiary to serve in a specialty occupation by satisfying the precise, multi-tiered requirements stated at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

Also, in the motion, counsel states that the AAO did not address “whether the credentials are sufficient on their own.” However, there was no need for the AAO to address the beneficiary’s educational credentials in its decision, since the AAO was simply pointing out that there is an additional deficiency in the record relating to the beneficiary’s credential evaluation, on which the petitioner relied upon to establish that the beneficiary had the requisite degree for the proffered position.<sup>4</sup> Further, counsel fails to even address how the evidence of record would satisfy all of the multiple requirements at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

Finally, the petitioner does not assert that the AAO’s decision was incorrect based on the evidence of record that was before the AAO at the time of its initial decision. To the contrary, counsel states that “[t]he evidence presented alone, might not go to the gravamen of the documentation necessary to prove an Employer-Employee relationship.”

In short, the submissions constituting the motion do not satisfy the requirements of a motion to reconsider. Thus, the motion-to-reconsider component of this joint motion must also be dismissed.

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<sup>4</sup> The AAO notes that the beneficiary’s “Degree of Bachelor of Science” from [REDACTED] in [REDACTED] does not list a major on the diploma. Upon review of the transcript, it is noted that the beneficiary’s major is listed as “Israel Professional Studies/Business,” which does not appear to qualify the beneficiary to perform the duties of an environmental analyst. In this matter, it appears that the petitioner (incorrectly) relied upon the evaluation of Dr. [REDACTED] to establish that the beneficiary has a Bachelor of Science degree with a major in both Business Administration and in Environmental Health. It should be noted, also, that comparison of the so-called three-for-one rule cited by Dr. [REDACTED] with the actual wording at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) will reveal that Dr. [REDACTED] mischaracterizes, impermissibly reduces, and consequently misapplies the rules for USCIS determination of attainment of educational equivalency through experience and or training, at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

**Additional Basis for Dismissal**

Finally, 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.

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 combined 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.