U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

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DATE: NOV 2 9 2012 OFFICE: CALIFORNIA SERVICE CENTER FILE: [redacted]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: On November 5, 2009, the service center director denied the nonimmigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO) and, on November 10, 2011, the AAO dismissed the appeal. The matter is again before the AAO on a combined motion to reopen and motion to reconsider. The motion will be dismissed.

On the Form I-129 visa petition, the petitioner describes itself as a non-profit public benefit corporation established in 2001. In order to employ the beneficiary in what it designates as a computer systems analyst position, the petitioner seeks 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, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the statutory and regulatory provisions. The AAO affirmed the director's denial and dismissed the appeal.

The matter is once again before the AAO on a motion to reopen and/or reconsider. As indicated by the check mark at box F of Part 2 of the Form I-290B, counsel for the petitioner elected to file a combined motion to reopen and motion to reconsider.

On motion, counsel for the petitioner submits a brief accompanied by documentary evidence, and contends that the proffered position qualifies as a specialty occupation based on its complexity relative to other computer systems analyst positions.

In this matter, the motion consists of the Form I-290B, a brief in support of the motion, and copies of the following documents: (1) a letter dated December 8, 2011 from the petitioner; (2) an excerpt entitled "Enterprise resource planning" from Wikipedia; (3) job vacancy announcements; (4) an opinion letter dated December 7, 2011 from [redacted] of Seattle Pacific University; and (5) the curriculum vitae of [redacted]

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 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.[1]

On motion, counsel submits only evidence that was previously available and could have been submitted in the prior proceedings. For example, the Wikipedia excerpt could previously have been submitted with the petition or in response to the director's RFE issued on August 3, 2009.

[1] 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).

Moreover, [redacted] opinion letter could also have been obtained and submitted with the petition or in response to the RFE.

Again, a motion to reopen must state the new facts that will be proven if the matter is reopened and must be supported by affidavits or other documentary evidence. The new facts 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). Here, the evidence submitted on motion does not contain new facts that were previously unavailable. As the documentation submitted on motion was previously available or could have been obtained prior to the motion, and as none of it is therefore "new" or supports new facts, there is no basis for the AAO to reopen the proceeding.

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." *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.

Furthermore, 8 C.F.R. § 103.5(a)(2) states, in pertinent part:

> A motion to reconsider must state the reasons for reconsideration and 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, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Although the petitioner has submitted a motion entitled "Motion to Reopen and Reconsider," the petitioner does not submit any document that would meet the requirements of a motion to reconsider. The petitioner does not specifically state any reasons for reconsideration nor cite any precedent decisions in support of a motion to reconsider. The petitioner does not argue that the previous decisions were based on an incorrect application of law or Service policy. Nevertheless, as the arguments made on motion are primarily based on evidence that was not in the record at the time of the initial decision, it cannot be concluded that the petitioner on motion established that the AAO's decision was incorrect based on the evidence of record at that time. Therefore, the petitioner's motion to reconsider will be dismissed.[2]

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[2] It is noted for the record that, even if the AAO were to consider the petitioner and counsel's additional assertions on motion regarding the claimed complexity of the position, such assertions are simply not credible given that the petitioner has designated the proffered position as a Level I position on the submitted Labor Condition Application (LCA). Classifying a proffered position as a Level I position indicates that it is an entry-level position for an employee who has only basic understanding of the occupation. *See* Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009). Therefore, it is simply not credible that the position is one with specialized and complex duties, as such a higher-level position would be classified as a Level IV position, requiring a significantly higher prevailing wage. It is incumbent upon the petitioner to

Finally, 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). As 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.

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).

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.

Title 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.

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resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).