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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

[Redacted]

DATE: **NOV 25 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)

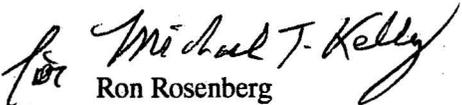
ON BEHALF OF PETITIONER:  
[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

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  
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. The matter is now before the AAO on a combined 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 established in 1992 which sells fine jewelry. In order to employ the beneficiary in what it designates as a credit analyst 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 revoked the petition on September 29, 2011, on the basis of her determination that the petitioner had failed to demonstrate that the beneficiary was performing the duties of a credit analyst and that the petitioner failed to pay the beneficiary as required by the Labor Condition Application (LCA). The petitioner, through counsel, filed a timely appeal. In its June 21, 2013, decision dismissing the petitioner's appeal, the AAO concurred with the director's decision.

The petitioner, through counsel, filed the present motion to reopen and reconsider on July 22, 2013.

In this matter, the joint motion consists of (1) a Form I-290B; (2) a brief; (3) a letter from the petitioner; (4) copies of IRS Forms W-2c, Corrected Wage and Tax Statement, for tax years 2010 through 2012;<sup>1</sup> and, three receipts for electronic funds transfers (EFT) showing payments made from the petitioner to the IRS for an undisclosed employee for the fourth quarters of 2010 through 2012, all sent on July 22, 2013.

The AAO will now discuss the combined motion to reopen and reconsider submitted by counsel. As will be discussed below, the submissions constituting this joint motion do not satisfy the requirements of either a motion to reopen or a motion to reconsider. A motion that does not meet 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.

#### 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>2</sup> The

<sup>1</sup> These documents are all filled in by hand and none are dated.

<sup>2</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 NEW COLLEGE DICTIONARY 753 (2008) (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).

We note that the petitioner attempts to persuade the AAO to reopen on the basis of documentary evidence that it has remedied its past failure to pay the beneficiary as required by the LCA. The petitioner now provides documents which it states show back payments have been made. We note that the AAO's prior decision discusses the petitioner's failure to pay the beneficiary as required by the LCA. On motion, the petitioner does not provide any evidence that it paid the beneficiary in accord with the LCA. The petitioner did not provide evidence of cancelled checks showing payments made to the beneficiary in 2009 through 2012. The "new" evidence submitted on motion indicates the petitioner remitted funds to the IRS in 2013 for an unnamed employee.

Even if the petitioner had provided evidence to show these payments to the IRS were in fact for the beneficiary, it still has not established that the beneficiary received the appropriate wages during the relevant time period. The AAO's decision on appeal found that the petitioner violated the terms of the petition and LCA. Evidence of back payments in an attempt to atone for prior violations are not new evidence as the term is used in motions to reopen. Responsive evidence would show that the AAO erred below because the petitioner had in fact paid the beneficiary the appropriate wages when they were due. That is, for evidence to fall within the scope of a motion to reopen, that evidence must not only be "new" within the sense of the regulation, but it must also relate to the issue of whether the AAO had erred in its decision on appeal. If anything, the documentary evidence regarding late wage-payments attempting to remedy the regulatory violation found by the AAO on appeal reinforces the correctness of the AAO determination in its decision on the appeal. Far from undermining the AAO's determination that the petitioner failed to adequately pay the beneficiary as required by the LCA, the payments are in fact a concession by the petitioner that it violated the terms of the LCA, requiring "catch up" payments to be made after the violation was brought to the petitioner's attention.

Also, within the context of a motion to reopen, "new" evidence does not include after-the-fact evidence created in an attempt to alter material facts from what they were at the time the appeal was decided. As the payments made by the petitioner to the IRS did not occur until after the AAO's decision, they cannot be used to show that decision was in error.

Motions for the 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.

We note that, while both the petitioner's letter and counsel's brief on motion assert that the beneficiary has been serving as a credit analyst, the motion contains no supportive documentation in the form of new evidence within the scope of a motion to reopen. Accordingly, the motion to reopen does not encompass the AAO's determination on appeal that the beneficiary had not been serving in the credit analyst position for which the petition had been approved.

The AAO finds that nothing submitted on the present motion constitutes new evidence that would require reopening of the proceedings. Thus the petitioner did not meet the standard imposed by 8.F.R. § 103.5(a)(2) for motions to reopen.

Motion for Reconsideration

Next, the AAO will discuss its determination that the submissions on motion also do not satisfy the requirements for a 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 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.<sup>3</sup>

In the brief on the motion, counsel contends that the “Service should consider revoking an approved petition only due to fraud, changes in circumstances or clear error on the part of [the] Service in approving the petition. [The] Service should not assume that a petition should be revoked simply

<sup>3</sup> 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 :

[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.

because they would have reached a different decision if adjudicating that petition today.” Counsel provides no legal authority to support this assertion. Indeed, counsel’s assertion is partly in conflict with the regulations, which provide five separate grounds for revocation of approved petitions, which counsel fails to acknowledge. The controlling regulation is 8 C.F.R. § 214.2(h)(11)(iii), which states, in pertinent part:

(A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
- (2) The statement of facts contained in the petition or on the application for a temporary labor certification was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
- (3) The petitioner violated terms and conditions of the approved petition; or
- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
- (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

The prior decision informed the petitioner that it failed to demonstrate that it did not violate paragraphs 1, 3, and 4 above; and the evidence of record does not establish that the grounds for revocation were misapplied to the facts regarding this petition. Likewise, the evidence of record does not support counsel’s suggestion that revocation of the approval was based merely upon a view that, for no material reason, USCIS “would have reached a different decision if adjudicating that petition today.”

On motion, the petitioner renews its assertion that the underlying reason for the beneficiary’s wages failing to meet the requirements of the LCA is that the beneficiary took time off to be with his wife and newborn child. Counsel provides a long explanation of the Family Medical Leave Act, suggesting the beneficiary availed himself of this law to take time off. There is insufficient evidence in the record to support this assertion, however.<sup>4</sup> In this regard, it should be noted that the unsupported statements of

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<sup>4</sup> In its independent review of the record of proceeding as part of its deliberations on this joint motion, the AAO found no direct evidence of the beneficiary availing himself of the Family Medical Leave Act. While the records contain information indicating that the beneficiary’s wife was pregnant and gave birth, there is no evidence in the record establishing that the discrepancy in the beneficiary’s pay was due to his taking leave under that Act. Thus, assertions by counsel and/or the petitioner in this regard are not persuasive, in light of the absence of corroborating evidence. Going on record without supporting documentary evidence is not

counsel on appeal or in a motion are not evidence and thus 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).

Moreover, the motion does not cite a statutory or regulatory authority, case law, or precedent decision to establish that the AAO's decision to dismiss the appeal was based on an incorrect application of law or USCIS policy.

Even considered in their totality, the documents constituting this motion do not articulate how the AAO's decision was incorrect based on the evidence of record that was before the AAO at the time of its decision on the appeal. In short, the petitioner has not submitted any document that would meet the requirements of a motion to reconsider. Thus, the motion to reconsider must be dismissed.

Further, to merit reconsideration of the AAO's decision to dismiss the appeal, the petitioner must both (1) specifically cite laws, regulations, precedent decisions, and/or binding USCIS policies that the petitioner believes that the AAO misapplied in deciding to dismiss the appeal; and (2) articulate how those standards cited on motion were so misapplied to the evidence before the AAO as to result in a dismissal that should not have been rendered. Here, the submissions on motion fail to articulate how such standards were misapplied to the petitioner's evidence.

Again, the regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

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.

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.

For the reasons discussed above, the petitioner has not satisfied the requirements for a motion to reconsider. Accordingly, the motion-to-reconsider component of this joint motion must also be dismissed.

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sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Additional Basis for Dismissal

In addition, 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.

Conclusion

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 June 21, 2013 decision dismissing the appeal was proper, and is hereby affirmed.

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).

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met. Accordingly, the 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 motion is dismissed.