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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

DATE: DEC 17 2014

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
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)

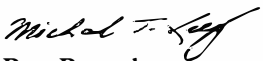
ON BEHALF OF PETITIONER:

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,

for 
Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the nonimmigrant visa petition, and the Administrative Appeals Office (AAO) dismissed the petitioner's appeal. The matter is again before the AAO on a motion to reopen. The motion will be dismissed pursuant to 8 C.F.R. §§ 103.5(a)(1)(iii)(C), 103.5(a)(2), and 103.5(a)(4).

I. PROCEDURAL BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as a 77-employee computer and IT consulting company¹ established in [REDACTED]. In order to employ the beneficiary in a full-time position that it identifies by the job title "Senior Implementation Consultant" at a minimum salary of \$105,000 per year,² 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, concluding that the evidence of record fails to demonstrate that the proffered position qualifies as a specialty occupation.

The petitioner filed an appeal of the director's decision, which we dismissed on August 26, 2014. The matter is once again before us on a motion to reopen. Counsel filed a timely Form I-290B, Notice of Appeal or Motion, on September 29, 2014, and he marked the box at Part 3, Item 2(d) of the form, which signifies the "filing of a motion to reopen a decision."³ On motion, counsel submits a 14-page letter from the petitioner contending that the denial by our office was erroneous.

II. MOTION REQUIREMENTS

As stated in the provision at 8 C.F.R. § 103.5(a)(4), "[a] motion that does not meet applicable requirements shall be dismissed."

Before discussing the motion before us, we shall first review the requirements for a motion to reopen the proceeding.

¹ The petitioner provided a North American Industry Classification System (NAICS) Code of 541511, "Custom Computer Programming Services." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "541511 Custom Computer Programming Services," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited 9, 2014).

² The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the occupational classification of "Software Developers, Applications," SOC (O*NET/OES) Code 15-1131, and for which the appropriate prevailing wage level would be Level IV.

³ Although both counsel and the petitioner assert in their letters dated September 26, 2014 that the petitioner is filing an appeal of our decision dated August 26, 2014, the Form I-290B indicated that the petitioner is filing a motion to reopen. Therefore, despite their repeated references to the current submission as an "appeal," the matter will be treated as a motion to reopen. It should be noted that we do not exercise appellate jurisdiction over our own decisions.

A. Overarching Requirement for Motions by a Petitioner

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

[T]he official having jurisdiction may, for proper cause shown, [a] reopen the proceeding or [b] 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.

B. Requirements for Motions to Reopen

The regulation at 8 C.F.R. § 103.5(a)(2), *Requirements for motion to reopen*, states the following, in pertinent part:

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:⁴

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. THE SUBMISSIONS CONSTITUTING THIS MOTION TO REOPEN

The submissions presented as the motion consist of a 14-page letter from Immigration & Talent Acquisition Specialist for the petitioner, along with the following documents:

⁴ The regulation at 8 C.F.R. § 103.2(a)(1) states, in pertinent part, the following:

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions . . . and such instructions are incorporated into the regulations requiring its submission.

- Blueprint and overview of the petitioner's new office space;
- "Summary Report for Software Developers, Applications" from O*NET OnLine;
- Excerpts addressing Computer and Information Technology Occupations from the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)*;
- Various Articles by journalists and IT personnel regarding the educational requirements for software engineer/programmer/analyst positions;
- Seventeen job vacancy announcements from www.dice.com, which the petitioner contends are parallel to the proffered position within the petitioner's industry;
- Twelve job vacancy announcements from www.monster.com, which the petitioner contends are parallel to the proffered position within the petitioner's industry;
- Seventeen job vacancy announcements from both www.dice.com and www.monster.com, which the petitioner contends are parallel to the proffered position within a broad range of industries;
- Copies of job postings by the petitioner on its website for various positions;
- Copy of a chart outlining the petitioner's employees, their positions, and their academic qualifications;
- Copies of invoices listing employees of the petitioner in order to demonstrate the petitioner's continued employment of these persons;
- Letter from [REDACTED] Senior Consultant with the petitioner, explaining the complexity of the duties associated with the petitioner's consultants;
- Internal, 2-page document of the petitioner entitled "Description of Internal Support Role for Senior Implementation Consultant Position";
- 24-page document entitled "2014 Quarter 2 Review";
- 25-page brochure entitled [REDACTED] providing an overview of the petitioner's client projects;
- 4 Case Studies for three of the petitioner's projects;
- Internal, 4-page email from a partner at the petitioner announcing the release of the petitioner's proprietary software product called [REDACTED];
- Master Service Agreements and Statements of Work for current and on-going clients of the petitioner, including [REDACTED]

We note that, despite the submission of a large amount of documentary evidence, the petitioner's letter dated September 26, 2014 asserts no grounds for a motion to reopen. The petitioner simply states: "We are filing this appeal to submit additional evidence showing that the position of Senior Implementation Consultant is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A) and that [the petitioner] would engage [the beneficiary] in an employer-employee relationship under 8 C.F.R. 214.2(h)(4)(ii)."

IV. DISMISSAL OF THE MOTION TO REOPEN

As already noted, a motion that does not meet applicable requirements must be dismissed. *See* 8 C.F.R. § 103.5(a)(4).

In its September 26, 2014 letter, the petitioner provides no statements addressing the requirements of a motion to reopen or assertions regarding the manner in which the current submission meets such requirements. The petitioner presents no statute, regulation, or precedent decision in support of the contention that these proceedings warrant reopening.

Despite the petitioner's submission of documents not previously included in the record, a review of the evidence submitted on motion reveals no fact that could be considered *new* under 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.⁵ Generally, the new facts submitted on motion must be material and unavailable previously, and could not have been discovered earlier in the proceeding. *See* 8 C.F.R. § 1003.23(b)(3).

Here, no evidence in the motion contains new facts that were previously unavailable. In fact, the petitioner specifically states on page two of its September 26, 2014 letter that "all of the evidence submitted with this appeal was available at the time we filed our initial H-1B petition in the sense that identical or substantially similar evidence was available in [REDACTED] 2013." The evidence submitted, by the petitioner's own admission, was either previously submitted, previously available and could have been discovered or presented in the previous proceeding, or post-dates the petition. The regulation at 8 C.F.R. § 103.2(b)(12) requires that the petition be denied when evidence submitted does not establish eligibility at the time of filing.

Further, even if the documents submitted on motion were viewed – mistakenly – as "new facts," their content would not merit the reopening of the proceeding, either. 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. It is not apparent that if we considered the contents of these documents in a reopened proceeding, they would likely change the outcome of our adjudication.

Furthermore, the petitioner's assertion that the "focus in our appeal is primarily on the future" does not satisfy the evidentiary requirements here. The petitioner's admission that the matter is essentially moot due to the passage of time further undermines the question of eligibility in this matter, and demonstrates that reopening these proceedings is not warranted. If the petitioner seeks

⁵ 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).

to employ the beneficiary in the future under a new state of circumstances, the appropriate avenue for such a request is the filing of a new petition, with a timely certified and conforming LCA and appropriate fees, rather than a motion to reopen.

The documentation submitted by the petitioner does not satisfy the requirements of a motion to reopen. The motion, therefore, will be dismissed.

"There is a strong public interest in bringing [a case] to a close as promptly as is consistent with the interest in giving the [parties] a fair opportunity to develop and present their respective cases." *INS v. Abudu*, 485 U.S. 94, 107 (1988). 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 petitioner and counsel have not met that burden.

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). 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 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.

V. CONCLUSION AND ORDER

The documents presented as the motion to reopen do not satisfy the requirements of a motion to reopen. However, even if we overlooked that factor and considered the merits of the submitted documents and the arguments made therein, they would still fail to establish error in our August 26, 2014 decision. The motion to reopen will therefore be dismissed, and our August 26, 2014 decision will be affirmed.

The petitioner should note 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 motion is dismissed. The AAO's decision dated August 26, 2014 is affirmed.