



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **AUG 29 2014** 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:

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 initially denied the nonimmigrant visa petition. Upon further review, the director subsequently reopened the matter, on Service motion, in order to afford the petitioner an additional opportunity to establish its eligibility for the benefit sought. In the reopened proceeding the director once again concluded that the petition should be denied, and she certified her decision to the Administrative Appeals Office (AAO) for review. On certification, we affirmed the director's decision. The matter is again before us on a combined motion to reopen and motion to reconsider. The combined motion will be dismissed.

I. PROCEDURAL BACKGROUND

The petitioner describes itself as a 45-employee provider of homecare services established in [REDACTED]. It seeks approval of this Petition for a Nonimmigrant Worker (Form I-129) so that it may employ the beneficiary as an H-1B temporary 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), and the related regulations at 8 C.F.R. § 214.2(h).

The petitioner filed the petition for a part-time position to which it assigned the job title "Deputy Controller." In support of this petition, the petitioner submitted a Labor Condition Application (LCA) certified for a job offer falling within the "Financial Managers" occupational category, at a Level I (entry-level) prevailing wage-rate, the lowest of the four assignable levels.

The director denied the petition on December 13, 2012, concluding that the petitioner had failed to establish that the proffered position is a specialty occupation. After the petitioner filed a Complaint for Writ of Mandamus and Declaratory and Injunctive Relief in Federal District Court, the director reopened the matter on Service motion on May 14, 2013 and issued a request for additional evidence (RFE) on that same date. Counsel submitted a timely response.

Not persuaded by the RFE response, the director issued a decision on the reopened proceeding on September 27, 2013. In that decision, the director denied the petition again on the ground that the evidence of record did not establish the proffered position as a specialty occupation and certified that decision to us for review.

On January 31, 2014 we concluded our certification review by issuing a decision that affirmed the director's September 27, 2013 decision to deny the petition. Our decision also included a new finding that we made in the course of our *de novo* review of the record of proceeding, namely, that the approval of the petition was also precluded by what we identified as "the failure of the evidence of record to establish that the beneficiary is qualified to perform the duties of a specialty occupation."²

¹ The petitioner provided a North American Industry Classification System (NAICS) Code of 621610, "Home Health Care Services." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "621610 Home Health Care Services," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited Aug. 29, 2014).

² As we noted in the decision, the AAO conducts review of service center decisions on a *de novo* basis and that it was in the course of this *de novo* review that we identified this additional ground for denial.

Our January 31, 2014 decision is now the subject of this combined motion reopen and motion to reconsider.

Counsel filed a timely Form I-290B, Notice of Appeal or Motion, on March 5, 2014, and he marked the box at Part 2, Item F of the form, which signifies the "filing of a motion to reopen and a motion to reconsider a decision."³ By the express terms of the form, by marking that box, counsel also attested that a "brief and/or additional evidence [was] attached" to the Form I-290B. However, in lieu of such attachments, counsel submitted a letter in which he requested an additional thirty days during which to submit a brief/and or additional evidence.

The requirements for a motion to reopen are described at 8 C.F.R. § 103.5(a)(2), and the requirements for a motion to reconsider are described at 8 C.F.R. § 103.5(a)(3). Although the regulation at 8 C.F.R. § 103.3(a)(2)(vii) allows for the submission of a brief and/or additional evidence after the filing of an *appeal*, the regulations contain no similar provision for the filing of a *motion*. In other words, in the case of a motion to reopen and/or a motion to reconsider the Form I-290B and any brief and/or additional evidence must be filed together; the documents submitted with the Form I-290B alone comprise that motion, and they cannot be supplemented at a later date. See 8 C.F.R. §§ 103.5(a)(2) and (3); 103.3(a)(2)(vii). That counsel did not comply with this requirement is not in dispute.

We received counsel's supplemental brief and additional evidence on April 16, 2014, 42 days after counsel filed the motion. However, because we received the supplemental brief and evidence before the service center returned the record of proceeding to us, we exercised our discretion and reviewed these late and improperly filed documents instead of returning them to counsel.

II. MOTION REQUIREMENTS

Before discussing the particular joint motion before us, we shall first review the requirements for its two components, namely (1) a motion to reopen the proceeding and (2) a motion for reconsideration of the decision that is the subject of the motion.

A. Overarching Requirement for Motions by a Petitioner

The provision at 8 C.F.R. § 103.5(a)(1)(i) includes the following statement limiting a U.S. Citizenship and Immigration Services (USCIS) officer's authority to reopen a proceeding or reconsider a decision to instances where "proper cause" has been shown for such action:

[T]he official having jurisdiction may, for proper cause shown, [a] reopen the proceeding or [b] reconsider the prior decision.

³ The Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, submitted with the Form I-290B lacked the requisite authorization signature from the petitioner. We issued two RFEs – on May 21 and July 7, 2014 – to resolve this discrepancy. We received timely responses to each RFE, and the second response clearly established counsel's authority to represent the petitioner on motion.

Thus, to merit reopening or reconsideration, the submission must not only meet the formal requirements for filing (such as, for instance, submission of a Form I-290B that is properly completed and signed, and accompanied by the correct fee), but the petitioner must also show proper cause for granting the motion. As stated in the provision at 8 C.F.R. § 103.5(a)(4), "[a] motion that does not meet applicable requirements shall be dismissed."

B. Requirements for Motions to Reopen

The regulation at 8 C.F.R. § 103.5(a)(2), *Requirements for motion to reopen*, states the following, in pertinent part:

A motion to reopen must [(1)] state the new facts to be provided in the reopened proceeding and [(2)] be supported by affidavits or other documentary evidence. . . .

This provision is supplemented by the related instruction at Part 3 of the Form I-290B, which states:⁴

Motion to Reopen: The motion must state new facts and must be supported by affidavits and/or documentary evidence.

Further, the new facts must possess such significance that, "if proceedings . . . were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case." *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992); *see also Maatougui v. Holder*, 738 F.3d 1230, 1239-40 (10th Cir. 2013).

C. Requirements for Motions to Reconsider

The regulation at 8 C.F.R. § 103.5(a)(1)(i)(3), *Requirements for motion to reconsider*, states:

A motion to reconsider must [(1)] state the reasons for reconsideration and [(2)] 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 [(3)], [(a)] when filed, also [(b)] establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

These provisions are augmented by the related instruction at Part 3 of the Form I-290B, which states:

⁴ The regulation at 8 C.F.R. § 103.2(a)(1) states, in pertinent part, the following:

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions . . . and such instructions are incorporated into the regulations requiring its submission.

Motion to Reconsider: The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions.

A motion to reconsider contests the correctness of the prior decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new facts. *Compare id.* and 8 C.F.R. § 103.5(a)(2).

A motion to reconsider should not be used to raise a legal argument that could have been raised earlier in the proceedings. *See Matter of Medrano*, 20 I&N Dec. 216, 219 (BIA 1990, 1991) ("Arguments for consideration on appeal should all be submitted at one time, rather than in piecemeal fashion."). Rather, any "arguments" that are raised in a motion to reconsider should flow from new law or a *de novo* legal determination that could not have been addressed by the affected party. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006) (examining motions to reconsider under a similar scheme provided at 8 C.F.R. § 1003.2(b)); *see also Martinez-Lopez v. Holder*, 704 F.3d 169, 171-72 (1st Cir. 2013). Further, the reiteration of previous arguments or general allegations of error in the prior decision will not suffice. Instead, the affected party must state the specific factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision. *See Matter of O-S-G-*, 24 I&N Dec. at 60.

III. THE SUBMISSIONS CONSTITUTING THIS JOINT MOTION

The submissions presented as the combined motion consist of two sets of documents. The first set, which was properly submitted within 30 days of our decision on certification, included the Form I-290B. The second set, submitted after the fact and considered in the exercise of our discretion, includes a brief and additional evidence.

The first set is introduced by a one-page March 4, 2014 cover letter which merely serves to identify its enclosures. Those enclosures are: (1) the aforementioned Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative; (2) the Form I-290B, Notice of Appeal or Motion; and (3) the aforementioned letter from counsel, identified as a "fax" to the AAO, requesting a "30 day extension in which to file a brief and additional evidence." We note that this first set of submissions asserts no grounds for either a motion to reopen or a motion to reconsider. In fact, the only entry at the Form I-290B's Part 3, Basis for the Appeal or Motion, reads: "Please see attached request for 30 day extension for filing a brief and supporting documentation."

The second set of submissions consists of a one-page April 15, 2014 cover letter from counsel and the additional documents submitted with it. These documents are (1) counsel's 8-page "Brief in Support of Motion to Reopen and Reconsider"; and (2) "Exhibit 1" to the brief, which consists of (a) a copy of a six-page "Specialty Occupation Assessment for the [P]osition Deputy Controller" provided to the petitioner by Professor [REDACTED] an accounting professor at [REDACTED] University; (b) a copy of Professor [REDACTED] six-page resume; and (3) a copy of a previously submitted March 7, 2014 Form I-797C that notes the AAO's receipt of the Form I-290B.

In his "Specialty Occupation Assessment,"⁵ Professor ██████ (1) describes the credentials he believes qualify him to opine upon the nature of the proffered position; (2) briefly lists some of the duties proposed for the beneficiary; (3) briefly discusses what he describes as the "Deputy Controller" entry in the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*;⁶ (4) states his opinion that the proffered position requires a bachelor's degree in finance or a related field; and (5) claims that similar organizations routinely recruit and employ individuals with at least a bachelor's degree in finance or a related field for parallel positions. However, we find that Professor ██████ Assessment document does not constitute probative evidence of the proffered position satisfying any of the specialty occupation criteria.

In his brief on appeal, counsel premises the motion-to-reopen component upon Professor ██████ Assessment document, stating the following:

Based upon the expert opinion letter, which was not previously available, petitioner hereby requests that USCIS reopen this matter and take the expert opinion letter into consideration in reaching a decision in this case.

We find that, as counsel does not provide any documentary support for his assertion that Professor ██████ opinion "was not previously available," the claimed unavailability is not established. The unsupported statements of 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). Accordingly, we will not regard Professor ██████ opinion as "not previously available." Also, we will later discuss why counsel's characterization of Professor ██████ Assessment as an "expert opinion" letter is not supported by the letter itself or the resume submitted with it.

That being said, there is another, fundamental aspect of Professor ██████ Assessment that undermines its value for the motion to reopen. Professor ██████ submission is no more than an opinion – albeit submitted for consideration as one by an expert - about facts and assertions of fact already presented in the record of proceeding. As such, and as clear in its content, Professor ██████ letter does not state new facts that would be presented if the proceeding were reopened.

Next, it is worth noting that Professor ██████ Assessment document nowhere argues or cites any specific statute, regulation, precedent decision - let alone any that would be relevant to determining whether the AAO misapplied any law, regulation, precedent decision, or Service policy to the evidence of record at the time we rendered our decision. This aspect of Professor ██████ submission also undermines its evidentiary value for the motion-to-reconsider component of this joint motion.

⁵ We will hereafter refer to this document as Professor ██████ Assessment document.

⁶ As noted in our January 31, 2014 decision, the AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.

We will now discuss why we find that Professor's [REDACTED] Assessment document does not merit any probative weight towards satisfying the requirements of either a motion to reopen or a motion to reconsider.

We will first address counsel's suggestion that Professor [REDACTED] should be regarded as an "expert" in the area in which he offered his Assessment document. In the opening paragraph of the document Professor [REDACTED] frames his letter as:

[P]rovid[ing] a professional opinion about (1) whether the position of Deputy Controller at [the petitioner] is a specialty occupation, [and] (2) whether a minimum of a Bachelor's degree in finance or a related field would be required for the position of Deputy Controller at [the petitioner].

We see that Professor [REDACTED] does not claim – and his resume does not indicate – that he has ever studied, surveyed, or otherwise obtained comprehensive and authoritative knowledge with regard to the home care industry in general, or with regard to the particular operations of business entities in that industry of the relative size and scope of the petitioner. We also see no claim in the Assessment document itself or in Professor [REDACTED] resume that he has conducted any scholarly research or published any papers or reports in the area of the H-1B specialty-occupation program or its governing statutes, policies, or regulations. Further, the record of proceeding includes no documentary evidence to remedy these material deficiencies in establishing Professor [REDACTED] as a person possessing such specialized knowledge as to be helpful in assessing the areas in which he offered his opinion.

Rather, from the content of the Assessment document, particularly its second paragraph, it appears that Professor [REDACTED] bases the value of his opinion upon (1) the many academic positions that he has held in accounting and in unspecified business-related subjects; (2) his membership in the [REDACTED] (whose membership requirements are not stated); (3) his having "served on the editorial review boards of accounting journals"; (4) his "regularly supervis[ing] accounting internships in both public accounting and industry positions" and (5) his "regularly engag[ing] in discussions with consultants, companies, and recruiters about positions and career paths in accounting, finance, and business" (although he does not mention any such contacts as relating to the particular type of position upon which he here opines). At least to the minimal extent in which Professor [REDACTED] background is presented, we see no reasonable basis to accord him any deference with regard to the areas upon which his Assessment document opines.

Next, looking for the factual foundation upon which Professor [REDACTED] bases his opinion, we see no evidence that he has ever visited the petitioner's premises; observed its operations; reviewed any of the matters which would engage the holder of the proffered position; interviewed any officials of the petitioner with regard to the substantive scope and substantive work of the proffered position, as it would actually be performed, or otherwise obtained sufficient knowledge of the actual requirements of the proffered position for us to accord his opinion any weight at all.

Further, we observe that Professor [REDACTED] asserts that his knowledge of the petitioner's particular position that is the subject of both this petition and his Assessment document is relegated to the

contents of the one May 2, 2012 letter which the owner submitted to USCIS. As evident in the excerpts that he quotes from that letter, we find that the information upon which Professor [REDACTED] bases his opinion is too generalized and abstract to form a reliable factual foundation with regard to what performance of the proffered position would involve in either actual work or in the application of any particular educational level of a body of highly specialized knowledge in any specific specialty. We note, too, that the weakness of this foundation is reflected in the following caveat provided by Professor [REDACTED]

[I] am forming my opinion based upon documents submitted to me for review. I am in no position to authenticate any of these documents and am forming my opinion based on the assumption that the documents are accurate. My professional opinion is limited to the information that I received and my educational and professional experience and judgment.

Furthermore, Professor [REDACTED] states that he produced his opinion and analysis "based on [the] documents submitted to me," which consisted of four items: (1) the May 2, 2012 letter from the petitioner submitted to the director in support of this petition; (2) the *Handbook*; (3) DOL's Occupational Information Network (O*NET OnLine); and (4) links to three job-vacancy announcements he found online. It therefore appears as though Professor [REDACTED] frame of reference for his opinions regarding the petitioner's business operations is limited solely to the petitioner's May 2, 2012 letter, which is less than two pages long. It does not appear as though Professor [REDACTED] visited the petitioner's business premises or communicated with anyone affiliated with the petitioner so as to ascertain what the performance of the general list of duties cited by the professor would actually require.

Nor does Professor [REDACTED] indicate that he reviewed any documentation regarding the petitioner and its business operations, beyond the brief May 2, 2012 letter. These factors raise further questions regarding the ability of Professor [REDACTED] to formulate a meaningful, reliable analysis of the job requirements of the duties he listed in his letter. Furthermore, given the brevity of the petitioner's May 2, 2012 letter, and Professor [REDACTED] apparent failure to review even minimal documentation regarding the petitioner's business efforts, the basis for certain claims by him, such as his assertion that the petitioner's business is "increasingly complex" is unclear. In short, while there is no standard formula or "bright line" rule for producing a persuasive opinion regarding the educational requirements of a particular position, a person purporting to provide such an expert evaluation should establish greater knowledge of that position than Professor [REDACTED] has done here.

Moreover, Professor [REDACTED] description of the position upon which he opines does not indicate that he considered, or was even aware of, the fact that the petitioner submitted an LCA that was certified for a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation which, as previously discussed, signifies that the beneficiary is only expected to possess a basic understanding of the occupation. We consider this a significant omission, in that it suggests an incomplete review of the position in question and a faulty factual basis for the professor's ultimate conclusion as to the educational requirements of the position upon which he opines.

As noted earlier, the LCA submitted by the petitioner in support of the instant position was certified for use with a job prospect within the "Financial Managers" occupational category, SOC (O*NET/OES) Code 11-3031, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels. The *Prevailing Wage Determination Policy Guidance* issued by DOL states the following with regard to Level I wage rates:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf (last visited Aug. 29, 2014).

The proposed duties' level of complexity, uniqueness, and specialization, as well as the level of independent judgment and occupational understanding required to perform them, are questionable, as the petitioner submitted an LCA certified for a Level I, entry-level position. The LCA's wage-level indicates that the proffered position is actually a low-level, entry position relative to others within the same occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to possess a basic understanding of the occupation; that she will be expected to perform routine tasks requiring limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results. As such, Professor [REDACTED] omission of such an important factor as the LCA wage-level significantly diminishes the evidentiary value of his assertions.

Professor [REDACTED] references to the *Handbook* and O*NET OnLine are also acknowledged. However, we discussed both of those resources in our January 31, 2014 decision and explained in detail why neither supports the proffered position as being a specialty occupation. Professor [REDACTED] does not address that portion of our discussion.⁷

⁷ In addition, although Professor [REDACTED] quotes from what he claims to be the *Handbook's* discussion of the "Deputy Controller" occupational category, we observe that the *Handbook* has no such category. It appears as though Professor [REDACTED] quoted from the *Handbook's* "Financial Managers" occupational category and replaced the term "Financial Managers" with "Deputy Controllers." Whether this was a typographical error or not, this issue further diminishes the probative value of his assertions.

With regard to the three job-vacancy announcements referenced by Professor [REDACTED] we note first that the record does not contain copies of the announcements. In making a determination of statutory eligibility, we are limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). The AAO's January 31, 2014 decision discussed the 22 job-vacancy announcements contained in the record of proceeding at length. Professor [REDACTED] however, does not address that discussion, and the record does not establish that the three job-vacancy announcements referenced by Professor [REDACTED] do not possess similar deficiencies.

Nor does Professor [REDACTED] address, let alone overcome, the supplemental finding we made in our decision that the present record of proceeding does not demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation.⁸

We may, in our discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

For all of these reasons, we find that Professor [REDACTED] Assessment document is not probative evidence toward satisfying any of the specialty occupation criteria. Consequently, the petitioner has not established that reopening this proceeding and considering the contents of Professor [REDACTED] letter would change the outcome of this case.⁹

IV. DISMISSAL OF THE MOTION TO REOPEN

While we have found that the record of proceeding does not substantiate counsel's claim that Professor [REDACTED] Assessment document was not previously available, we do not consider this factor to be the primary impediment to satisfying the requirements of this motion to reopen, despite the fact that the petitioner should have been able to request and submit this evaluation earlier in these proceedings. What does fatally reduce the evidentiary value of Professor [REDACTED] Assessment document, however, is that, as discussed earlier, it does not convey any "new facts" for consideration if the proceeding were to be reopened.

⁸ Dr. [REDACTED] general statements that the beneficiary is qualified to perform the duties of the proffered position are acknowledged. However, our finding that the beneficiary is not qualified to perform the duties of a specialty occupation was based primarily upon our finding that the record of proceeding lacked a copy of the academic record upon which the evaluator relied in reaching her conclusion with regard to the beneficiary's academic credentials. Accordingly, the evaluator had not established, and the AAO could not assess, the reliability of the evaluation. Dr. [REDACTED] does not address this portion of our January 31, 2014 decision.

⁹ It is worth noting further that this letter does not address, let alone resolve, most of the evidentiary issues we identified in our January 31, 2014 decision.

Further, even if Professor [REDACTED] Assessment document were viewed – mistakenly – as a "new fact" in and of itself, its content would not merit the reopening of the proceeding, either. As noted above, in addition to satisfying the minimum requirements at 8 C.F.R. § 103.5(a)(2), the petitioner must also establish that the new facts to be proven in a motion to reopen possess such significance that they would likely change the results of the case. *Matter of Coelho*, 20 I&N Dec. at 473; see also *Maatougui v. Holder*, 738 F.3d at 1239-40. Such is not the case here. Even if we considered the contents of Professor [REDACTED] Assessment document in a reopened proceeding, they would not change the outcome of our adjudication.

As Professor [REDACTED] Assessment document does not satisfy the requirements of a motion to reopen, the motion to reopen will therefore be dismissed.

"There is a strong public interest in bringing [a case] to a close as promptly as is consistent with the interest in giving the [parties] a fair opportunity to develop and present their respective cases." *INS v. Abudu*, 485 U.S. 94, 107 (1988). 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 petitioner and counsel have not met that burden.

V. DISMISSAL OF THE MOTION TO RECONSIDER

Nor does the evidence submitted by counsel on motion meet the requirements of a motion to reconsider. As noted, 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); Instructions for Motions to Reconsider at Part 3 of the Form I-290B.

As a preliminary matter, it is noted that even if we agreed with the arguments made by counsel in his brief, the petition would still not be approvable, because counsel does not address, let alone resolve, the numerous evidentiary issues we discussed at length in our January 31, 2014 decision. Counsel does not address those portions of our decision, articulate any error in them, or cite to any pertinent statutes, regulations, and/or precedent decisions to establish that those portions of our decision were based on an incorrect application of law or USCIS policy.

With regard to the specialty occupation issue, counsel argues that our decision affirming the director's finding in that regard was "contradictory to the [*Handbook's*] entry on financial managers and the pertinent O*Net sections. Both of these sources are routinely used by USCIS to determine job classifications." However, neither counsel nor any of the documents submitted on motion articulate specifically *how* we contradicted the *Handbook* and O*Net OnLine. Again, we discussed both of those resources in our January 31, 2014 and explained in detail why neither supports the

proffered position as being a specialty occupation. Counsel does not address that discussion, articulate any error in that discussion, or cite to any pertinent statutes, regulations, and/or precedent decisions to establish that the specialty occupation portion of our decision was based on an incorrect application of law or USCIS policy.¹⁰

Counsel makes two arguments with regard to the beneficiary-qualifications component of our January 31, 2014 decision, neither of which is persuasive. First, counsel contends that we erred in according no evidentiary weight to the evaluation of the beneficiary's education because the record of proceeding did not contain a copy of the academic record upon which the evaluator relied in arriving at her conclusion. According to counsel, "[t]ypically only a copy of the degree and evaluation report are required for an H-1B application." Counsel does not cite any pertinent statutes, regulations, and/or precedent decisions to support his assertion or otherwise prove that this portion of our decision was based on an incorrect application of law or USCIS policy. Nor does he discuss our stated reasons for arriving at our conclusion to accord no weight to the evaluation or address the legal authorities we cited in support of that conclusion. Regardless, the regulations provide USCIS with the authority to request and consider any "evidence as [it] may independently require to assist [its] adjudication." 8 C.F.R. § 214.2(h)(9)(i); *see also* 8 C.F.R. § 103.2(b)(8).

Second, counsel states that we erred in finding that the evaluation does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). As discussed in our January 31, 2014 decision, 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) allows a petitioner to demonstrate that the beneficiary of a petition is qualified to perform the duties of a specialty occupation when the evidence of record shows that the beneficiary both (1) "[has] education, specialized training, and/or progressively responsible experience" that is equivalent to the completion of a United States baccalaureate or higher degree in the specialty occupation, and (2) "[has] recognition of expertise in the specialty through progressively responsible positions directly related to the specialty." As we explained in our January 31, 2014 decision, equivalence to completion of a United States baccalaureate or higher degree under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) is determined by one or more of the five factors set forth at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1)-(5). We found that the evaluation of the beneficiary's education did not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), the first of those five factors, because the evidence of record does not, in the words of that regulation, establish that evaluator who prepared that evaluation had "authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience."

On motion, counsel claims first that "this statement is clearly erroneous," but then concedes that "[t]his is not a case where professional experience is being used to establish that an individual has the equivalent of a Bachelor's degree based on years of work experience." In other words, after first arguing that we erred in finding that the evaluation did not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(D)(1),

¹⁰ Professor [REDACTED] Assessment document is not pertinent to the motion-to-reconsider portion of the instant decision because it was issued after our January 31, 2014 decision. As noted above, 8 C.F.R. § 103.5(a)(3) requires that a motion to reconsider a decision on an application establish that the decision was incorrect based on the evidence of record at the time of the initial decision. Dr. [REDACTED] letter was not a part of the evidence of record at the time of our January 31, 2014 decision.

counsel states that the petitioner was not even *attempting* to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(D)(I). In any event, as was the case above, counsel does not cite any pertinent statutes, regulations, and/or precedent decisions to support his assertion or otherwise prove that this portion of our decision was based on an incorrect application of law or USCIS policy. Nor does he discuss our stated reasons for arriving at our conclusion that the evaluation does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(D)(I) or address the legal authorities we cited in support of our conclusion.

As discussed above, counsel does not address each portion of our January 31, 2014 decision. Nor do we find persuasive any of the arguments he makes with regard to those portions of our decision that he does elect to address on motion. Furthermore, none of counsel's arguments are supported by any pertinent statutes, regulations, and/or precedent decisions to establish that our January 31, 2014 decision was based on an incorrect application of law or USCIS policy. The motion to reconsider must therefore be dismissed in accordance with 8 C.F.R. § 103.5(a)(4) as it fails to meet the applicable requirements.

VI. CONCLUSION AND ORDER

The two sets of documents presented as the combined motion to reopen and reconsider do not satisfy the requirements of either a motion to reopen or a motion to reconsider. However, even if we overlooked that factor and considered the merits of the submitted documents and the arguments made therein, they would still fail to establish error in our January 31, 2014 decision. The combined motion to reopen and reconsider will therefore be dismissed, and our January 31, 2014 decision will be affirmed.

The petitioner should note 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 combined 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. The AAO's decision dated January 31, 2014 is affirmed.