



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **JUN 26 2013** OFFICE: VERMONT SERVICE CENTER

IN RE: Petitioner:  
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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) 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:** The service center director denied the nonimmigrant visa petition. The petitioner appealed the director's denial to the Administrative Appeals Office (AAO) and, on March 4, 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 "clothing design manufacture & sales wholesale retail" business that was established in 2006.<sup>1</sup> In order to employ the beneficiary in what it designates as a part-time 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 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, the petitioner and counsel submitted a Form I-290B, a brief, and supporting evidence. As indicated by the check mark at Box D of Part 2 of the Form I-290B, the petitioner indicated that it was filing a motion to reopen the decision. In the brief accompanying the Form I-290B, 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 the petitioner and counsel. As will be discussed below, the submission does 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 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.<sup>2</sup> The

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<sup>1</sup> On the Form I-129 petition, the petitioner states that it has three employees. The petitioner further states that its gross annual income is \$250,000. Although requested on the Form I-129, the petitioner did not provide its net annual income. No explanation was provided.

<sup>2</sup> 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).

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 the Form I-290B along with a cover letter and brief from counsel. In addition, the petitioner and counsel submitted a copy of a document entitled "Expert Opinion and Educational Evaluation," dated December 21, 2010 (previously submitted); a copy of an AAO's unpublished decision from 2002; and a copy of the decision *Young China Daily v. Chappell*, 742 F. Supp. 552 (N.D. Cal. 1989). All of the documentation is dated prior to the conclusion of the prior proceeding, and thus was previously available and discoverable.

Upon review of the submission, the AAO notes that the petitioner and counsel have not provided any "new facts" and that the instant motion does not contain any "new" evidence. There is no indication that the evidence submitted was not available and could not have been discovered or presented in the previous proceeding.<sup>3</sup> Thus, it fails 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.

#### **Additional Basis for Dismissal**

Finally, 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 submission constituting the motion does 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 motion does 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 also.

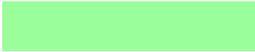
Motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen 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 motion to reopen will be dismissed.

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. Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the previous decision of the AAO will not be disturbed.

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<sup>3</sup> The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). In the instant case, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents with the initial petition or in response to the director's request for evidence. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988).

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**ORDER:** The motion is dismissed.