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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: **MAR 06 2012** Office: CALIFORNIA SERVICE CENTER FILE: W 

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 August 26, 2008, the Director, California Service Center, denied the nonimmigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO) and, on February 24, 2010, the AAO dismissed the appeal. The matter is again before the AAO on a combined motion to reopen and motion to reconsider. The motion will be dismissed.

The petitioner claims to be a company engaged in the marketing of dental supplies with four employees and a gross annual income of \$1,600,000.00. It seeks to employ the beneficiary as a web designer and 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 the proffered position is a specialty occupation. The AAO affirmed the director's denial and dismissed the appeal.

The matter is once again before the AAO on a motion to reopen and/or reconsider. As indicated by the check mark at box F of Part 2 of the Form I-290B, counsel for the petitioner elected to file a combined motion to reopen and motion to reconsider.

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 computer engineer or software engineer than a web designer. Counsel, thus, claims that the proffered position is a specialty occupation.

In this matter, the motion consists of the Form I-290B, a brief in support of the motion, and copies of the following documents: (1) a letter from a computer consulting firm; (2) a letter from a software company; (3) an excerpt entitled "Computer Software Engineers and Computer Programmers" from the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*), 2010-11 edition; (4) a copy of the University of Southern California's undergraduate program brochure for a bachelor of science degree in computer science and computer engineering; (5) a copy of California State University at Northridge's course list for computer science and computer engineering; (6) a copy of the petitioner's 2008 income tax return; (7) a copy of the petitioner's business license; and (8) copies of the petitioner's pamphlets.

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 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 University of Southern California's undergraduate program brochure for a bachelor of science degree in computer science and computer engineering could previously have been submitted with the petition or in response to the director's RFE issued on May 12, 2008. Moreover, the California State University at Northridge's course list for computer science and computer engineering could also have been submitted with the petition or in response to the RFE.

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 evidence submitted on motion does not contain 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 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.

Furthermore, 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.

Although the petitioner has submitted a motion entitled "Motion to Reopen and Reconsider," the petitioner does not submit any document that would meet the requirements of a motion to reconsider. The petitioner does not state any reasons for reconsideration nor cite any precedent decisions in support of a motion to reconsider. The petitioner does not argue that the previous decisions were based on an incorrect application of law or Service policy. Other than the title of the motion, the petitioner does not assert that a motion to reconsider should be considered as an alternative to the motion to reopen.² Nevertheless, as the arguments made on motion are primarily based on evidence that was not in the record at the time of the initial decision, it cannot be concluded that the petitioner on motion established

² Based on a review of the motion, it appears that the petitioner has submitted a simple motion to reopen which is erroneously titled "Motion to Reopen and Reconsider." Despite checking Box F on Form I-290B, the petitioner does not explicitly claim that there are two motions made in the alternative, nor does the petitioner cite to any regulation that would clarify the intended motion.

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that the AAO's decision was incorrect based on the record at that time. Therefore, assuming, ██████████ that the petitioner intended to file a motion to reconsider, the petitioner's motion will be dismissed. Finally, it should be 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.

Title 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." 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.