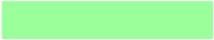


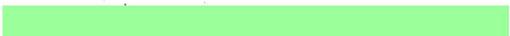


U.S. Citizenship
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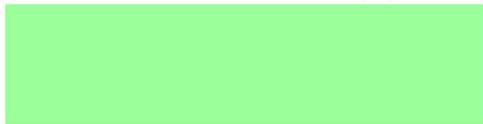


DATE: MAR 04 2013 OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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:

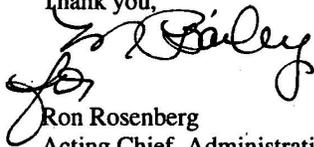


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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 December 17, 2009, the service center director denied the nonimmigrant visa petition. The petitioner and its counsel submitted an appeal of this denial to the Administrative Appeals Office (AAO) and, on March 8, 2012, the AAO dismissed the appeal. The matter is again before the AAO on a combined motion to reopen and motion to reconsider. The motion will be dismissed.

On the Form I-129 visa petition, the petitioner describes itself as a weight loss and nutrition medical services provider established in 2001. In order to employ the beneficiary in what it designates as a market research analyst position, the petitioner seeks to classify her 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 qualifies as a specialty occupation in accordance with the statutory and regulatory provisions. Thereafter, the petitioner and its counsel submitted an appeal of the decision. 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 (1) failed to submit a certified labor condition application (LCA) that corresponded to the petition; (2) failed to demonstrate that the petitioner offered a *bona fide* job to the beneficiary; and (3) failed to properly notify USCIS of a material change in the beneficiary's employment.¹ In addition, the AAO noted that the petitioner had not established that the beneficiary is qualified to serve in a specialty occupation. The AAO dismissed the appeal.

The matter is once again before the AAO on a motion to reopen and/or reconsider. As indicated by the check mark at box F of Part 2 of the Form I-290B, counsel for the petitioner elected to file a combined motion to reopen and motion to reconsider. On motion, counsel submits a brief and three job vacancy announcements. The AAO reviewed the record of proceeding in its entirety before issuing its decision.

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

¹ The AAO notes that it provided a full analysis and discussion of the deficiencies in the record of proceeding that preclude a determination that the proffered position qualifies as a specialty occupation, as well as the additional reasons beyond the decision of the director that the petition cannot be approved.

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).

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 counsel's brief and several job announcements. The AAO reviewed the information presented but notes that the petitioner and its counsel have not submitted factual information or changed factual circumstances that were not considered and could not have been presented in the initial proceeding. Here, the evidence submitted on motion does not contain material, new facts that were previously unavailable. As the documentation submitted on motion was previously available or could have been obtained prior to the motion, and as none of it is "new" or supports material new facts, there is no basis for the AAO to reopen the proceeding. 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 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

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:

In the instant case, counsel for the petitioner claims that the proffered position qualifies as a specialty occupation. The AAO notes that counsel made this assertion on appeal. Although counsel states his disagreement with the prior decision, he 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. Counsel has not established that the decision was incorrect based on the evidence of record at the time of its initial decision. In short, the petitioner and its 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;

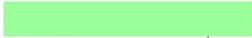
In this matter, the submission constituting the motion does not contain a statement as to whether or not the unfavorable decision has been or is the subject of any judicial proceeding as required by 8 C.F.R. § 103.5(a)(1)(iii)(C). Thus, the petitioner and counsel failed to comply with the requirements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

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

[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.



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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.