



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **SEP 25 2013**

OFFICE: CALIFORNIA 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,

Michael T. Kelly
Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The petitioner appealed the director's denial to the Administrative Appeals Office (AAO) and, on June 19, 2013, 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 a transportation business established in 2000. In order to employ the beneficiary in what it designates as a business manager 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 an H-1B specialty occupation in accordance with the controlling statutory and regulatory provisions. The petitioner submitted an appeal of the director's decision to the AAO. 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. Accordingly, the AAO dismissed the appeal.

Thereafter, counsel for the petitioner submitted a Form I-290B, a brief, and additional evidence. 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 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.

In this matter, the joint motion consists of the Form I-290B along with a cover letter and brief from counsel. In addition, the petitioner and counsel submitted (1) a copy of two sections from the U.S. Department of Labor's *Occupational Outlook Handbook's (Handbook)* chapter on Compensation and Benefits Managers (previously submitted); (2) a copy of the O*NET OnLine Summary Report for Compensation and Benefits Managers (previously submitted); (3) a copy of two sections from the *Handbook* chapter on Computer Programmers; (4) a copy of the O*NET OnLine Summary Report for Computer Programmers; (5) a copy of the Labor Condition Application (LCA) for another petitioner, certified on March 28, 2008; (6) a copy of the Request for Evidence, dated April 23, 2008, for a Form I-129 submitted by another petitioner and pertaining to a beneficiary named Artur Lazarz; (7) a copy of the I-797A, Notice of Action approval notice dated July 25, 2008, for a Form I-129 submitted by another petitioner and pertaining to a beneficiary named Artur Lazarz; and (8) a copy of the petitioner's letter of support, dated September 6, 2011 (previously submitted).

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.¹ 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).

The AAO reviewed all of the evidence submitted in support of the instant motion. Upon review of the submissions, the AAO notes that the petitioner and counsel have not provided any "new facts" and that the instant motion does not contain any "new" evidence. More specifically, the AAO finds that the petitioner and counsel have failed to submit material evidence that was previously unavailable. The documentation submitted in support of the motion was all available and was or could have been submitted in the prior proceeding and cannot be considered "new facts" or "new" evidence. Thus, the submissions on motion fail 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 submissions on motion also fail 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.²

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 NEW COLLEGE DICTIONARY 753 (2008) (emphasis in original).

² The provision at 8 C.F.R. § 103.5(a)(3) states the following:

As previously mentioned, counsel contends that the AAO's decision dismissing the appeal and affirming the director's decision was erroneous. The AAO finds, however, that, on motion, counsel restates assertions made on appeal, claims that the job duties are complex, and basically requests a review of the record of proceeding.

As a motion to reconsider a decision on a petition must, by regulation, establish that the contested decision was incorrect based on the evidence of record at the time of that decision, the AAO will not speculate about what difference, if any, the newly submitted documents might have had upon the AAO's decision if such evidence had been part of the record of proceeding that was before the AAO when it made its decision. See 8 C.F.R. § 103.5(a)(3).

At the outset, the AAO will address why the two federal district court decisions cited on motion carry no probative weight within the context of this motion to reconsider.

Counsel's reliance upon (1) *Fred 26 Importers, Inc. v. DHS*, 445 F. Supp. 1174, 1179-80 (C.D. Cal. 2006), cited by counsel for the proposition that "the degree must directly relate to the proffered position," and (2) *Louisiana Philharmonic Orchestra v. INS*, No. Civ. A. 98-2855, 2000 WL 282785 (E.D. La. Mar. 15, 2000), cited by counsel for the proposition that "[u]nder the Service's view, the position qualifies as a specialty occupation if it always or nearly always requires a bachelor's degree or higher rather than "usually" requires a degree," is mistaken, as those decisions do not have precedential status with regard to the matter now before the AAO. In this regard, the AAO also notes that, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decisions of a United States district court in matters arising even within the same district. See *Matter of K-S-*, 20 I&N Dec. 715

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.

(BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Also, counsel references a previously approved H-1B petition filed by a different trucking company on behalf of another individual, for what counsel claims is the same profession. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). If the referenced nonimmigrant petition was approved based on the same description of duties and assertions that are contained in the current record, it would constitute material and gross error on the part of the director. It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not even preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Further, the record of proceeding before the AAO when it rendered its decision to dismiss the appeal did not contain copies of the record of proceeding of the visa petition that the petitioner claims was previously approved on basically the same facts as in the present matter before the AAO. It bears emphasis that, as noted earlier, the scope of review on a motion to reconsider is limited to the evidence of record at the time of the decision that is the subject of the motion. *See* 8 C.F.R. § 103.5(a)(3).³

Finally, while counsel asserts that the position is a specialty occupation, refers to the O*NET and the *Handbook's* descriptions of the educational requirements for the occupational classification, and reiterates some of the arguments from the previous proceeding, the motion does not cite a statutory

³ Also, although not relevant to the disposition of this motion, the AAO observes that each petition filing is a separate proceeding with a separate record. *See Hakimuddin v. Dep't of Homeland Sec.*, No. 4:08-cv-1261, 2009 WL 497141, at *6 (S.D. Tex. Feb. 26, 2009); *see also Larita-Martinez v. INS* 220 F.3d 1092, 1096 (9th Cir. 2000) (stating that the "record of proceeding" in an immigration appeal includes all documents submitted in support of the appeal). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). The record of proceeding of this particular petition did not include within it a copy of the record of proceeding related to the prior approval for another petitioner and another beneficiary.

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.

Moreover, 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 initial decision. 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.

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. *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 short, the AAO finds that the submissions on motion neither articulate nor establish that the AAO's decision on appeal was based upon misapplication of any statutory or regulatory authorities, case law, precedent decisions, or binding USCIS policy.

For all of the reasons discussed above, the motion to reconsider will also be dismissed for failure to meet applicable requirements. *See* 8 C.F.R. § 103.5(a)(4).

Finally, it should be noted for the record that, unless USCIS directs otherwise, the filing of a motion 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 combined motion is dismissed.