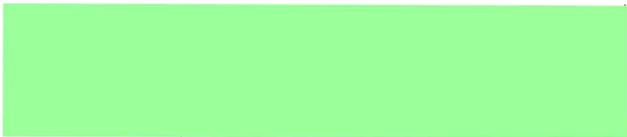


(b)(6)

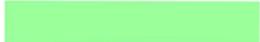


U.S. Citizenship
and Immigration
Services

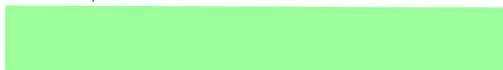


DATE: **JAN 03 2013**

OFFICE: CALIFORNIA SERVICE CENTER

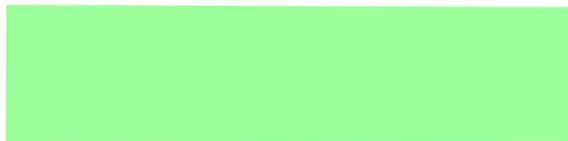
FILE: 

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:

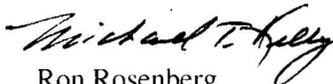


INSTRUCTIONS:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


for Ron Rosenberg

Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director revoked approval of the nonimmigrant visa petition, and the Administrative Appeals Office (AAO) summarily dismissed a subsequent appeal. The matter is again before the AAO on a motion to reopen. The motion will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a technology solutions provider established in 2003. In order to employ the beneficiary in what it designates as an accountant position, the petitioner seeks 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 relevant facts and procedural history of this case were set forth adequately in its prior decision, so the AAO will here only repeat such facts and procedural history here as necessary. The director denied the petition on February 2, 2010, on the basis of her determination that the petitioner had failed to demonstrate that the proffered position qualifies for classification as a specialty occupation. The petitioner, through counsel, filed a timely appeal. In its February 8, 2012 decision dismissing the petitioner's appeal, the AAO concurred with the director's decision, and found additionally that the petitioner had failed to submit a certified Labor Condition Application that corresponds to the petition.

On motion to reopen counsel submits a brief; a letter from the petitioner to its accountant dated January 16, 2008; a letter from the petitioner's accountant dated February 29, 2012; and the following documents:

- E-mail correspondence dating from 2007, 2008, and 2009;
- A "Cash Flow Budget Summary" encompassing the period April 7 to May 16, 2008;
- Documents entitled "A/R Aging Detail," dated April 6 and 7, 2008;
- A Payroll Summary for the two-week period ending May 16, 2008;
- A document entitled "Expected AR Collection," for the period April 28 through May 30, 2008;
- A document entitled "Other Business Expenses" covering the period April 7 through May 16, 2008;
- A credit card balance sheet dated April 7, 2008;
- A "Project Tracking Sheet" dated April 7, 2008;
- A document entitled "Business Plan – Summary Info" covering the period February 2008 through January 2010;
- A "Cash Flow Forecast" for the period of February 2008 through January 2010;
- A document entitled "P L Forecast" covering the period February 2008 through January 2010;
- A document entitled "P L Ratio Analysis" covering the period February 2008 through January 2010;
- A document entitled "Detailed Sales Budget" covering the period February 2008 through January 2010;

- A document entitled “Cost of Delivery Budget” covering the period February 2008 through January 2010;
- A document entitled “Salary Wage Budget” covering the period February 2008 through January 2010;
- An “Expense Budget” covering the period February 2008 through January 2010;
- A document entitled “Performance Analysis – Budget vs. Actual” for the period February 2008 through April 2008;
- A document entitled “Profit Loss – Detailed” for the period February 2008 through April 2008;
- “Balance Sheets” dated November 30, 2007; January 31, March 31, and April 30, 2008; and September 30 and October 6, 2009;
- A document entitled “Projected Profitability Cash Flow – Exec. Summary” covering the period January 2008 through January 2010;
- A document entitled “Budget – Summary” covering the period January 2008 through January 2010, which appears to have been prepared on September 27, 2007;
- A document entitled “Revenue Summary 2008-2010” which covers the period January 2008 through January 2010;
- A document entitled “Revenue Budget - Details” covering the period January 2008 through January 2010;
- A document entitled “Expenses Details 2008-2008”;
- A document entitled “Resource Budget – Summary” covering the period January 2008 through January 2010;
- A document entitled “Resource Budget – Innovations Team” covering the period January 2008 through January 2010;
- A document entitled “Resource Budget – Consultants/ ODC Team” covering the period January 2008 through January 2010;
- A document entitled “Cash Flow Budget – Summary” covering the period January 2008 through January 2010;
- A document entitled “Pipeline – ” covering the period February 2008 through June 2008;
- A document entitled “Projected Profitability Analysis – Summary” covering the period January 2008 through June 2008;
- A document entitled “Projected Profitability Analysis – Detailed” covering the period January 2008 through June 2008;
- A document entitled “Projected Billing” covering the period January 2008 through June 2008;
- A document entitled “Projected Cash Flow” covering the period January 2008 through June 2008;
- Documents entitled “Revenue Analysis, Rosetta Stone, UK,” “Cost Analysis, Rosetta Stone, UK,” “Profitability Analysis, Rosetta Stone, UK,” and “Balance Sheet Cash Flow Analysis, Rosetta Stone, UK,” all of which were prepared in December 2008;¹

¹ The “Remarks” portion of this document contains the statement “[n]ow that we are in December 2008[.]”

- A document entitled “Sales By Customer Summary” covering the period January 2003 through December 2008;
- Profit and loss statement covering the periods January 2007 through November 2007, April 2009 through September 2009, and the month of September 2009;
- Documents entitled “Income by Customer Summary” covering the periods January 2007 through June 2007, and from January through November of that same year;
- A document entitled “[REDACTED] Loan Repayment Schedule” covering the period December 2007 through November 2008;
- A document entitled “Projection of Impact of India ODC Team on Net Worth” covering the months of January 2008 and February 2008;
- A “Budget” covering the months of January 2008 and February 2008;
- An undated document entitled “Resource Cost Details” which was e-mailed by the beneficiary on December 27, 2007;
- Undated computer program instructions which appear to have been e-mailed by the beneficiary on October 7, 2009;
- Payroll information from 2009;
- Documents entitled “A/P Aging Detail” dated September 30, 2009 and October 6, 2009;
- A document entitled “Profit & Loss – for Consolidation” dated September 2009;
- A document entitled “Intercompany Transactions Report” dated September 2009;
- A document entitled “Sales by Customer Summary” covering the period April 2009 through September 2009;
- A document entitled “Payroll Reconciliation” covering the period April 2009 through September 2009;
- A document entitled “Cash Flow Analysis” covering the period April 2008 through September 2008;
- An undated spreadsheet entitled “Schedule: Fixed Assets” which was e-mailed by the beneficiary on July 25, 2008;
- A document entitled “Inter-Company Reconciliation” covering the period January 1, 2007 through July 29, 2008;
- A listing of employee expenses reimbursed in 2007 and 2008;
- A document entitled “Statement of Outstanding Invoices” covering the period January 1, 2007 through July 29, 2008; and
- A document entitled “Payroll Reconciliation” covering the period April 2009 through September 2009;

Counsel’s submission does not meet the requirements of a motion to reopen.

The regulation at 8 C.F.R. 103.5(a)(2) states that 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 upon the plain meaning of the word “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.² However, counsel cites no facts and makes no arguments in his brief that could not have been discovered or presented in the previous proceeding. Nor does counsel's brief constitute new evidence in and of itself, as the unsupported statements of counsel on appeal or in a motion are not evidence and therefore are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The letter from the petitioner's accountant dated February 29, 2012 does not contain any facts or arguments that could not have been discovered or presented in the previous proceeding either. Given its date of January 16, 2008, the same is obviously true of the accountant's other letter. The supporting documentation itemized above was all issued before the director's February 2, 2010 decision denying the petition, and the petitioner has not explained why this evidence could not have been discovered or presented in the previous proceeding.

Accordingly, the submissions on motion contain no facts or evidence that could be considered *new* pursuant to 8 C.F.R. § 103.5(a)(2).

Counsel's submissions do not meet the requirements of a motion to reopen. The regulation at 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Because the motion to reopen does not meet the applicable requirements set forth at 8 C.F.R. § 103.5(a)(2), the motion must be dismissed pursuant to 8 C.F.R. § 103.5(a)(4). The proceedings will therefore not be reopened, and the AAO's previous decision will not be disturbed.

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. Counsel's submission does not meet that burden, and it therefore does not qualify as a motion to reopen.

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.

ORDER: The motion to reopen is dismissed. The February 8, 2012 decision of the Administrative Appeals Office is affirmed. The petition is denied.

² 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 College Dictionary* 736 (Houghton Mifflin 2001)(emphasis in original).