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

U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: WAC 04 167 50956 Office: CALIFORNIA SERVICE CENTER Date: JUN 04 2007

IN RE: Petitioner: [redacted]
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:

[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, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen. The motion will be dismissed.

The petitioner is a business providing professional engineering and consulting services, with four employees. It seeks to employ the beneficiary as a network systems and data communications analyst and endeavors 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 (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition on the ground that the proffered position is not a specialty occupation. The AAO affirmed the director's findings.

The regulation at 8 C.F.R § 103.5 provides in pertinent part that "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." "New" facts are those that were not available and could not reasonably have been discovered or presented in the previous proceeding. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The motion to reopen is not supported by new facts that were unavailable that could not reasonably have been discovered or presented in previous proceedings. The "new facts" submitted by the petitioner is a restatement of the job duties of the proffered position by [redacted] the end user of the beneficiary's services. The new duty description, however, was prepared by the end user on January 17, 2006, and it is stated that the job description shall be an addendum to the software maintenance contracts under which the beneficiary is employed. The original Form I-129 petition was filed on May 21, 2004. Thus, the new duty statement was not in existence when the original Form I-129 was filed and may not now be used by the petitioner to establish eligibility for the petition. Since the record does not contain any evidence of a duty description from TMCS detailing the duties of the beneficiary at the time the present petition was filed, the record does not establish that the proffered position meets any of the requirements of a specialty occupation under the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed (the end user) is the "more relevant employer." The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services (the petitioner's clients). The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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. 1978).

A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). In visa petition proceedings, the burden of proving eligibility remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion is dismissed. The previous decision of the AAO dated December 23, 2005 is affirmed. The petition is denied.