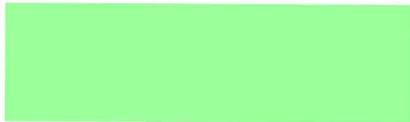




U.S. Citizenship
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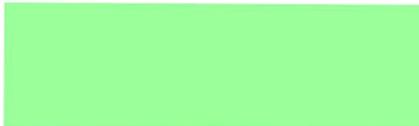


Date: **JUL 14 2014**

Office: VERMONT SERVICE CENTER

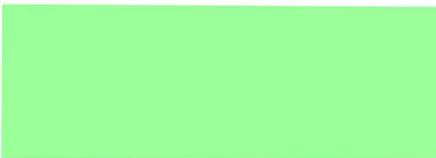
File: 

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)

IN BEHALF OF PETITIONER:

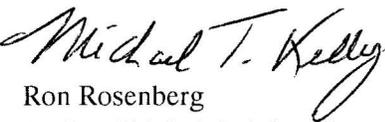


INSTRUCTIONS:

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
Acting Chief, Administrative Appeals Office

DISCUSSION: On May 12, 2011, the Director of the California Service Center denied the nonimmigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and we dismissed the appeal on November 7, 2012. On December 6, 2012, counsel for the petitioner filed a motion to reopen and motion to reconsider. The joint motion will be dismissed pursuant to 8 C.F.R. §§ 103.5(a)(1)(iii)(C) and 103.5(a)(2), (3), and (4).

On the Form I-129 petition, the petitioner describes itself as a fast-food restaurant established in 1992, with 20 employees and a gross annual income of approximately \$670,000. It seeks to employ the beneficiary in what it claims is a finance manager position, and thus seeks to employ the beneficiary 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 proffered position was not a specialty occupation, and we dismissed the petitioner's subsequent appeal. The AAO decision that is the subject of this joint motion affirmed the director's finding that the beneficiary would not be employed in a specialty occupation position, and, in addition, it noted that the beneficiary was not qualified to perform the duties of a specialty occupation position.

On motion, counsel contends that the decisions of both the service center and the AAO were based upon mistakes in law and mistakes of fact. We will focus on our decision to dismiss the petitioner's appeal, because, in accordance with the regulations governing motions, as the latest agency decision, that decision is the proper subject of this joint motion.

As indicated by the check mark at box F of Part 2 of the Form I-290B, counsel for the petitioner elected to file both a motion to reopen and a motion to reconsider.

I. Evidentiary Standard

As a preliminary matter, and in light of counsel's references to the requirement that we apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within its purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Id.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support counsel's contentions on motion that the petition at issue be reopened or reconsidered.

Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the petitioner has not satisfied the requirements for either a motion to reopen or a motion to reconsider. Accordingly, the joint motion will be dismissed.

II. MOTION REQUIREMENTS

We will now discuss why the submission constituting the combined motion would not have satisfied the substantive requirements for either a motion to reopen or a motion to reconsider. For the reasons discussed below, we conclude that the joint motion must be dismissed because the motion does not merit either reopening or reconsideration.

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 USCIS officer's authority to reopen the proceeding or reconsider the decision to instances where "proper cause" has been shown for such action:

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

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), "*Processing motions in proceedings before the Service*," "[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:

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:¹

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)(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:

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

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, 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* 8 C.F.R. § 103.5(a)(3) 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. DISCUSSION AND ANALYSIS

The submission constituting the combined motion consists of the following: (1) a letter signed by the petitioner's counsel; (2) the Form I-290B; (3) an eight-page brief submitted by counsel; and (4) documentary evidence previously submitted into the record.

The documentary evidence consists of copies of the following:

1. A Form I-797A, Notice of Action, reflecting that a previous H-1B petition filed by a different employer on behalf of the beneficiary had been approved for the period October 1, 2007 until September 28, 2010.
2. The Form I-129, Petition for Nonimmigrant Worker, pertaining to the present petition, which was filed on August 19, 2010;
3. The certified Labor Condition Application (LCA) and supporting documentation regarding the prevailing wage and occupational classification for the present petition;
4. The Form I-129, Petition for Nonimmigrant Worker, which pertains to the previously approved H-1B petition that had been filed by another employer;
5. The director's decision dated May 12, 2011;
6. Our decision dismissing the petitioner's appeal, dated November 7, 2012;
7. A two-page "I-LINK" document that had been previously submitted into the record as an excerpt from what counsel described as "USCIS' Standard Operating Procedures (SOPs) for H-1B Adjudication, July 26, 2007." (It appears to be an

excerpt from an edition of the U.S. Citizenship and Immigration Services Adjudicator's Field Manual (AFM) outlining standard operating procedures for adjudication of H-1B petitions involving a specialty occupation.

The brief on motion further relies on a portion of the 2010-2011 edition of the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* pertaining to Financial Managers, which was previously submitted into the record in support of the appeal.²

A. Dismissal of the Motion to Reopen

Upon review of the evidence, we observe that most of the documents submitted on motion were previously a part of the record of proceeding. The excerpts from the AFM was previously available and could have been submitted with the initial petition, in response to the RFE, or with the appeal.

In any event, we find that neither the Form I-290B, the brief on motion, nor any document submitted on motion "state[s] new facts" or constitutes new facts to be provided if the proceeding were to be reopened. It logically follows, of course, that, without showing such new facts to be provided if the motion were to be reopened, the motion also fails to establish new facts so significant as to likely change the outcome of this case if the proceeding were reopened for their consideration. Even if they constituted evidence of new facts to be provided in a reopened hearing – which is not the case – the documents submitted on motion have little or no probative value towards establishing the proffered position as satisfying the statutory and regulatory provisions for a specialty occupation.

Moreover, counsel reasserts many of the same arguments presented to us in the appeal brief dated June 8, 2011, and provides no statements addressing the requirements of a motion to reopen or assertions regarding the manner in which the motion meets such requirements.

"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 its counsel have not met that burden.

B. Dismissal of the Motion to Reconsider

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

² This document is cited to in the motion as "Tab E;" however, a review of the supporting documents reveals that this excerpt from the *Handbook*, included as an exhibit with the petitioner's appeal, was not resubmitted as an exhibit in support of the motion.

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) (detailing the requirements for a motion to reconsider).

Counsel for the petitioner asserts that we erred by failing to consider the uniqueness of the proffered position and by failing to give proper weight to the services the petitioner provides to the public. The documents constituting this motion do not, however, articulate how our decision on appeal misapplied any pertinent statutes, regulations, or precedent decisions to the evidence of record when the decision to dismiss the appeal was rendered. The petitioner has therefore not submitted any document that would meet the requirements of a motion to reconsider. Accordingly, the motion to reconsider must be dismissed.

Although not required to do so, we will now make some additional comments, to highlight flaws with some of the arguments on motion.

The petitioner has not substantiated its characterization of the proffered position as the same as the one that had been approved for the beneficiary's H-1B employment by the previous employer. As was stated in the AAO decision that is the subject of this motion, it is not a position's title that will most determine recognition of a position as specialty occupation position. Rather, the most determinative factors are the extent, quality, and weight of the evidence addressing the substantive nature of the particular position and its specific performance requirements. The evidence of record before us, however, does not establish that the prior approved position and the one now before us were substantially the same. In a similar vein, we note that while counsel asserts on motion that the duties as initially described in the record were sufficient to establish the proffered position as a specialty occupation, he does not articulate where and how the record before us on appeal established that, described as they were in terms of relatively abstract statements of generalized functions, the actual performance of the proffered duties would require at least a bachelor's degree, or the equivalent, in a specific specialty.

Further, the petitioner should also note that, even if the evidence of record before us on appeal had shown that the proffered position were substantially the same as the position in the previously approved petition, that fact would not have relieved us of the responsibility to determine the appeal on the basis of the merits of the particular evidence before us with regard to the specialty occupation issue in the present petition. 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, our 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 the nonimmigrant petitions on behalf of the beneficiary, we 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 petitioner errs in relying on the beneficiary's qualifications as evidence establishing the proffered position as a specialty occupation, for evidence of a beneficiary's credentials is relevant to determining whether the position in which he or she would work is a specialty occupation.

Finally, we also note that, while the motion argues that the beneficiary holds the equivalent of a U.S. bachelor's degree in a specific specialty by virtue of his education and experience, the motion fails to articulate a legal basis in statute, regulation, precedent decisions, or case law for establishing that we were incorrect in our determination on appeal that neither the evaluation of experience and education submitted into the record nor any other evidence of record satisfied the beneficiary-qualification requirements specified in the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(C) & (D).

C. Additional Basis for Dismissal

The motion shall also 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 motion does 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 motion did 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.

Finally, 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).

IV. CONCLUSION

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 our previous decision will not be disturbed.

ORDER: The combined motion is dismissed.