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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

[redacted]

D2

Date: JUN 02 2011 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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition, and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is again before the AAO on a combined motion to reopen/reconsider. The motion will be dismissed.

The petitioner claims to be an investment and management corporation that acts as the agent for the International Institute of Islamic Thought (IIIT), a non-profit research facility promoting and coordinating research and related activities among Muslim scholars.[1] The petitioner seeks to extend the employment of the beneficiary as a publication manager, and therefore endeavors to classify the beneficiary 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 proffered position is not a specialty occupation. The AAO affirmed the director's findings. On motion, counsel for the petitioner submits a brief and additional evidence and asserts that the AAO erred in concluding that the proffered position was not a specialty occupation and for questioning the validity of the petitioner's employer-employee relationship with the beneficiary. Counsel did not address the AAO's additional ground of denial relating to the late filing of the petition extension.

Counsel's submission of additional evidence does not satisfy either the requirements of a motion to reopen or a motion to reconsider. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 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.[2]

A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

On motion, counsel for the petitioner submits the following documentary evidence:

1. Management Contract between The International Institute of Islamic Thought (IIIT) and the petitioner dated January 1, 1996;
2. Letter from [redacted] dated January 25, 2011;

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[1] It is noted that the petitioner's actual name is [redacted]. In addition, although it claims to be an agent for [redacted] it is apparent from its support letter that it is filing the instant petition as the United States employer of the beneficiary and not as an agent for the beneficiary's employer.

[2] 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).

3. Letter from accountant for the petitioner, dated January 5, 2011;
4. Copies of quarterly tax returns for the petitioner from the first quarter of 2003 through the fourth quarter of 2009;
5. Copies of federal tax returns of IIIT for the years 2007, 2008, and 2009;
6. Copies of General Ledger Detail Report entries of the petitioner for the period January 1, 2001 through December 31, 2009;
7. Copies of W-2 Wage and Tax Statements issued by the petitioner to the beneficiary for the years 2003, 2004, 2005, 2006, 2007, 2008, and 2009; and
8. Letter from at dated January 25, 2011.

In addition, counsel indicated that it was submitting the following representative samples of the beneficiary's work and the duties he performed as a publications manager at

9. E-mail correspondence between the beneficiary and from April 2008;
10. E-mail correspondence between the beneficiary and from March and April 2009;
11. E-mail correspondence between the beneficiary and from February 2010;
12. E-mail correspondence between the beneficiary and from May and June 2010;
13. E-mail correspondence between the beneficiary and from August 2010;
14. E-mail correspondence between the beneficiary and from July, August and September 2010;
15. E-mail correspondence between the beneficiary and from December 2010; and
16. E-mail correspondence between the beneficiary and and Dr. Ahmad Totonji from January 2011;

On motion, counsel contends that the submitted evidence constitutes new facts because both the director and the AAO failed to adequately consider the record prior to adjudication. Counsel's statement, however, is not persuasive. As previously stated, a motion to reopen must state the new facts that will be proven if the matter is reopened and must be supported by affidavits or other documentary evidence. Further, the new facts must be material and unavailable previously such that they could not have been discovered or presented in an earlier proceeding.

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). The evidence submitted was either previously submitted, previously available and could have been discovered or presented in the previous proceeding, or post-dates the petition. In this matter, the petition was filed on May 1, 2007. Most of the tax and wage documents, financial statements, letters, and emails submitted on motion were prepared and/or signed after the petition was

filed. 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. The tax and financial documents, along with the email correspondence and letters of support from the petitioner and others therefore do not contribute to the record and cannot be used to establish that the proffered position was a specialty occupation at the time of filing.

Here, no evidence in the motion contains new facts that were previously unavailable. Accordingly, the AAO is not swayed by counsel's claim that, because neither the director nor the AAO considered the evidence in prior proceedings, this evidence is now "new" for the purpose of a motion to reopen. If the petitioner had wanted the evidence to have been considered, it should have submitted it with the petition, in response to the director's request for evidence, or in support of the appeal this motion seeks to reopen and reconsider.

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." *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.

The evidence also fails to satisfy the requirements of a motion to reconsider. The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part:

> A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

On motion, counsel asserts that the AAO committed error in not finding that the proffered position was a specialty occupation and for questioning whether the petitioner was actually the beneficiary's employer; however, counsel does not specifically argue that the previous decision of the AAO was based on an incorrect application of law or USCIS policy. For example, although counsel briefly cites *Nationwide Mutual Ins. Co. v. Darden,* 503 U.S. 318 (1992) and *Clackamas Gastroenterology Assoc., P.C. v. Wells*, 538 U.S. 440 (2003), these citations merely discuss common-law policies generally applied to employer-employee relationships, and are not relied upon by counsel to demonstrate that the AAO's decision was based on an incorrect application of law or Service policy.[3]

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[3] It is further noted that the AAO did not dismiss the appeal and deny the petition on the basis that the requisite employer-employee relationship had not been established. *See generally* 8 C.F.R. § 214.2(h)(4)(ii). As such, the petitioner as United States employer issue noted by the AAO is not a proper basis for reconsideration. Even if it were, it remains unexplained how two separate legal entities can claim to be the petitioner. As noted by the AAO, it appears that the petitioner, Reston Investments, Inc. D/B/A Reston Management Group, a for-profit Virginia corporation, is claiming to be the

In addition, while counsel also cites to *Defensor v. Meissner,* 201 F.3d 384 (5th Cir. 2000), upon which the AAO relied in rendering its unfavorable decision, counsel does not contend that this decision supports a finding that the decisions of the director and the AAO were incorrect applications or law or USCIS policy. Simply citing case law without articulating the basis for which such citations disprove the findings of the director and the AAO is not sufficient to meet the requirements of a motion to reconsider.

Moreover, 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 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.

Finally, it is noted for the record that, unless USCIS directs otherwise, the filing of a motion to reopen or reconsider 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).

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 proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.

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beneficiary's employer. On motion, however, counsel indicates that the actual employer and petitioner is the

Further confusing this issue is the fact that appears on the Form I-129, while appears on the supporting labor condition application (LCA). Thus, even if this matter were to be reconsidered, it is apparent that the petition would have to be denied for the additional reason that the submitted LCA does not correspond to the petition in that the petition was filed by one legal entity while the submitted LCA was certified for another.