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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: DEC 1 1 2013 OFFICE: VERMONT 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 (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 Michael T. Kelly
Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The petitioner appealed the director's denial to the Administrative Appeals Office (AAO) and, on July 19, 2013, the AAO dismissed the appeal. The matter is again before the AAO on a motion to reopen. The motion to reopen will be dismissed.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a distributor and wholesaler of medical supplies with six employees. In order to employ the beneficiary in what it designates as a controller 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 applicable statutory and regulatory provisions. The petitioner, through counsel, submitted an appeal of the director's decision to the AAO. 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.

Thereafter, counsel for the petitioner submitted a Form I-290B, a brief in support of the motion, and additional evidence. As indicated by the check mark at Box D of Part 2 of the Form I-290B, counsel stated that the petitioner was filing a motion to reopen the decision. Counsel claims that the AAO's decision dismissing the appeal and affirming the director's decision was erroneous.

The AAO will now discuss the motion to reopen submitted by counsel. As will be discussed below, the Form I-290B, brief, and accompanying documents submitted as the motion do not satisfy the requirements of a motion to reopen. A motion that does not meet applicable requirements shall be dismissed. *See* 8 C.F.R. § 103.5(a)(4). Accordingly, this motion to reopen will be dismissed.

Dismissal of the Motion to Reopen

The AAO reviewed all of the documents submitted on motion. However, as will now be discussed, the AAO finds that they do not merit reopening the proceeding, as they do not present new facts that would be provided if the proceeding were reopened.

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.[1] The

[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 NEW COLLEGE DICTIONARY 753 (2008)(emphasis in original).

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).

In this matter, the motion consists of (1) the Form I-290B; (2) a brief submitted by counsel; (3) an August 16, 2013 letter from the Managing Director of and (4) a letter, dated August 19, 2013, from

The Form I-290B contains no substantive statements, but rather directs the AAO to "[p]lease see the attached brief." That three-page brief in support of the motion addresses several issues.

The brief first addresses the inconsistency, noted in the AAO's decision on the appeal, between (a) the Form-129 statement of the petitioner's Type of Business as "Distribution of Wholesale and Medical Supplies" and (b) the petitioner's self-description elsewhere in the petition as being engaged in the business of providing home-care for the elderly. Counsel asserts, in part:

> [I]n the rest of the documentation previously submitted, the Petitioner makes clear that it provides senior and home care services, and the error in the description of the visa petition should not be held against the petitioner in the unfavorable adjudication of this petition.

On that same issue, the brief introduces the above-mentioned letter from the Managing Director of In the brief, counsel describes the letter (which is on letterhead) as being from the petitioner, and as "detailing the nature and scope of [its] business." Counsel also states that is a franchise that is controlled by the petitioner and is also "the Beneficiary's intended place of employment."

The brief on motion also states that, as the petitioner actually is in the home care industry, "the Petitioner is now retracting any previous assertion that it is a distributor and wholesaler of medical supplies, and now confirms that it is in the business of home care for the elderly."

Next, in a section of the brief captioned "Employees Performing Financial Duties," counsel introduces the aforementioned letter from as evidence that the "beneficiary will be relieved from performing non-qualifying functions, "as the company works with outside companies to manage those functions."

Finally, the brief restates the proposed duties and, states in part, that the beneficiary "will be in charge of directing the responsibility of the independent accounting firm with which they work."

The letter from the Managing Director of states that the petitioner operates as a franchise that provides home care for the elderly and also for elderly people suffering from Alzheimer's disease. The letter also again states the proposed duties. It also asserts that would provide the petitioner's accounting and bookkeeping services, and that the beneficiary's primary responsibilities as the petitioner's Controller would include "assisting the accountants in the completion of the tax returns by providing them with

financial data and analysis conducted of the company's accounts" and "being in charge of assuring that our company is following the necessary regulations of the financial sector."

The substantive content of the aforementioned letter from is rather skeletal. According to the letter, Mr. company "has been providing tax and bookkeeping services to since 2010, filed "income tax return" of 2011, and will file "2012 return."

The AAO finds that, as should be evident in its review of them above, none of the documents submitted on motion constitute evidence that is new within the meaning of a motion to reopen. None of them presents new facts or evidence that were not earlier available and could not have been discovered or presented earlier in the adjudication of this petition. Thus, the submissions fail to meet the requirements for a motion to reopen at 8 C.F.R. § 103.5(a)(2). 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.

In addition, the motion shall 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 submissions constituting the motion do 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 combined motion does not meet the applicable filing requirement listed at 8 C.F.R. §103.5(a)(1)(iii)(C), it must be dismissed for this reason also.

As the regulation at 8 C.F.R. § 103.5(a)(4) mandates that "[a] motion that does not meet applicable requirements shall be dismissed," the AAO's July 19, 2013 decision dismissing the appeal shall not be disturbed.

Finally, it should be noted for the record that, unless USCIS directs otherwise, the filing of a motion to reopen 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 motion will be dismissed, the proceedings will not be reopened, and the previous decision of the AAO will not be disturbed.

ORDER: The combined motion is dismissed.