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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**



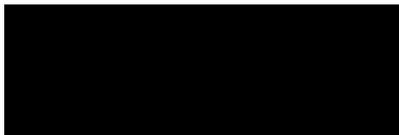
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Date: JUN 02 2011 Office: CALIFORNIA SERVICE CENTER FILE: 

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 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 service center director denied the nonimmigrant visa petition. The petitioner subsequently filed a motion to reopen. The director dismissed that motion as not meeting the requirements of a motion to reopen. The petitioner appealed that latter decision to the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner has retained two attorneys during the pendency of this matter. Although the first attorney, in Torrance, California, did not withdraw his appearance, a Form G-28, Notice of Entry of Appearance, properly executed by the petitioner's director and acknowledging a second attorney as counsel of record, accompanied the appeal to the AAO, and thereby substituted this attorney's appearance for the petitioner. See 8 C.F.R. § 292.4. As such, while all representations will be considered, the decision in this matter will be provided only to the petitioner and the petitioner's present counsel of record.

On the Form I-129 visa petition the petitioner stated that it is an educational consulting firm. To employ the beneficiary in what it designates as an English instructional coordinator position, the petitioner endeavors 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, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On motion, styled as a motion to reopen, counsel provided additional evidence. Counsel did not state any reasons for reconsideration.

Title 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>1</sup>

On motion, counsel for the petitioner submitted, (1) sections of the California Educational Code; and (2) an affidavit, dated June 4, 2009, from the petitioner's president. On appeal, counsel argued that the evidence should be considered new because the director did not previously request it. The AAO observes that the director never requested that evidence, but that fact does not render it in any sense *new*.

A review of the evidence that the petitioner submitted on motion reveals no fact that could be considered *new* under 8 C.F.R. § 103.5(a)(2). The California Educational Code existed prior to the submission of the instant visa petition and was readily available to the petitioner and previous counsel. Although the affidavit was produced subsequent to the denial of the instant visa petition, it is merely an explanation of various misstatements on the petitioner's Forms 1099 and on the visa petition and supporting documents. None of the facts alleged are in any sense *new*. Further, the basis of the decision of denial is the director's finding that the petitioner failed to demonstrate that it would employ

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<sup>1</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).

the beneficiary in a specialty occupation, and the facts alleged in that affidavit are of only peripheral relevance to that finding.<sup>2</sup>

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are 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.

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. Title 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." The AAO finds that the director was correct in her determination that the motion before her failed to meet the requirements of a motion to reopen. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the motion shall be also dismissed for failing to meet another applicable requirement. The regulation at 8 C.F.R. § 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and motions to reconsider. Title 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 in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must be dismissed for this additional reason.

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<sup>2</sup> It is noted that counsel appears to imply on appeal that the director was required to request further evidence (RFE) or issue a notice of intent to deny (NOID) before denying the petition. Counsel appears to allege that, absent an RFE or a NOID, any evidence that might have been requested should now be treated as new.

First, the regulation at 8 C.F.R. § 103.2(b)(8) clearly states that a petition may be denied if there is evidence of ineligibility in the record or if the evidence does not establish eligibility. The regulation does not state that the evidence of ineligibility must be irrefutable. Where evidence of record indicates that eligibility has not been met, it is appropriate for the director to deny the petition without an RFE or a NOID.

Second, if the petitioner has relevant, rebuttal evidence, the administrative process provides for an appeal or a motion to reopen as a forum for that evidence. The requirements for a motion to reopen are greater than that for an appeal, noting for instance that there is no requirement that evidence submitted in support of an appeal be "new." See generally 8 C.F.R. §§ 103.3 and 103.5. The petitioner chose to file a motion to reopen instead of an appeal in this matter, however, and as such, precluded itself from having a de novo review of the director's underlying decision to deny the petition as well as the opportunity to submit additional, but not necessarily new, evidence in support of this matter. As such, it is disingenuous and, unfortunately, too late for counsel to claim at this point that evidence that could have been considered in support of an appeal must have been considered in support of a motion to reopen even when such evidence was previously available or could have been discovered or presented in the previous proceeding.

Finally, it should be noted for the record that, unless U.S. Citizenship and Immigration Services 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, 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. The appeal will be dismissed and the petition denied.

**ORDER:** The appeal is dismissed. The director's decision to dismiss the motion to reopen is affirmed. The petition is denied.