U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 16 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal and affirmed that decision on a motion reconsider. The matter is now before the AAO on a motion to reopen.

The petitioner is a Mexican restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification filed on October 29, 1997, and approved by the Department of Labor (DOL), on May 4, 1998. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The AAO upheld the director's decision and the petitioner's counsel subsequently filed a motion to reconsider. In a decision dated March 25, 2002, the AAO affirmed its previous decision. Following that decision counsel filed a motion to reopen.

In support of the motion to reopen counsel submits a letter but no additional evidence. Counsel's motion continues to assert that the record establishes that the petitioner has met its burden and has demonstrated that it has the ability to pay the proffered wage, and also asserts that the petitioner need not show anything other than the petitioner's ability to pay the wage in the initial year of filing the petition. (Counsel's Letter at p.1.)

We are not persuaded by counsel's argument and the motion fails, as it does not satisfy the regulatory requirements which provide:

> 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.

8 C.F.R. § 103.5(a)(2)

When used in the context of a motion to reopen in analogous legal disciplines, the terminology "new facts" or "new evidence" has been determined to be evidence that was previously unavailable during the prior proceedings. In removal hearings and other proceedings before the Board of Immigration Appeals, "[a] motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. § 3.2 (1999). In examining the authority of the Attorney General to deny a motion to reopen in deportation proceedings, the Supreme Court has found that the appropriate analogy in criminal procedure would be a motion for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992) *INS v. Abudu*, 485 U.S. 94, 100 (1988). In federal criminal proceedings, a motion for a new trial based on newly discovered evidence "may not be granted unless...the facts discovered are of such nature that they will probably change the result if a new trial is granted,...they have been discovered since the trial and could not by the exercise of due diligence have been discovered earlier, and...they are not merely cumulative or impeaching." *Matter of Coelho*, 20 I&N Dec. 464, 472 n.4 (BIA 1992) (quoting *Taylor v. Illinois*, 484 U.S. 400, 414 n.18 (1988)).

A review of the motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2). Counsel has submitted no new evidence. His motion simply restates arguments previously made and takes issue with the conclusions previously reached in this case.

For these reasons, the motion may not be granted. Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, supra, at 323 (citing *INS v. Abudu*, 485 U.S. at 107-108). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, supra, at 110.[1]

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motion to reopen is dismissed.

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[1] Even if we were to treat counsel's filing as a motion to reconsider and grant the motion to reconsider, we would nevertheless affirm the previous decision. Contrary to counsel's assertion that the petitioner need only establish the ability to pay the proffered wage on the date of filing, 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate that it has the ability to pay the proffered wage, "at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence."