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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

B2

[REDACTED]
CULVER CITY, CA 90230

Date: **JUN 16 2011** FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER

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:

[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 California Service Center denied the nonimmigrant visa petition and dismissed a subsequently-filed motion to reopen and reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer sales, software and website development company that seeks to extend the employment of the beneficiary as a computer system analyst. Thus, the petitioner endeavors to extend the beneficiary's employment 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).

On December 22, 2009, the director denied the petition, finding that the beneficiary is not eligible for extension of stay in H-1B nonimmigrant status under the American Competitiveness in the Twenty-First Century Act (AC21), as amended by the 21st Century Department of Justice Appropriations Authorization Act (DOJ21), because a final decision was made on the alien's Form I-485 application to register permanent residence or adjust status. On January 20, 2010, counsel filed a combined motion to reopen and reconsider and asserted that contrary to the director's findings, the beneficiary is entitled to an extension beyond the six year limitation since she was (1) the beneficiary of an approved I-140 petition; and (2) prohibited from filing an application for adjustment of status based on per country limitations.

The director dismissed the motion on January 31, 2011, finding that counsel had failed to satisfy the regulatory requirements for either a motion to reopen or a motion to reconsider. Specifically, the director concluded that counsel's brief and copy of the USCIS memo submitted did not constitute new facts supported by affidavits or other documentary evidence that were previously unavailable, and further did not establish that the director's decision was based on an incorrect application of law or service policy.

On appeal to the AAO, counsel asserts that the director's dismissal was erroneous, and focuses on the requirements of a motion to reconsider. Specifically, counsel notes that a motion to reconsider must establish that the denial was based on an incorrect application of law or Service policy, and contends that since USCIS may grant extensions beyond the six year maximum where certain circumstances apply, according to the submitted memorandum, the petitioner met its burden of proof for a motion to reconsider.

The AAO disagrees. The director correctly concluded that the petitioner's motion and accompanying evidence failed to satisfy 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.¹

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 submitted a brief accompanied by a copy of a memorandum dated May 30, 2008 from Donald Neufeld, Acting Associate Director for Domestic Operations, U.S. Citizenship and Immigration Services, Department of Homeland Security, entitled *Supplemental Guidance Relating to Processing Forms I-140 Employment-Based Immigrant Petitions and I-129 H-1B Petitions, and Form I-485 Adjustment Applications Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313), as amended, and the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Title IV of Div. C. of Public Law 105-277.*²

Although counsel on appeal only asserts that the motion submitted to the director met the requirements of a motion to reconsider, the AAO will review the motion for conformance to the regulatory provisions for both motions to reopen and reconsider.

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 memorandum submitted was previously available and could have been discovered or presented in the previous proceeding. Moreover, counsel for the petitioner submitted no additional documentation to support the claim that the beneficiary was prohibited from filing an application for adjustment of status based on per country limitations.³ Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec.

¹ 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).

² Although counsel submitted a copy of the Neufeld Memorandum dated May 30, 2008 in support of the motion, she cited to and relied upon a different memorandum in her appeal brief. Specifically, counsel cited to a memorandum dated May 12, 2005 by [REDACTED] Director for Operations, Citizenship and Immigration Services, Department of Homeland Security, entitled *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by American Competitiveness in the Twenty First Century Act of 2000 (AC21)(Public Law 106-313)*.

³ A review of USCIS records indicates that, contrary to the assertions of counsel, the beneficiary filed an application on Form I-485 to adjust status (LIN 07 258 57477) on August 3, 2007, which was denied on June 17, 2009. This issue will be discussed in further detail later in this decision.

533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Here, no evidence in the motion contains new facts that were previously unavailable.

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 regard to the motion submitted to the director, the movant failed to meet that burden. The motion to reopen, therefore, was properly dismissed by the director.

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.

As discussed above, counsel asserts that the petitioner satisfied the requirements for a motion to reconsider because its motion established that the director's decision was based on an incorrect application of law or USCIS policy; namely, that the director failed to consider the exemption permitted when an alien who has an approved I-140 immigrant petition is prohibited from applying for adjustment of status but for per country limitations. However, counsel's assertions are not accompanied by any pertinent precedent decisions to support these contentions, nor has counsel established that the decision was incorrect based on the evidence of record at the time of the initial decision. Consequently, the motion to reconsider was properly dismissed by the director.

Moreover, while not addressed by the director, the motion failed 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 did 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 was properly dismissed by the director.

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).

Beyond the decision of the director, the AAO notes several additional issues that render the beneficiary ineligible for the benefit sought even if the combined motion to reopen and reconsider had been properly filed.

First, the petitioner has failed to establish that the proffered position of computer system analyst is a specialty occupation as required under 8 C.F.R. § 214.2(h)(4)(iii)(A). A review of the U.S. Department of Labor's *Occupational Outlook Handbook* (hereinafter the *Handbook*) does not indicate that such a position qualifies as a specialty occupation in that the *Handbook* does not state a normal minimum requirement of a U.S. bachelor's or higher degree in a specific specialty or its equivalent for entry into the occupation of computer system analyst. See Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook*, 2010-11 Edition, "Computer Systems Analysts," <<http://www.bls.gov/oco/ocos287.htm>> (accessed June 14, 2011). As such, absent evidence that the position of computer system analyst meets one of the additional, alternative criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), the instant petition could not be approved for this additional reason.

Additionally, even if the proffered position were deemed a specialty occupation requiring at least a bachelor's degree in computer science or its equivalent, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of an occupation that requires at least a baccalaureate degree in that specific specialty. The record contains an educational credentials evaluation which indicates that the beneficiary possesses the equivalent of a U.S. bachelor's degree in statistics. However, because the field of statistics is not closely related to the field of computer science, the petitioner must demonstrate that the beneficiary meets the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) and possesses the equivalent of a United States baccalaureate degree in a specialty closely related to the proffered position.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary's credentials to a United States baccalaureate or higher degree shall be determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials; or
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant

certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

Since the beneficiary's degree is unrelated to the proffered position, USCIS must evaluate the beneficiary's qualifications. A review of the record demonstrates that the petitioner submitted none of the evidence outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(1)-(4).

When USCIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation⁴;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

⁴ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

The record contains a translated copy of the beneficiary's foreign diploma as well as letters from two of her past employers. These letters are brief and fail to demonstrate that the beneficiary's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation. Moreover, there is no evidence that the beneficiary has recognition of expertise in the industry, membership in a recognized association in the specialty occupation, or published material by or about the beneficiary. Thus, absent corroborating evidence as outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), the AAO cannot conclude that the beneficiary's past work experience included the theoretical and practical application of a body of highly specialized knowledge in a field closely related to the proffered position or that the beneficiary has recognition of expertise in the industry.

As related in the discussion above, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position. For this additional reason, the petition will be denied.

The petition must also be denied as it was filed after the expiration of the petition it sought to extend. *See* 8 C.F.R. § 214.2(h)(14). In this matter, the petition that the petitioner is seeking to extend [REDACTED] expired on July 10, 2008. The instant petition was filed on July 31, 2009, over one year after the original petition's expiration. As opposed to a discretionary extension of stay application, there is no discretion to grant a late-filed petition extension. As such, even if the AAO found that the director erred in part as a matter of law or policy such that a motion to reconsider should be granted, the petition could still not be approved as it was filed after the validity date of the petition it sought to extend.

Moreover, the petitioner has failed to establish that the beneficiary is eligible for an exemption to the six-year limitation on the authorized period of stay in H-1B visa status.

In general, section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4) provides that: "[T]he period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years." However, AC21, as amended by DOJ21, removes the six-year limitation on the authorized period of stay in H-1B visa status for certain aliens whose labor certifications or immigrant petitions remain undecided due to lengthy adjudication delays, and broadens the class of H-1B nonimmigrants who may avail themselves of this provision.

As amended by § 11030(A)(a) of DOJ21, § 106(a) of AC21 reads:

(a) EXEMPTION FROM LIMITATION. -- The limitation contained in section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. § 1184(g)(4)) with respect to the duration of authorized stay shall not apply to any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) of such Act (8 U.S.C. § 1101(a)(15)(H)(i)(b)), if 365 days or more have elapsed since the filing of any of the following:

(1) Any application for labor certification under section 212(a)(5)(A) of such Act (8 U.S.C. § 1182(a)(5)(A)), in a case in which certification is required or used by the alien to obtain status under section 203(b) of such Act (8 U.S.C. § 1153(b)).

(2) A petition described in section 204(b) of such Act (8 U.S.C. § 1154(b)) to accord the alien a status under section 203(b) of such Act.

Section 11030(A)(b) of DOJ21 amended § 106(a) of AC21 to read:

(b) EXTENSION OF H-1B WORKER STATUS--The Attorney General shall extend the stay of an alien who qualifies for an exemption under subsection (a) in one-year increments until such time as a final decision is made—

(1) to deny the application described in subsection (a)(1), or, in a case in which such application is granted, to deny a petition described in subsection (a)(2) filed on behalf of the alien pursuant to such grant;

(2) to deny the petition described in subsection (a)(2); or

(3) to grant or deny the alien's application for an immigrant visa or for adjustment of status to that of an alien lawfully admitted for permanent residence.

Additionally, section 104(c) of AC21 enables H-1B nonimmigrants with approved I-140 petitions who are unable to adjust status because of per-country limits to be eligible to extend their H-1B nonimmigrant status until their application for adjustment of status has been adjudicated. On motion, counsel argues that the beneficiary meets these requirements of section 104(c) and thus is exempt from the six year limitation. According to section 104(c), however, the beneficiary must be eligible to adjust status *except for the per-country limitations*. Since the petition that the petitioner is seeking to extend on behalf of the beneficiary expired prior to the filing of the instant petition, the beneficiary is not eligible for an extension under the provisions of 104(c). Moreover, even if the late petition extension could be approved, section 104(c) of AC21 provides that such an extension may only be granted “until the alien’s application for adjustment of status has been processed and a decision made thereon.” As the beneficiary’s adjustment of status application had already been processed and a decision to deny it had been issued prior to the filing date of the instant petition and its requested validity dates, the beneficiary is not eligible for an extension under the provisions of section 104(c) of AC21 for this additional reason.

Furthermore, the beneficiary is ineligible for an exemption to the six year limitation under section 106(a) for two reasons. First, USCIS records indicate that the beneficiary filed an application to adjust status on August 3, 2007, which was denied on August 7, 2009 (LIN 07 258 57477). A review of the director’s decision, which denied the adjustment application based on the beneficiary’s departure from

the United States without a valid H-1B visa or approved advanced parole travel document, was appropriate. By virtue of this denial, the beneficiary is ineligible for the benefits under section 106(a) of AC21, since a final decision to deny the beneficiary's application to adjust status had been entered on August 7, 2009.

Second, USCIS records indicate that, at the time of the filing of the instant petition, the beneficiary was present in the United States on Humanitarian Parole, and thus was not considered a nonimmigrant for purposes of this analysis. Therefore, since she was not in nonimmigrant status at the time the petition was filed, she is thus is further ineligible for the benefits of section 106(a) of AC21.

Finally, a review of USCIS records reveals that the petitioner failed to disclose material facts on the I-129 petition. First, the petitioner failed to discuss the beneficiary's entire history of H-1B status. The H Classification Supplement to Form I-129 requires a petitioner to list each alien's prior periods of stay in H classification during the last six years. A review of this section demonstrates that the petitioner listed only the beneficiary's most recent stay in H-1B status, from September 1, 2005 to July 10, 2008. As stated above, USCIS records demonstrate that the beneficiary was also approved for H-1B status from September 12, 2003 to December 12, 2005, yet the petitioner failed to disclose this fact as required. Moreover, part 4 of Form I-129, which asks whether the petitioner has ever filed an immigrant petition for any person listed in the petition, is marked "no," when in fact the petitioner did file an immigrant petition on behalf of the beneficiary on August 22, 2006 [REDACTED]. That petition was approved on September 4, 2006. Finally, at the time of filing, the petitioner failed to disclose that the beneficiary's I-485 application to adjust status ([REDACTED]) based on that immigrant petition had been denied.

Consequently, the AAO additionally finds that the aforementioned misrepresentation of material facts further invalidates the petition and precludes its approval, as validity of an H-1B petition for consideration for approval requires that the petition's material assertions be true and correct. This fact is clearly indicated in the required certification at Part 6 of the Form I-129 - which the petitioner signed, under penalty of perjury - "that this petition and the evidence presented with it is all true and correct." For this reason also, the petition must be denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 appeal will be dismissed, and the previous decisions of the director will be affirmed.

ORDER: The appeal is dismissed. The petition is denied.