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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: APR 0 4 2012 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.

Thank you,

for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, revoked the approval of the petition for a nonimmigrant visa. The petitioner appealed that decision to the Administrative Appeals Office (AAO). The AAO rejected the appeal. The matter is again before the AAO on a motion to reopen. The motion will be dismissed.

On the Form I-129 visa petition, the petitioner states that it is a construction company established in 1972. In order to employ the beneficiary in what it designates as an electrical systems technical specialist position, the petitioner seeks 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, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director revoked the approval of the petition on the basis that the petitioner had failed to provide requested evidence and had failed to establish that the proffered position meets the definition of a specialty occupation. The director also found that the beneficiary is not entitled to an extension of his stay beyond the six-year limit imposed by section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4). The petitioner appealed that decision to the AAO. The AAO rejected the appeal.

The matter is once again before the AAO on a motion to reopen. As indicated by the check mark at box D of Part 2 of the Form I-290B, the petitioner elected to file a motion to reopen.

On motion, the petitioner submits a brief, and contends that the AAO's decision was incorrect based on the facts and based on an incorrect application of the Service policy. The petitioner further states that it was a victim of unauthorized practice of law and, therefore, could not present timely documents to rebut the grounds of revocation and properly file an appeal.

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]

On motion, the petitioner does not submit any documentary evidence with the brief.

Again, 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. The new facts must be material and previously unavailable, and could not have been discovered earlier in the proceeding. *Cf.* 8 C.F.R. § 1003.23(b)(3). Here, the petitioner does not submit any evidence on motion. Therefore, there is no basis for the AAO to reopen the proceeding.

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[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).

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 will be dismissed.

Finally, the AAO notes the petitioner's claim of ineffective assistance of counsel.

Upon review of the record, the petitioner has also failed to fulfill the prerequisites for allegations of ineffective assistance of counsel. *See Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003); *Matter of Grijalva*, 21 I&N Dec. 472 (BIA 1996); *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988)), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

The AAO notes that any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with the appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. at 637.

Here, the petitioner has not submitted an affidavit, evidence that the prior counsel has been informed of the allegations leveled against him and given an opportunity to respond, and evidence that a compliant has been filed with the appropriate disciplinary authorities, and if not, explanation of why not. The petitioner has therefore failed to satisfy the criteria for a *Lozada* claim, and the motion must be dismissed for this additional reason.

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 proceeding will not be reopened, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed. The previous decision of the AAO, dated June 4, 2010, is affirmed. The approval of the petition remains revoked.