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: FEB 2 6 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 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 April 8, 2009, the Director of the Vermont Service Center denied the nonimmigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and the AAO dismissed the appeal on October 4, 2010. On November 4, 2010, the petitioner filed a motion to reopen, which the AAO dismissed on June 12, 2012 pursuant to 8 C.F.R. § 103.5(a)(1)(iii)(C), (a)(2), and (a)(4). The matter is again before the AAO on a motion to reopen. The motion will be dismissed.

In the Form I-129 visa petition, the petitioner describes itself as a travel business established in 2007. In order to employ the beneficiary in what it designates as a market research analyst position, the petitioner seeks to classify her 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's prior counsel submitted an appeal of the decision to the AAO. The AAO reviewed counsel's submission and found that it did not overcome the basis for the denial of the petition. The AAO dismissed the appeal. Thereafter, the petitioner's prior counsel submitted a motion to reopen the decision. The AAO reviewed the motion and found that there was no basis for the AAO to reopen the proceedings. Moreover, the motion failed to meet the applicable requirements of a motion. Accordingly, the AAO dismissed the motion to reopen. Subsequently, new counsel for the petitioner submitted a motion to the AAO. Specifically, as indicated by the check mark at box D of Part 2 of the Form I-290B, counsel elected to file a motion to reopen. Thus, the matter is once again before the AAO.

The record of proceeding before the AAO contains: (1) the Form I-129 petition and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the RFE; (4) the director's decision; (5) the Form I-290B appeal; (6) the AAO's decision dismissing the appeal; (7) the Form I-290B motion to reopen (dated November 4, 2010); (8) the AAO's decision dismissing the motion to reopen; and (9) the Form I-290B motion to reopen (dated July 9, 2012). The AAO reviewed the record in its entirety before issuing its decision.

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 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).

[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).

On motion, the petitioner and counsel submit (1) a letter from the petitioner dated July 6, 2012; (2) a brief from counsel; (3) an unpublished AAO decision dated October 30, 2009; (4) a copy of United States district court case *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012); and (5) previously submitted documentation regarding the beneficiary's qualifications. Counsel claims that the unpublished AAO decision and district court case constitute "new case law" that affects the outcome of the instant petition. Counsel further asserts that the position of market research analyst qualifies as a specialty occupation.

Upon review of the submission, the AAO notes that the petitioner and counsel have not provided any material "new facts" and that the instant motion does not contain any "new" evidence. Thus, it fails to meet the requirements for a motion to reopen at 8 C.F.R. § 103.5(a)(2).

More specifically, the AAO finds that the petitioner and counsel have failed to submit material evidence that was previously unavailable. Any evidence available or discoverable by the petitioner in the previous proceeding cannot be considered "new" facts. On motion, counsel submitted a statement from the petitioner dated July 7, 2012 regarding the duties of the proffered position, the minimum educational requirement for the position, and the beneficiary's qualifications.[2] The AAO notes that the content of the letter does not provide any material, new facts. Thus, the letter cannot be considered new evidence.

Counsel also submits an unpublished AAO decision dated October 30, 2009. The AAO notes that unpublished decisions may be obtained by the public pursuant to the Freedom of Information Act. Thus, the unpublished case provided in support of the motion was previously available and discoverable.

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[2] With the instant motion, the petitioner and counsel provide revised descriptions of the proffered position. Notably, counsel's submission contains several duties not included in the petitioner's description of the proffered position. No explanation was provided for the discrepancy. Furthermore, the petitioner and counsel failed to provide a valid reason for not submitting the information with the initial H-1B petition. Nevertheless, the revised job duties are not considered material "new" evidence in the instant motion. As discussed, "new" evidence must have not previously been available and could not have been discovered or presented in the previous proceeding.

It must also be noted that USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). On motion, a petitioner (or its counsel) cannot offer a new position to the beneficiary or materially change the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). A petitioner (or its counsel) may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). 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'r 1978). If the petitioner wishes for USCIS to consider the amended job description, the petitioner may, of course, file a new petition with a valid labor condition application and the proper fee(s).

Moreover, the AAO notes that the decision is not probative to the issue here. The matter cited to pertains to an immigrant visa petition and whether the beneficiary in that case was a member of the profession as defined in section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32); 8 C.F.R. § 204.5(k)(2). The issue before the AAO is the distinct and separate issue of whether the petitioner's proffered position qualifies as a nonimmigrant H-1B specialty occupation and not whether it is a profession.[3] Thus, the AAO finds no merit in counsel's assertion that the cited matter is relevant to these proceedings. Neither the statutory nor regulatory provisions governing USCIS adjudication of Form I-129 H-1B specialty-occupation petitions provide for the approval of an H-1B specialty occupation petition on the grounds argued by the petitioner's counsel, or even indicate that USCIS decisions on immigrant adjudications are relevant to USCIS adjudications of Form I-129 H-1B specialty occupation petitions. Moreover, the AAO notes that an unpublished AAO decision does not carry precedential weight in these proceedings. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

As previously mentioned, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). The petitioner is required to establish that the proffered position qualifies as a specialty occupation within the meaning of the controlling statutory and regulatory provisions. It may not rely on an unpublished decision regarding an immigrant petition for a different employer to establish eligibility for H-1B classification. Thus, for the reasons discussed, the AAO finds that the matter cited by counsel is irrelevant to the instant petition.

Similarly, the AAO takes administrative notice that the U.S. district court case provided by counsel, *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), was published on March 12, 2012. Thus, this published decision was also available to the petitioner during the earlier proceeding. *Cf.* 8 C.F.R. § 1003.23(b)(3). Moreover, aside from the job title, the AAO notes that counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*.[4] Further, in regard to the materiality of a district court decision to the instant proceedings,

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[3] The AAO notes that the current, primary, and fundamental difference between qualifying as a profession and qualifying as a specialty occupation is that specialty occupations require the U.S. bachelor's or higher degree, or its equivalent, to be in a specific specialty. Thus, while "teachers in elementary or secondary schools" are specifically identified as qualifying as a profession as that term is defined in section 101(a)(32) of the Act, that occupation would not necessarily qualify as a specialty occupation unless it met the definition of that term at section 214(i)(1) of the Act.

[4] It is noted that the district judge's decision in that case appears to have been based largely on the many factual errors made by the service center in its decision denying the petition. The AAO further notes that the director's decision was not appealed to the AAO. Based on the district court's findings and description of the record, if that matter had first been appealed through the available administrative process, the AAO may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied by the AAO in its *de novo* review of the matter.

the AAO notes that, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Finally, the AAO notes that the foreign academic credentials equivalency evaluation and supporting documentation was submitted to the AAO with the petitioner's previous motion to reopen, and also appears elsewhere in the record of proceeding. Here, the director did not address whether or not the beneficiary is qualified to serve in a specialty occupation position as a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.[5]

As previously stated, a motion to reopen must state the new material facts that will be proven if the matter is reopened, and must be supported by affidavits or other documentary evidence. Generally, the new facts must be material and unavailable previously, and could not have been discovered earlier in the proceeding. *Cf.* 8 C.F.R. § 1003.23(b)(3). Here, no evidence in the motion contains new material facts that were previously unavailable. Therefore, as none of the evidence is "new" or supports new facts, there is no basis for the AAO to reopen the proceeding.

In the instant motion brief, counsel claims that the AAO's dismissal of the prior motion (dated November 4, 2010) for failure to provide the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C) was incorrect. However, counsel cites no statutory or regulatory authority, case law, or precedent decision to support his assertion. The AAO notes that the regulation at 8 C.F.R. § 103.5(a)(1) states the following:

> (iii) Filing Requirements—A motion shall be submitted on Form I-290B and may be accompanied by a brief. It must be:
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> * * *
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> (C) Accompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding;

The submission constituting a motion did not contain a statement as to whether or not the unfavorable decision had been the subject of any judicial proceeding as required by 8 C.F.R.

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[5] USCIS is required to follow long-standing legal standards and determine first, whether the proffered position is a specialty occupation, and second, whether an alien beneficiary is qualified for the position at the time the nonimmigrant visa petition is filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

§ 103.5(a)(1)(iii)(C). Thus, the petitioner and counsel failed to comply with the requirements as set by the regulations for properly filing a motion.

The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Upon review of the record of proceeding, the AAO notes that its prior decision dismissing the motion for this additional reason was correct because the petitioner's motion did not meet the applicable filing requirement as stated at 8 C.F.R. §103.5(a)(1)(iii)(C).

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.

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. Accordingly, the motion will be dismissed, the proceeding will not be reopened, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed. The previous decision of the AAO, dated June 12, 2012, is affirmed. The petition is denied.