

(b)(6)

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Service  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

DATE: OCT 28 2013

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

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)

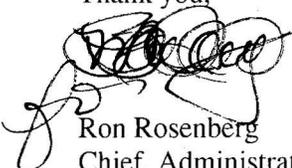
ON BEHALF OF PETITIONER:

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

Chief, Administrative Appeals Office

**DISCUSSION:** The director initially approved the nonimmigrant visa petition. Upon subsequent review of the record, the director issued a notice of intent to revoke (NOIR), and ultimately did revoke the approval of the petition. The petitioner and its counsel submitted an appeal of this revocation to the Administrative Appeals Office (AAO) and, on May 29, 2013, the AAO dismissed the appeal. The matter is again before the AAO on a combined motion to reopen and motion to reconsider. The joint motion will be dismissed.

On the Form I-129 visa petition and supporting documentation, the petitioner describes itself as a company, established in 2004, that provides information technology services of software and hardware solutions. In order to employ the beneficiary in what it designates as a computer programmer 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 position was approved for what was designated as a computer programmer position. However, thereafter an onsite visit was conducted at the beneficiary's work location, as specified in the petition. Upon subsequent review of the record of proceeding upon which approval of the petition was based, the director issued a NOIR, and ultimately did revoke the approval of the petition. Thereafter, counsel for the petitioner 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 complied with the terms and conditions of the approved petition. The AAO dismissed the appeal.<sup>1</sup>

The matter is once again before the AAO on a joint motion. As indicated by the check mark at box F of Part 2 of the Form I-290B, counsel elected to file a combined motion to reopen and motion to reconsider. On motion, counsel submits a brief and additional documentation. 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.<sup>2</sup> The 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).

---

<sup>1</sup> Contrary to counsel's assertion in the joint motion, the AAO did not "approve some issue appealed." Rather, the AAO found that the grounds specified by the director for the revocation action were proper and that the petitioner had not demonstrated compliance with the terms and conditions of employment.

<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 II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

In this matter, the motion consists of the Form I-290B along with counsel's brief, as well as the following documents: (1) a payroll summary (showing a balance owed to the beneficiary); (2) a copy of the beneficiary's Form W-2, Wage and Tax Statements, for 2011 and 2012; (3) copies of the beneficiary's pay statements; (4) copies of photographs identified as areas of Texas after Hurricane Ike (2008); and (5) a letter from [REDACTED] C.P.A., P.C.

The AAO reviewed the information presented but notes that the petitioner has 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 counsel's motion to reconsider. Upon review, the AAO finds that counsel's assertions do not adequately support the motion to reconsider. 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.

In other words, the purpose of a motion to reconsider is to contest the correctness of the original decision based on the previously established factual record. A motion to reconsider based on a legal argument that could have been raised earlier in the proceedings will be denied. See *Matter of Medrano*, 20 I&N Dec. 216, 219-20 (BIA 1990, 1991). The "reasons for reconsideration" that may be raised in a motion to reconsider should flow from new law or a *de novo* legal determination reached by the AAO in its decision that could not have been addressed by the party. See *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). Further, a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. *Id.* Instead, the moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *Id.* at 60.

In the instant case, 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.<sup>3</sup> Counsel has not established that the decision was incorrect based on the evidence of record at the time of the initial decision. In short, counsel has not submitted any evidence that would meet the requirements of a motion to reconsider. Thus, the motion to reconsider must be dismissed.

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 petition has been revoked; however, both the director and the AAO have provided the petitioner with detailed statements regarding the grounds for the revocation. As previously discussed, the petitioner has not met its burden of proof and the revocation 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.

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.

---

<sup>3</sup> In the instant case, counsel states that the beneficiary commenced employment with the petitioner in October 2009. In a payroll summary, the petitioner states that it owed the beneficiary \$10,134 for wages in 2009 and 2010. The petitioner asserts that it provided the beneficiary with promissory notes and began paying back wages to the beneficiary in February 2011. According to the petitioner, as of June 2013, an outstanding balance of \$1,000 remains due to the beneficiary.

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 joint motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decision will not be disturbed.

**ORDER:** The joint motion is dismissed.