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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



82

Date:

**MAR 29 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,

*Michael T. Kelly*  
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 the 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 is a for-profit enterprise providing developmental program services for adults. It seeks to employ the beneficiary as an accountant and endeavors to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on September 3, 2009, finding that the petitioner failed to establish the proffered position as a specialty occupation. On October 5, 2009, the petitioner filed a timely motion to reopen the proceeding. The director dismissed the motion on February 8, 2010, upon finding that the submissions constituting the motion to reopen failed to satisfy the regulatory requirement that a motion to reopen state new facts to be proven on reopening. The matter is now before the AAO on appeal.

For the reasons to be discussed below, the AAO finds that the director's decision to dismiss the motion to reopen was correct. Accordingly, the appeal will be dismissed, and the petition will be denied.

On its motion to the director to reopen, counsel for the petitioner submitted additional evidence consisting of copies of (1) counsel's letter providing additional details on job duties; (2) the state license for the petitioner's facility; (3) a variety of documents submitted as "Accounting Transactions" of the petitioner, including (a) an Internet page regarding [REDACTED] to which the petitioner provides its Focus Day Program Services as a vendor, (b) billing and attendance records pertaining to the petitioner's services for [REDACTED] and (c) the Quickbook Startup and Reference Guide; (4) samples of the beneficiary's work product, including a profit and loss statement, insurance ledger, and gas disbursement summaries; (5) a letter from [REDACTED] opining on the petitioner's need for an in-house accountant; (6) job vacancy announcements submitted by firms other than the petitioner; and (6) billing and expense records pertaining to the petitioner's services.

On appeal, counsel states that the director dismissed the motion "on technical grounds," finding that the petitioner failed to present new facts and evidentiary proof for classifying the proffered position as a specialty occupation." Counsel further states that the appeal is "anchored on the ground that the [service center director] failed to accord due consideration on the totality of the magnitude of the petitioner's business operations vis-à-vis the complexity of the beneficiary's job duties concerning her continued employment with the petitioner under the H1B status."

The appeal's latter contention basically asserts that the director denied the petition on the basis of an inadequate consideration of the evidence before her when she made her decision. As such, this assertion is not a proper subject for the present appeal, whose focus is the director's action on the motion to reopen, rather than her initial decision regarding the petition. In contrast to a petitioner's direct appeal to the AAO of a service center director's decision denying a petition, an appeal of a service center director's dismissal of a motion limits the scope of the AAO's review to whether the evidence in the record of proceeding establishes that the director's decision to dismiss the motion was a correct application of the motion regulations to the facts of the particular case.

If a petitioner desires to contest a service center director's decision denying an H-1B petition, the pertinent regulations require the petitioner to elect to proceed by either an appeal or a motion, by checking the appropriate box at Part 2 of the Form I-290B that signifies the petitioner's particular election. Here, by

checking box D (“I am filing a motion to reopen a decision. . . .”) the petitioner elected to contest the director’s denial of the petition by filing a motion to reopen.

A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The regulation at 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>

The requirements for a motion to reopen a director’s decision are greater than that for an appeal of such a decision to the AAO, in that an appeal does not require that the evidence submitted in support of an appeal be “new.” See generally 8 C.F.R. §§ 103.3 and 103.5. In the present case, the petitioner elected to contest the director’s denial of the petition by filing a motion to the director to reopen the proceeding, instead of an appeal to the AAO, as evidenced by the check mark at box D at Part 2 of the Form I-290B that was submitted in response to that initial decision. Consequently, the petitioner narrowed the AAO’s scope of review to whether, based upon the submissions constituting the motion to reopen, the director’s decision to dismiss the motion for failure to present new evidence to justify reopening was a correct application of the motion regulations to the facts of this case.

The AAO’s review of the evidence submitted on motion reveals no fact that could be considered *new* under 8 C.F.R. § 103.5(a)(2). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). Therefore, the director’s decision to dismiss the motion was correct.

It is noted that the petitioner retained two attorneys during the pendency of this matter and that the present counsel of record filed the motion to reopen. However, the additional evidence provided at the time of filing the motion did not state any facts that were not readily available to the petitioner and previous counsel at the time of responding to the Request for Evidence (RFE). Most of the evidence submitted on motion to reopen, such as copies of the petitioner’s state license, program documents, and descriptions of itself and its services, the copy of Quickbook Startup and Reference Guide, samples of the beneficiary’s work product, and billing and expense documents, were dated prior to the deadline for the RFE, and there are no indications that such evidence was not available or could not reasonably have been discovered at the time of the response to the RFE. Moreover, it appears that the job listings submitted with the motion are the job vacancy announcements previously submitted in response to the RFE.

In any event, the AAO finds that the submissions on motion did not state any facts for consideration in a reopened proceeding that were in any sense *new*. Rather, the AAO finds that any material facts submitted on motion were either already presented for the director’s consideration prior to her decision to deny the petition or were available to the petitioner or reasonably discoverable and producible for submission for the director’s consideration before her decision to deny the petition. Accordingly, the director’s decision to dismiss the motion to reopen was correct.

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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).

Again, as the motion to reopen presented no fact that could be considered *new* under 8 C.F.R. § 103.5(a)(2), the director's decision to dismiss the motion was correct. A motion that does not meet applicable requirements shall be dismissed, in accordance with the regulation at 8 C.F.R. § 103.5(a)(4).

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.

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.

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.