

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**

(b)(6)

DATE: DEC 19 2014

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner:
Beneficiary: [REDACTED]

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.

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,
Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The petitioner through counsel filed a motion to reopen. Upon review, the service center director dismissed the motion to reopen. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

I. PROCEDURAL AND FACTUAL BACKGROUND

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as an information technology and related services business, with two employees, that was established in [REDACTED]. In order to employ the beneficiary in what it designates as a software developer 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 did not establish that the proffered position qualifies as a specialty occupation and that the petitioner has sufficient work for the requested period in accordance with the applicable statutory and regulatory provisions. Thereafter, the petitioner through counsel filed a motion to reopen, which was dismissed by the director on February 5, 2014. The matter is now before us on appeal.

It is noted that when an appeal is filed in response to a director's unfavorable action on a motion, the scope of the appeal is limited to the director's decision on that motion. We see, for instance, that the regulatory provision at 8 C.F.R. § 103.3(a)(2)(i) states: "The affected party must submit the complete appeal including any supporting brief as indicated in the applicable form instructions *within 30 days after service of the decision* (emphasis added)." Thus, if the petitioner wished to appeal the director's decision to deny the petition, it should have elected to file that appeal within 30 days of the director's decision. Here, though, the petitioner elected to file a motion instead and, thereby, limit the scope of the instant appeal to the merits of the director's decision to dismiss that motion.

The record of proceeding before us contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's decision dated November 4, 2013; (5) the petitioner's motion to reopen and supporting documents; (6) the director's decision dated February 5, 2014; (7) the petitioner's appeal and supporting documents; (8) our RFE regarding the petitioner's corporate status; and (9) the petitioner's response to our RFE.

II. LAW AND ANALYSIS

A. Overarching Requirement for Motions by a Petitioner

We have focused our review and analysis upon determining whether – based upon the record of proceeding at the time the director decided to deny the petition – the director's decision to dismiss the motion to reopen was correct.

The provision at 8 C.F.R. § 103.5(a)(1)(i) includes the following statement limiting USCIS's authority to reopen the proceeding or reconsider the decision to instances where "proper cause" has been shown for such action:

[T]he official having jurisdiction may, for proper cause shown, reopen the proceeding or reconsider the prior decision.

Thus, to merit reopening or reconsideration, the submission must not only meet the formal requirements for filing (such as, for instance, submission of a Form I-290B that is properly completed and signed, and accompanied by the correct fee), but the petitioner must also show proper cause for granting the motion. As stated in the provision at 8 C.F.R. § 103.5(a)(4), *Processing motions in proceedings before the Service*, "[a] motion that does not meet applicable requirements shall be dismissed."

B. Requirements for Motions to Reopen

The regulation at 8 C.F.R. § 103.5(a)(2), "*Requirements for motion to reopen*," states:

A motion to reopen must [(1)] state the new facts to be provided in the reopened proceeding and [(2)] be supported by affidavits or other documentary evidence. . . .

This provision is supplemented by the related instruction at Part 3 of the Form I-290B, which states:¹

Motion to Reopen: The motion must state new facts and must be supported by affidavits and/or documentary evidence.

Further, the new facts must possess such significance that, "if proceedings . . . were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case." *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992); *see also Maatougui v. Holder*, 738 F.3d 1230, 1239-40 (10th Cir. 2013).

III. DISCUSSION AND ANALYSIS

The director's initial decision to deny the petition was based upon the determination that the evidence of record failed to establish that the proffered position is a specialty occupation and that the petitioner

¹ The regulation at 8 C.F.R. § 103.2(a)(1) states in pertinent part :

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, such instructions are incorporated into the regulations requiring its submission.

has sufficient work for the requested period. However, as we noted above, the matter before us on appeal is the director's later decision to dismiss the petitioner's motion to reopen. Specifically, the issue before us is whether the director's February 5, 2014 decision was correct in dismissing the petitioner's motion to reopen upon the ground that the evidence submitted was not new evidence for the purpose of a motion to reopen. As will be discussed below, we find that the director's decision to dismiss the motion was correct. Accordingly, the appeal will be dismissed and the petition will be denied.

On motion, the petitioner submitted the following: (1) a November 20, 2013 letter from [REDACTED] Chief Information Officer for [REDACTED] (end-client); and (2) a brief from counsel.²

We find that the petitioner's submission on motion did not meet the requirements of a motion to reopen. The petitioner did not sufficiently substantiate that the end-client letter submitted on motion was not previously available, nor does it establish new facts. Our review of the record and the adverse decision indicates that the director properly applied the statute and regulations to the petitioner's case.

On appeal, the petitioner submitted a second letter from the end-client, dated February 26, 2014. This letter is almost identical to the previously submitted letter, however, it includes the following information: "[the petitioner] requested us for client supporting letter in the month of September 2013 for immigration concerns. We couldn't provide the supporting letter because of our own administrative reasons." It must be noted that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). 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).

Even if the end-client's letters were viewed – mistakenly – as providing "new facts" in and of themselves, the content would not merit the reopening of the proceeding. As noted above, in addition to satisfying the minimum requirements at 8 C.F.R. § 103.5(a)(2), the petitioner must also establish that the new facts to be proven in a motion to reopen possess such significance that they would likely change the results of the case. *Matter of Coelho*, 20 I&N Dec. at 473; see also *Maatougui v. Holder*, 738 F.3d at 1239-40. Such is not the case here. Even if we considered the client's letters in a reopened proceeding, they would not change the outcome of the adjudication.³

² It must be noted that in the brief, counsel mistakenly referred to the beneficiary by another name, "[REDACTED]" No explanation was provided by the petitioner or counsel.

³ For instance, we observe that in the letter, the end-client asserted that "[a]ny Bachelor of degree having more than 5 years [of] experience in SAP testing and good analytical skills" is required for the position. Notably, the letter does not state a requirement for a degree in a specific specialty. The degree requirement set by the statutory and regulatory framework of the H-1B program is not just a college degree, but a baccalaureate (or higher degree) in a specific specialty that is directly related to the proffered position. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Thus, the end-client's assertion that a general-purpose college degree is acceptable is tantamount to an admission that the proffered position is not in fact a specialty occupation.

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NON-PRECEDENT DECISION

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As the appeal does not establish that the director's decision to dismiss the motion to reopen was incorrect, the appeal will be dismissed, and the petition will be denied.

We find that the director did not err in dismissing the motion to reopen, as the document constituting that motion to reopen would not change the outcome of this case if the proceeding were reopened.

IV. CONCLUSION AND ORDER

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 Otiente*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.