



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JAN 31 2014 OFFICE: VERMONT SERVICE CENTER



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 Director of the Vermont Service Center denied the nonimmigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO) and the AAO dismissed the appeal. On August 19, 2013, the petitioner filed a joint motion to reopen and reconsider. The joint motion will be dismissed.

On the Form I-129 visa petition, the petitioner describes itself as a retail business established in 2005. In order to employ the beneficiary in what it designates as an accountant 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, 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 statutory and regulatory provisions. Thereafter, on December 7, 2012, counsel for the petitioner submitted a Notice of Appeal or Motion (Form I-290B), indicating that he was submitting an appeal of the director's denial of the petition to the AAO. The AAO reviewed the evidence and determined that the record of proceeding contained insufficient evidence to establish eligibility for the benefit sought. The AAO dismissed the appeal.

The petitioner's counsel subsequently submitted another Form I-290B. As indicated by the check mark at Box F of Part 2 of the Form I-1290B, the petitioner filed a joint motion to reopen and reconsider. The joint motion before the AAO contains: (1) the Form I-290B; (2) the AAO's decision dated July 19, 2013; (3) a brief prepared by counsel; (4) financial documents, including a 2012 report and tax documents; (5) a letter, dated April 20, 2012, from [REDACTED] and a copy of his curriculum vitae; (6) a letter from [REDACTED] dated July 16, 2008, along with documentation regarding the [REDACTED] and (7) a document entitled "Supporting Documentation for H-1B Petitions," which appears to be dated November 1995.

The AAO reviewed the record of proceeding in its entirety before issuing its decision. The AAO notes that the petitioner failed to comply with the regulatory filing requirements for motions to reopen and motions to reconsider. 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 be dismissed for this reason.

Although the motion will be dismissed for the petitioner's failure to comply with the filing requirements, the AAO nonetheless reviewed the motion, and finds that even if the petitioner had complied with the requirements of 8 C.F.R. § 103.5(a)(1)(iii)(C), both the motion to reopen and the motion to reconsider would have been dismissed, as discussed below.

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 that which 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 has reviewed all of the evidence submitted in support of the instant motion. Upon review of the submission, the AAO observes that the petitioner and counsel have not provided any new, material facts. Thus, it fails to meet the requirements for a motion to reopen at 8 C.F.R. § 103.5(a)(2).

More specifically, the AAO finds that the majority of the evidence provided in support of the motion to reopen was previously submitted in prior proceedings. Documents provided for the first time on motion include a financial report and tax documents for the petitioner, along with a document entitled "Supporting Documentation for H-1B Petitions." In regard to the financial and tax documents, the AAO observes that similar evidence, including quarterly tax returns for 2012 and financial documents for a portion of 2012, were previously provided and considered by the AAO on appeal. The document entitled "Supporting Documentation for H-1B Petitions" was previously available during the prior proceeding. Counsel has not established any new, material facts that are relevant to the issue here.² The AAO reviewed all of the documentation submitted on motion, but finds that it does not provide new, material facts upon which to reopen the instant petition.

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*

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

² Furthermore, the AAO notes that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1).

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. As stated above, the instant motion will be dismissed for the petitioner's failure to comply with the filing requirements provided at 8 C.F.R. §103.5(a)(1)(iii). However, had the motion to reopen been properly filed, it would nonetheless have been dismissed pursuant to the above analysis for the petitioner's failure to establish new, material facts in support of the motion.

Turning to the petitioner's motion to reconsider, the AAO again notes that as the motion was not properly filed pursuant to 8 C.F.R. §103.5(a)(1)(iii), it will be dismissed for that reason. However, the AAO reviewed the entire record of proceeding prior to issuing this decision, and finds that even if the petitioner had complied with the filing requirements, the AAO would have nonetheless dismissed the motion. 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 a 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.³ In his brief, counsel reiterates arguments previously made in response to the director's request for additional evidence and again on appeal. Counsel has not established that the prior decision was based on an incorrect application of law or USCIS policy.

³ 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 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 the instant case, counsel states his disagreement with the decision and suggests that the AAO's decision should be reversed, but has not submitted any document that would meet the requirements of a motion to reconsider. Moreover, counsel has not established that the decision was incorrect based on the evidence of record that was before the AAO at the time of its initial decision. Thus, the petitioner and counsel have failed to comply with the requirements of a motion to reconsider. Therefore, had the motion to reconsider been properly filed, it would nonetheless be dismissed for this reason.

As previously discussed, the instant motion does not meet the applicable filing requirement. Accordingly, it must be dismissed. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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).

Title 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the joint motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The joint motion is dismissed.