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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



D2

Date: FEB 09 2012

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: On May 1, 2008, the Director of the California Service Center denied the nonimmigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO) and, on November 9, 2009, the AAO dismissed the appeal. On December 7, 2009, counsel for the petitioner filed a motion to reopen. The motion will be dismissed pursuant to 8 C.F.R. § 103.5(a)(1)(iii)(C), (a)(2), and (a)(4).

The petitioner is a church that was established in 1958. It seeks to employ the beneficiary as a music instructor. Thus, the petitioner endeavors to change the beneficiary's employer and extend her 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).

The director denied the petition, finding that the petitioner failed to establish that the proffered position is a specialty occupation. The AAO affirmed the director's denial and dismissed the appeal, adding an additional ground for denial, namely, the petitioner's failure to demonstrate that the beneficiary was qualified to perform the duties of a specialty occupation since the record did not contain an evaluation of the beneficiary's foreign educational credentials.

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, counsel for the petitioner submits a brief accompanied by documentary evidence, and contends that the AAO's decision dismissing the appeal and affirming the director's decision was erroneous. Specifically, counsel contends that, contrary to the findings of both the director and the AAO, the proffered position is more akin to a music teacher than a self-enrichment teacher. Counsel further asserts that the documentation submitted on motion establishes the petitioner's eligibility for approval in this matter.

The motion consists of the Form I-290B; a brief in support of the motion to reopen, and copies of the following documents, tabbed as Exhibits 1, 2, and 3: (1) the beneficiary's multicultural piano instruction curriculum; (2) the petitioner's description of the duties of the proffered position; and (3) a credential evaluation report dated December 4, 2009.

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

¹ [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).

On motion, counsel submits only evidence that was previously available and could have been submitted in the prior proceedings. For example, the petitioner's position description of part-time music teacher forms the basis for the job offered in this matter and could previously have been submitted with the petition or in response to the request for evidence (RFE) issued on October 19, 2007. Moreover, the curriculum overview, submitted as a sample of the typical curriculum for a child enrolled in the petitioner's program at the middle-school level, could also have been submitted in response to the RFE. Finally, the educational evaluation, though dated December 4, 2009, is a duplicate evaluation report and states that the original was completed on March 30, 2004. Therefore, although this document is submitted for the first time on motion, it was previously available to the petitioner at the time the petition was filed and therefore cannot be considered "new" for purposes of this motion.²

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. 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, no evidence in the motion contains new facts that were previously unavailable. As the documentation submitted on motion was previously available prior to the motion, and as none of it is therefore "new" or supports new facts, there is no basis for the AAO to reopen the proceeding.

Motions for the reopening or reconsideration 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. *See 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.

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). 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.

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.

² Even if the evaluation was not previously available, it could have been requested and presented in an earlier proceeding. As such, it would not be considered "new" for purposes of this motion even if it was not a duplicate of one completed years earlier.

ORDER: The motion is dismissed. The previous decision of the AAO, dated November 9, 2009, is affirmed. The petition is denied.