

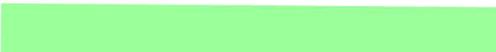


U.S. Citizenship
and Immigration
Services

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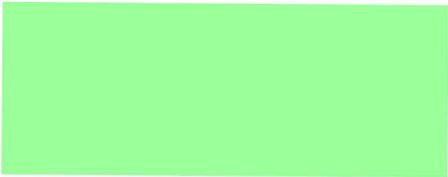


DATE: **MAY 20 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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)

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 denied the nonimmigrant visa petition. The petitioner and its counsel appealed this denial to the Administrative Appeals Office (AAO) and, the AAO dismissed the appeal. The matter is again before the AAO on a motion to reopen and a motion to reconsider. The combined motion will be dismissed.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center. The petitioner describes itself as a specialty food manufacturing business that was established in 2010.¹ In order to employ the beneficiary in what it designates as an accountant 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 statutory and regulatory provisions. Thereafter, the petitioner and its counsel submitted an appeal of the decision. 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. The AAO dismissed the appeal.

The matter is once again before the AAO. As indicated by the check mark at box F of Part 2 of the Form I-290B, the petitioner and its counsel elected to file a motion to reopen and a motion to reconsider. On motion, counsel for the petitioner submits a brief and additional documentation. The AAO reviewed the record of proceeding in its entirety before issuing its decision.

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. 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 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).

In the instant case, the petitioner and counsel submitted the following documents:

¹ On the Form I-129, the petitioner stated that it has seven employees. In response to the RFE, the petitioner provided a "Declaration" dated November 5, 2012. In the "Declaration," the petitioner certified that it has a "total of 18 employees." The petitioner's "Employer's Quarterly Contribution and Wage Report" for the quarter ending 09/30/12 indicates that wages were paid to 22 individuals. The list of employees, submitted on motion, indicates that the petitioner has 21 employees.

- (1) job vacancy announcements;
- (2) a letter from the petitioner, dated December 29, 2013;
- (3) tax related documents;
- (4) copies of the petitioner's invoices for equipment and leasehold improvements;
- (5) a list of the petitioner's employees.

Although many of the documents are dated subsequent to the prior proceeding in this matter, it must be noted that the content of the documents does not provide any new material facts. The petitioner and counsel have not established that the evidence submitted on motion was material, previously unavailable and could not have been presented in the previous proceeding. The petitioner and its counsel have not provided a valid reason for not previously submitting such evidence. Further, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

The petitioner could have previously provided any evidence it deemed appropriate to meet its burden of proof. The fact that the petitioner elected to provide this type of previously available and discoverable evidence on motion, does not render it "new" evidence for the purpose of the instant motion to reopen. As the petitioner was previously put on notice and provided with a reasonable opportunity to provide the required evidence, the evidence submitted on motion will not be considered "new" and will not be considered a proper basis for a motion to reopen. With the instant motion, the petitioner presented no facts or evidence that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen. 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. The motion to reopen will be dismissed.

The AAO will now consider the petitioner's 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 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) and the instructions for motions to reconsider at Part 3 of the Form I-290B.²

² 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

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.

In the instant case, the petitioner and counsel claim that the proffered position qualifies as a specialty occupation. The AAO notes that the petitioner and counsel made this assertion on appeal. Although the petitioner states its disagreement with the prior decision, the petitioner does not cite a statutory or regulatory authority, case law, or precedent decision to establish that the decision was based on an incorrect application of law or USCIS policy. The petitioner has not established that the decision was incorrect based on the evidence of record at the time of the decision. In short, the petitioner has not submitted evidence that would meet the requirements of a motion to reconsider. Thus, the motion to reconsider must be dismissed.

In addition, the motion shall be dismissed for failing to meet another applicable filing requirement. Specifically, the regulation at 8 C.F.R. § 103.5(a)(1) states the following:

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.

(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 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 also be dismissed for this reason.

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).

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. Accordingly, the combined motion will be dismissed, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The combined motion is dismissed.