



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **SEP 25 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:

SELF-REPRESENTED

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,

*for Michael T. Keay*  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The petitioner then filed a motion to reconsider the AAO's decision. The AAO dismissed the motion and reaffirmed its initial decision. The matter is now again before the AAO on a joint motion to reopen and motion to reconsider. The motion will be dismissed.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a bilingual French/English school for children established in 1989. 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 applicable statutory and regulatory provisions. Counsel for the petitioner submitted an appeal of the director's decision to the AAO, which was dismissed. Subsequently, counsel for the petitioner filed a motion to reconsider and the AAO dismissed the motion and reaffirmed its initial decision.

Thereafter, the petitioner timely filed the present motion. As indicated by the check mark at Box F of Part 2 of the related Form I-290B, the petitioner elected to file both a motion to reopen and a motion to reconsider the decision.

The AAO will now discuss the combined motion to reopen and reconsider submitted by the petitioner. 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 motion to reconsider will be dismissed.

Along with the Form I-290B, the joint motion includes (1) a copy of the one-page Summary section of the 2012-2013 U.S. Department of Labor's *Occupational Outlook Handbook's (Handbook)* chapter on Market Research Analysts; and (2) a copy of a document entitled "Market Research Analyst: Job Duties, Requirements and Career Information," printed from the Internet site located at educationportal.com.

### **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.<sup>1</sup> The

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<sup>1</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).

The AAO reviewed all of the evidence submitted in support of the instant motion. Upon review of those submissions, the AAO finds that the petitioner has not provided any "new facts" and that the instant motion does not contain any "new" evidence. The AAO notes that even though the petitioner submitted a copy of the Summary section from the *Handbook* chapter on Market Research Analysts and a printout from educationportal.com, neither of these two documents presents new facts that were not earlier available and could not have been discovered or presented earlier in the adjudication of this petition.<sup>2</sup> 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 preceding decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy.

The subject of this present motion is the AAO's June 21, 2013 decision to dismiss the previously filed motion to reconsider. Where, as here, the subject of a motion to reconsider is an AAO decision to dismiss a previous motion to the AAO, the present motion must, when filed, also establish that the preceding AAO decision was incorrect based on the evidence of record at the time of that 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>

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<sup>2</sup> Additionally, the AAO notes another reason why the *Handbook* information presented in the copy of the Summary section cannot be considered "new," namely, the fact that the AAO has already addressed the pertinent *Handbook* chapter of which the Summary section is a part.

<sup>3</sup> 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

The AAO finds, however, that, on motion, the petitioner fails to establish that the AAO's June 21, 2013 decision to dismiss the previous motion was based on an incorrect application of law or USCIS policy to the evidence of record that was before the AAO at that time of its decision.

The present motion to reconsider consists of the Form I-290B, the assertions therein, and the two other aforementioned submissions. The AAO notes that the aforementioned *Handbook* excerpt is a proper item for consideration on this motion, as the *Handbook* chapter from which that Summary section was copied had already been cited, partially quoted, and considered by the AAO on appeal. However, as a motion to reconsider a decision must, by regulation, establish that the contested decision was incorrect based on the evidence of record at the time of that decision, the "Market Research Analyst: Job Duties, Requirements and Career Information" Internet printout will not be considered or accorded any weight, because that document was not evidence that was part of the record when the director considered the preceding motion. See 8 C.F.R. § 103.5(a)(3).

However, even if that newly submitted Internet document were considered, the totality of the submissions on motion would still fail to meet the requirements for a motion to reconsider.

The AAO finds that the statements on the Form I-290B merely constitute a recitation of the petitioner's view that "USCIS made an erroneous decision." Those statements do not include citations to appropriate statutes, regulations, or precedent decisions; and they do not specify in what respects, if any, the AAO's decision on the previous motion was based upon an incorrect application of law or Service policy to the evidence of record at the time of the decision. The AAO further finds that the two documents submitted with the Form I-290B "as additional evidence" contain no explanation as to how, if at all, the AAO's decision to deny the previous motion incorrectly applied any law or Service policy.

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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.

In short, the AAO finds that the Form I-290B assertions and the "additional evidence" documents do not articulate how any particular aspect of the AAO's decision on the previous motion misapplied any statute, regulation, precedent decision, or binding Service policy in adjudicating the issues and evidence that were within the scope of that motion.

To merit reconsideration of the AAO's decision to dismiss the preceding motion, 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 preceding motion; and (2) articulate how those standards cited on the present motion were so misapplied to the evidence before the AAO on the preceding motion as to result in a dismissal of that motion that should not have been rendered. Here, the submissions on motion fail to articulate how such standards were misapplied to the petitioner's evidence that was before the AAO when it decided to dismiss the previous motion to reconsider on June 21, 2013.

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 short, the AAO finds that the submissions on motion neither articulate nor establish that the AAO's decision on the prior motion 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).

#### **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.

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).

(b)(6)

*NON-PRECEDENT DECISION*

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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.