



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[Redacted]

DATE: **AUG 08 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: [Redacted]

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

*Michael T. Kelly*  
for Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition. The petitioner appealed the director's denial to the Administrative Appeals Office (AAO) and, on May 24, 2013, the AAO dismissed the appeal. The matter is again before the AAO on a motion to reopen. The motion to reopen will be dismissed.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a transportation/logistics firm established in 2005. In order to employ the beneficiary in what it designates as a "Marketing and Business Development Manager" position, the petitioner seeks to classify her 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 qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The petitioner, through counsel, submitted an appeal of the director's decision to the AAO. The AAO reviewed the evidence and determined that the record of proceeding contained insufficient evidence to establish that the petitioner would employ the beneficiary in a specialty occupation position. The AAO dismissed the appeal.

Thereafter, counsel for the petitioner submitted a Form I-290B, a brief in support of the motion, and additional evidence. As indicated by the check mark at Box D of Part 2 of the Form I-290B, counsel stated that the petitioner was filing a motion to reopen the decision. Counsel claims that the AAO's decision dismissing the appeal and affirming the director's decision was erroneous.

The AAO will now discuss the motion to reopen submitted by counsel. As will be discussed below, the submission does not satisfy the requirements of a motion to reopen. A motion that does not meet applicable requirements shall be dismissed. *See* 8 C.F.R. § 103.5(a)(4). Accordingly, this motion to reopen will be dismissed.

### **Dismissal of the Motion to Reopen**

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 new facts submitted on motion 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).

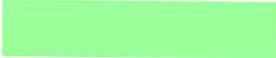
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<sup>1</sup> The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . . ." WEBSTER'S NEW COLLEGE DICTIONARY 753 (2008) (emphasis in original).

In this matter, the motion consists of the Form I-290B along with a cover letter and brief from counsel. In addition, the petitioner and counsel submitted (1) a copy of two sections from the U.S. Department of Labor's *Occupational Outlook Handbook's (Handbook)* chapter on Computer Programmers; (2) a copy of the O\*NET OnLine Summary Report for Computer Programmers; (3) a copy of two sections of the *Handbook's* chapter on the Advertising, Promotions, and Marketing Managers occupational group (previously submitted); (4) a copy of the O\*NET OnLine Summary Report for Marketing Managers (previously submitted); (5) a letter from the petitioner, dated June 6, 2013; (6) a copy of a Labor Certification Application (LCA), certified on March 28, 2008 (previously submitted); (7) a copy of the Request for Evidence, dated April 23, 2008, for a Form I-129 submitted by the petitioner and pertaining to a beneficiary named [REDACTED] (8) a copy of the letter in response to a request for evidence, dated July 15, 2008, submitted on behalf of the petitioner and pertaining to a beneficiary named [REDACTED]; (9) a copy of the I-797A, Notice of Action approval notice, for a Form I-129 submitted by the petitioner and pertaining to a beneficiary named [REDACTED] (previously submitted); (10) a copy of the foreign diploma and its English translation for an individual named [REDACTED] (11) a copy of the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation for 2011; (12) a document entitled, "General Evaluation Report, dated March 29, 2012, prepared on behalf of the beneficiary by Foreign College Credits Evaluators and Translators (previously submitted); (13) a copy of the beneficiary's foreign diploma and its English translation (previously submitted); (14) a copy of [REDACTED] degree from [REDACTED] in Chicago (previously submitted); (15) a copy of the petitioner's State of Illinois, Employer's Contribution and Wage Report for the quarter ending March 31, 2008 (previously submitted); and (16) a copy of an undated document entitled, "Employee Listing" specifying "employee" names and their respective "job title[s]."

The AAO reviewed all of the evidence submitted in support of the instant motion. Upon review of the submission, the AAO notes that the petitioner and counsel have not provided any "new facts" and that the instant motion does not contain any "new" evidence. More specifically, the AAO finds that the petitioner and counsel have failed to submit material evidence that was previously unavailable. The documentation submitted in support of the motion was all available and was or could have been submitted in the prior proceeding and cannot be considered "new facts" or "new" evidence. Also, while the letter from the petitioner dated June 6, 2013 post-dates the AAO's decision on appeal, the letter purports to clarify the petitioner's statement in the prior proceeding regarding the educational requirements for the proffered position. The information presented in the letter cannot be considered "new facts" or "new" evidence. Thus, the submission fails to meet the requirements for a motion to reopen at 8 C.F.R. § 103.5(a)(2). Accordingly, the motion to reopen will be dismissed.

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" of proof. *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden.



Finally, it should be noted for the record that, unless USCIS 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, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met. Accordingly, the motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decision of the AAO will not be disturbed.

**ORDER:** The motion is dismissed.