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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: JUN 20 2013 OFFICE: CALIFORNIA 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)

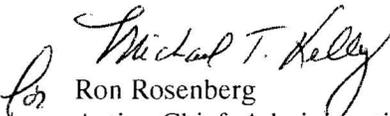
ON BEHALF OF PETITIONER:

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: The service center director revoked approval of the nonimmigrant visa petition, and the Administrative Appeals Office (AAO) dismissed the petitioner's subsequent appeal. Next, the AAO dismissed the petitioner's subsequent joint motion to reopen and to reconsider. The matter is again before the AAO, on another joint motion to reopen and to reconsider. The motion will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a company which markets dental supplies established in 1986. 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 August 26, 2008, on the basis of her 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 February 24, 2010 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 and reconsider. The AAO dismissed the motion, thus affirming its prior decision dismissing the appeal. In its March 6, 2012 decision dismissing the motion, the AAO found that counsel's submission failed to meet either: (1) the requirements of a motion to reopen as set forth at 8 C.F.R. 103.5(a)(2); or (2) the requirements of a motion to reconsider as set forth at 8 C.F.R. § 103.5(a)(3). 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 petitioner, through counsel, filed the present motion to reopen and reconsider 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 March 6, 2012 decision to dismiss the previous motion to reopen and to reconsider.

Now on motion, counsel submits the Form I-290B; a brief; a letter from the petitioner, dated March 20, 2012; copies of job-vacancy announcements printed from the Internet; a printed excerpt from a weblog, or blog, covering dental matters; an entry printed from Wikipedia.com; and a printed excerpt from a website entitled [REDACTED]

As noted above, in its March 6, 2012 decision at issue here, the AAO found that counsel's submissions in support of his motion to reopen and reconsider the AAO's earlier, February 24, 2010 decision dismissing the appeal (which submissions will hereinafter be referred to as "counsel's March 24, 2010 submissions") failed to meet the requirements of a motion to reopen and reconsider.

As noted by the AAO in its March 6, 2012 dismissal of the previous motion, counsel's March 24, 2010 submissions constituting that motion consisted of the following: the Form I-290B; a brief; a letter from a computer consulting firm; a letter from a software company; an excerpt from the

Department of Labor's *Occupational Outlook Handbook*; a copy of a brochure issued by the [REDACTED] regarding its bachelor's degree programs in computer science and computer engineering; a document published by [REDACTED] which lists available courses in computer science and computer engineering; a copy of the petitioner's 2008 income tax return; a copy of the petitioner's business license; and copies of pamphlets produced by the petitioner. As will be discussed below, the AAO finds no error in its March 6, 2012 finding that counsel's March 24, 2010 submission 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 both the motion-to-reopen and the motion-to-reconsider components of this joint motion.

The AAO will first address its finding that March 24, 2010 submissions met 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.

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 March 24, 2010 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.

Also, the AAO notes, that neither the submissions on the previous motion nor the submissions on the present motion do not establish why any of the letters, the *Handbook* excerpt, the information from the [REDACTED] the petitioner's tax return, the petitioner's business license, and the petitioner's pamphlets 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 March 24, 2010 submission constitute new evidence in and of itself,² 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).

As the present motion does not itself present new facts or evidence that would establish that the March 24, 2010 submissions contained facts or evidence that were *new* within the meaning of 8

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).

² Nor did the brief that accompanied counsel's March 24, 2010 submission contain any new arguments that counsel could not have made in the proceeding prior to the one at issue here; i.e., on appeal.

C.F.R. § 103.5(a)(2), the present motion does not satisfy the requirements of a motion to reopen under 8 C.F.R. § 103.5(a)(2), 103.5(a)(2). Consequently, the present motion does not meet the requirements of a motion to reopen.

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 March 6, 2012 decision to not reopen the proceeding.

Next, the AAO will discuss its determination that the present motion does not meet the requirements of a motion to reconsider.

As will now be discussed, the motion also fails to satisfy the requirements for a motion to reconsider a 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 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.³

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

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 :

The AAO finds that the submissions constituting the present motion-to-reconsider generally allege abuse of discretion and that the AAO's decision on the previous motion did not take into account what the petitioner considers a growing body of information indicating increasing complexity, specialization, and knowledge requirements in positions such as the one claimed in the petition. However, the motion fails to establish, or even specifically articulate, where the AAO incorrectly applied law USCIS policy to the facts before it at the time the AAO dismissed the previous motion. Moreover, the AAO finds that the present motion-for-reconsideration component's statements, references, and arguments (which, by the way, to a substantial degree relate to assertions of developments after the motion was decided) do not establish that the AAO's decision to dismiss the previous motion to reconsider was, in the words of the pertinent provision at 8 C.F.R. § 103.5(a)(3), "incorrect based on the evidence of record at the time of the initial decision."

As the regulation at 8 C.F.R. § 103.5(a)(4) mandates that "[a] motion that does not meet applicable requirements shall be dismissed," the AAO's March 6, 2012 decision dismissing the petitioner's joint motion to reopen and reconsider was proper, and is hereby affirmed.

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 or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.

[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.