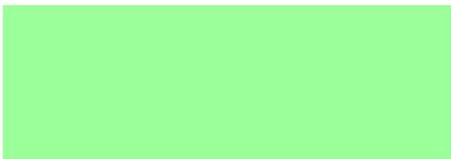
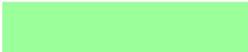


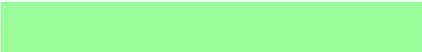


U.S. Citizenship  
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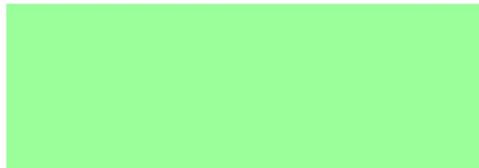


DATE: FEB 24 2015 Office: VERMONT SERVICE CENTER File: 

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)

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,

  
for Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director of the California Service Center denied the nonimmigrant visa petition, and the Administrative Appeals Office (AAO) dismissed the petitioner's appeal. The matter is again before the AAO on a motion to reopen. The motion will be dismissed pursuant to 8 C.F.R. §§ 103.5(a)(1)(iii)(C), 103.5(a)(2), and 103.5(a)(4).

## I. PROCEDURAL BACKGROUND

The petitioner seeks to extend the employment of 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) in a position to which it assigned the job title of "Manager of Administrative Support."

The director denied the petition, concluding that the evidence of record fails to demonstrate that the proffered position qualifies as a specialty occupation.

The petitioner filed an appeal of the director's decision, which we dismissed on August 26, 2014. The matter is once again before us on a motion to reopen. Counsel filed a timely Form I-290B, Notice of Appeal or Motion, on September 26, 2014, and he marked the box at Part 3, Item 2(f) of the form, which signifies the "filing of a motion to reopen and a motion to reconsider a decision." On motion, counsel submits a seven-page letter accompanied by additional documentation.

## II. MOTION REQUIREMENTS

We will now discuss why the submission constituting the combined motion does not satisfy 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:<sup>1</sup>

**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:

**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).

<sup>1</sup> 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.

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 seven-page letter signed by the petitioner's counsel; (2) the Form I-290B; and (3) documentary evidence, which consists of copies of the following:

1. Our decision dated August 26, 2014 dismissing the petitioner's appeal; and
2. Five job advertisements for positions the petitioner claims are for positions parallel to the proffered position within the petitioner's industry.

#### A. Dismissal of the Motion to Reopen

Upon review of the evidence, we observe that the type of documents submitted on motion – specifically, the five job advertisements – was previously available within the petitioner's industry. While the exact postings submitted on motion may not have been available during adjudication of this petition, there is no showing that firms within the petitioner's industry were not advertising for similar positions at the time of adjudication of the petition by the service center and that, therefore, similar evidence could not have been submitted at the time of the petition's filing.

In any event, we find that neither the Form I-290B, the brief on motion, nor any of the job postings submitted on motion "state[s] new facts" or constitute 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 appeal proceeding 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.

On motion, counsel asserts simply that the proffered position is specialized and complex, and further contends that the record demonstrates that the position requires an individual with a minimum of a bachelor's degree in business administration to perform the duties of the position. We note, however, that counsel provides no statements addressing the specific findings we

articulated in our August 26, 2014 decision. Counsel outlines no new facts upon which the motion to reopen is based, and further fails to support the motion with accompanying affidavits or documentary evidence in support of new facts and their likely positive impact towards changing the result of our decision on the appeal. In sum, counsel has not made any assertions regarding the manner in which the motion meets the regulatory requirements.

Despite the petitioner's submission of documents (job advertisements) not previously included in the record, a review of the evidence submitted on motion reveals no fact that could be considered *new* under 8 C.F.R. § 103.5(a)(2). 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>2</sup> Generally, the new facts submitted on motion must be material and unavailable previously, and could not have been discovered earlier in the proceeding. See 8 C.F.R. § 1003.23(b)(3).

Here, no evidence in the motion contains new facts that were previously unavailable. The type of evidence submitted was either previously submitted, previously available, or previously discoverable, and, as such, could have been discovered or presented in the previous proceeding. The regulation at 8 C.F.R. § 103.2(b)(12) requires that the petition be denied when evidence submitted does not establish eligibility at the time of filing.

Further, even if the documents submitted on motion were viewed – mistakenly – as "new facts," their 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. It is not apparent that if we considered the contents of these documents in a reopened proceeding, they would likely change the outcome of our adjudication.

Although the motion does not meet the regulatory requirements, we will restate here our findings in our August 26, 2014 decision, where we noted that the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* does not indicate that at least a bachelor's degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the proffered position. Although the *Handbook* states that some administrative services managers need a bachelor's degree to enter the occupation, the *Handbook* indicates that the duties of this occupational category can be performed by an individual with a high school diploma or GED diploma. In addition, the narrative of the *Handbook* reports that for those positions where a bachelor's degree may be necessary, a major or academic concentration in one of a variety of disparate fields (such as business, engineering, and facility management) would be acceptable. See U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Administrative Services Managers," <http://www.bls.gov/ooh/management/administrative->

<sup>2</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 II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

services-managers.htm#tab-4 (last accessed February 18, 2015). Furthermore, counsel's assertion on motion that the proffered position requires a minimum of a bachelor's degree in business administration for entry into the occupation is misplaced. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

The documentation submitted by the petitioner does not satisfy the requirements of a motion to reopen. The motion, therefore, will 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 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 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 once again asserts that the proffered position is the same position in job title and duties as the previously approved H-1B petition filed by the petitioner on behalf of the beneficiary. Counsel also references, as he did on appeal, an April 23, 2004 memorandum authored by William R. Yates (hereinafter Yates memo) as establishing that USCIS must give deference to the prior approval in this matter. Memorandum from William R. Yates, Associate Director for Operations, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, HQOPRD 72/11.3 (Apr. 23, 2004).

While counsel's reliance on the Yates memo is noted, the documents constituting this motion do not persuasively articulate how our previous decision dismissing the petitioner's appeal misapplied any pertinent statutes, regulations, or precedent decisions to the evidence of record when the decision to dismiss the appeal was rendered.

Counsel's assertion that we misapplied internal guidance provided in the Yates memo is not sufficient to warrant reconsideration in this matter. We point out that the Yates memo specifically states as follows:

[A]djudicators are not bound to approve subsequent petitions or applications seeking immigration benefits where eligibility has not been demonstrated, merely because of a prior approval which may have been erroneous. *Matter of Church Scientology International*, 19 I&N 593, 597 (Comm. 1988). Each matter must be decided according to the evidence of record on a case-by-case basis. See 8 C.F.R. § 103.8(d). . . . Material error, changed circumstances, or new material information must be clearly articulated in the resulting request for evidence or decision denying the benefit sought, as appropriate.

Thus, the Yates memo does not advise adjudicators to approve an extension petition when the facts of the record do not demonstrate eligibility for the benefit sought. Although counsel asserts that the "subjective findings" of prior adjudicators should be given deference, read in its entirety the memo counsels only that such findings be given only such deference as warranted by the particular facts pertaining to the specific petition under review. The memorandum's language quoted immediately above acknowledges that an extension petition should not be approved, where, as here, the evidence of record has not demonstrated that the position which is the subject of the petition is a specialty occupation.

Again, as indicated in the Yates memo, we are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g., *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). If the previous nonimmigrant petition was approved based on the same description of duties and assertions that are contained in the current record, that prior approval would constitute material and gross error on the part of the director. It would be unreasonable to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988). 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 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 nonimmigrant petitions on behalf of a 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).

As stated above, the petitioner has not submitted any document that would meet the requirements of a motion to reconsider. Accordingly, the motion to reconsider must be dismissed.

Finally, the joint 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.

#### IV. CONCLUSION

The documents presented as the joint motion to reopen and the motion to reconsider do not satisfy the regulatory requirements. 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 August 26, 2014 decision. The combined motion will therefore be dismissed, and our August 26, 2014 decision will be affirmed.

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).

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 decisions will not be disturbed.

**ORDER:** The combined motion is dismissed.