



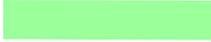
U.S. Citizenship
and Immigration
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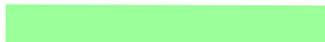
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Date: **JAN 25 2013**

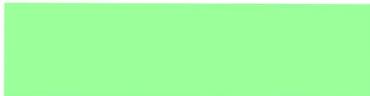
Office: CALIFORNIA SERVICE CENTER

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The petitioner subsequently filed a combined motion to reopen and motion to reconsider. The director dismissed that motion as not meeting the requirements of a motion to reopen or a motion to reconsider. The petitioner appealed that latter decision to the Administrative Appeals Office (AAO). The appeal will be dismissed. The motion will be dismissed, and the denial of the underlying petition will not be disturbed.

On the Form I-129 visa petition, submitted November 21, 2011, the petitioner stated that it is a "Software Development and IT [information technology]" firm. To continue to employ the beneficiary in what it designates as a computer software engineer position, the petitioner endeavors 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 on March 5, 2012, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. Counsel filed the motion to reopen or reconsider from that decision of denial.

On May 3, 2012, the director dismissed the motion, finding that as it did not qualify as a motion to reopen pursuant to 8 C.F.R. § 103.5(a)(2), or qualify as a motion to reconsider pursuant to 8 C.F.R. § 103.5(a)(3), it must be dismissed pursuant to 8 C.F.R. § 103.5(a)(4). This is the decision from which the counsel appealed.

Counsel filed the instant appeal on May 18, 2012. In that appeal, counsel alleged that the evidence previously presented showed that the proffered position is a specialty occupation position. Counsel also provided additional evidence that may be pertinent to that issue. The AAO observes that the issue before it on appeal is not the issue upon which the decision of March 5, 2012 was based, *i.e.*, whether the proffered position qualifies as a specialty occupation position. The decision from which counsel appealed is the May 3, 2012 decision that the petitioner's motion must be dismissed as it failed to meet the requirements of a motion to reopen or a motion to reconsider. That decision and that issue are before the AAO, and the decision will be restricted to that issue. The evidence pertinent to the specialty occupation issue will be considered only insofar as it pertains to whether the May 3, 2012 decision to dismiss the motions was correct. If the petitioner desired to have the underlying decision to deny the petition reviewed by the AAO, it should have filed a timely appeal of that decision and not of the decision to dismiss the petitioner's combined motion.

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.¹ The new facts submitted on

¹ The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered,

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).

On motion, counsel for the petitioner submitted the following:

- A request for proposals, dated April 3, 2009, issued by the [REDACTED] and the petitioner's undated proposal in response;
- A request for proposals, dated May 14, 2010, by the [REDACTED] and the petitioner's undated response;
- A request for proposals, dated May 18, 2010, by the [REDACTED] Purchasing Department, and the petitioner's undated response;
- Undated evidence pertinent to [REDACTED] which provides Internet-based educational measurement services;
- An undated letter from a manager at [REDACTED]
- The petitioner's May 13, 2011 balance sheet;
- The petitioner's 2010 Form 1120 U.S. Corporation Income Tax Return;
- Invoices dated from May 31, 2010 to March 14, 2012;
- Copies of websites developed by the petitioner;
- A letter, dated January 25, 2012, from a Global Solutions Manager at [REDACTED]
- A Software Development & Services Agreement between the petitioner and [REDACTED] ratified on August 3, 2010;
- A non-disclosure agreement signed by representatives of the petitioner and [REDACTED] on September 5, 2011 and September 7, 2011, respectively;
- A Master Professional Services Agreement signed by representatives of the petitioner and [REDACTED] on August 24, 2011 and August 30, 2011, respectively; and
- A Research and Development Project Agreement signed by representatives of the petitioner and representatives of [REDACTED] on January 7, 2012 and January 11, 2012.

A review of the evidence that the petitioner submits on motion reveals no fact that could be considered *new* under 8 C.F.R. § 103.5(a)(2). The evidence submitted was either previously available and could have been discovered or presented in the previous proceeding, or it post-dates the visa petition and is not material to establishing eligibility at the time the petition was filed.

The visa petition was filed on November 21, 2011. The requests for proposals all predate that filing date, and were apparently available to the petitioner when it filed the visa petition. When the petitioner issued its responses to those requests for proposals is unknown. No evidence was submitted, however, that they post-date the filing of the visa petition and were otherwise unavailable when the petitioner filed the instant visa petition.

Similarly, no evidence was provided to show that the evidence pertinent to [REDACTED] the undated letter from a manager at [REDACTED] the petitioner's balance sheet, its 2010 tax return, the copies of websites the petitioner developed, the Software Development & Services Agreement between the petitioner and [REDACTED] and the agreements between the petitioner and [REDACTED] were unavailable when the petitioner filed the visa petition on November 21, 2011.

As to the letter from [REDACTED] counsel stated:

This evidence . . . was not available at the time Petition was filed and the said facts could not be discovered from the evidence provided with the Petition.

Other than counsel's assertion, nothing in the record suggests that the petitioner could not have obtained that letter from [REDACTED] prior to submitting the visa petition. Further, whether USCIS could have discovered the evidence it contains by examining the evidence counsel submitted with the visa petition is not on point. The issue is whether counsel has demonstrated that the letter contains any *new* fact, that is, a fact that was unavailable *to the petitioner* and which the petitioner could not have discovered or presented in the previous proceeding. Counsel's failure to previously present a fact he now deems relevant does not render it new within the meaning of 8 C.F.R. § 103.5(a)(2).

Some of the invoices provided predate the filing of the visa petition and, as they were issued by the petitioner, were clearly available to the petitioner when it filed the visa petition. Other invoices, those issued after the petitioner filed the visa petition, were not available when the visa petition was filed. Title 8 C.F.R. § 103.2(b)(1), however, requires that eligibility for a benefit request be established at the time a visa petition is filed. In addition, 8 C.F.R. § 103.2(b)(12) requires that a petition be denied when evidence submitted does not establish eligibility at the time the petition is filed. The invoices prepared after the visa petition was filed have not been shown to have any relevance to whether eligibility was established on or before the date the instant petition was filed and, therefore, they are not relevant to whether the dismissal of the motion pursuant to 8 C.F.R. § 103.5(a)(2) was correct.

The January 25, 2012 letter from [REDACTED] states that the petitioner would assign one of its employees, not the beneficiary, to work on an [REDACTED] project in North Carolina if her H-1B status is approved. That letter contains no indication of any agreement that the beneficiary would work on any such project or, if such an agreement exists, that it (1) existed prior to the submission of the visa petition, (2) is relevant to the petitioner's eligibility when the petition was submitted, and (3) could not have been previously discovered and presented.²

The project agreement between the petitioner and [REDACTED] is for work to begin either on December 22, 2011 or upon ratification of that document, on January 11, 2012, whichever is later. It does not demonstrate that the petitioner had any work to which to assign the beneficiary when it filed the instant

² The AAO also notes that the Labor Condition Application (LCA) submitted in support of the visa petition is certified for employment at an address in Monterey, California. It is not valid for employment in North Carolina. If the letter from [REDACTED] evinced an intent to employ the beneficiary in North Carolina, it would raise additional issues of approvability, e.g., the satisfaction of the itinerary requirement and the provision of an LCA that corresponds to the petition.

visa petition, on November 21, 2011. Further, the agreement does not state that the beneficiary would be employed pursuant to it.³ For both reasons, that agreement has not been shown to be material to whether the visa petition was approvable when it was filed, and has not been shown to be relevant to any issue presently before the AAO.

None of the evidence submitted has been shown to pertain to any *new* facts that are relevant to whether eligibility for the benefit sought had been established at the time the instant visa petition was filed. As such, they do not address the issue that is before the AAO, that is: whether the finding in the May 3, 2012 decision, that the petitioner's motion must be dismissed as it qualified neither as a motion to reopen nor as a motion to reconsider, was correct.

The remaining consideration is whether the petitioner's motion qualified as a motion to reconsider. The regulation at 8 C.F.R. § 103.5(a)(3) 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.

On appeal, counsel asserted that the decision to dismiss the petitioner's motion failed to consider some of the evidence pertinent to the petitioner's business relationship with [REDACTED] [REDACTED] apparently asserting that the decision was, therefore, incorrect when it was issued based on the evidence then in the record.

Specifically, counsel stated:

USCIS omitted to refer to [REDACTED] project functionality document and their letter describing the works performed by petitioner to [REDACTED]

³ Further still, the period of employment requested in the visa petition is from January 1, 2012 through December 31, 2014. The agreement between the petitioner and [REDACTED] states that work performed under that agreement will end on March 31, 2012. Even if it were construed to show that the petitioner had some employment available for the beneficiary at the time the petition was filed, it would not show employment through the end of the period of requested employment.

Yet further, that agreement does not make clear whether the work contracted for would be performed at the petitioner's own location, in Pineville, North Carolina; at the billing address of [REDACTED] listed in that agreement, which is in Palo Alto, California; at the address to which notices sent to [REDACTED] under that agreement are to be addressed, which is in Charlotte, North Carolina, or at some other location. As was noted above, the LCA submitted with the visa petition is certified for employment at an address in Monterey, California. If the petitioner were to show that the beneficiary would work for [REDACTED], but not show that the contemplated employment would be in an area for which the LCA is certified, that would again raise an additional issue regarding the petitioner's eligibility for the benefit sought.

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The documents pertinent to [REDACTED] include the letter from its manager, which states: "[The petitioner] is providing professional and technical services on a project titled [REDACTED]

The documents pertinent to [REDACTED] state that it "provides Internet-based educational measurement services that accommodate teacher, school, and district benchmark assessment needs." The record does not contain a detailed description of the [REDACTED] project.

Nothing in the evidence provided describes the services the petitioner would perform on that project, except that the letter from [REDACTED] manager's statement that they are "professional and technical." That is insufficient to show that they are duties in a specialty occupation. Further, nothing in the record shows that the beneficiary would work on that project or, if he would, the nature and complexity of the services he might provide. The evidence pertinent to the petitioner's business relationship with [REDACTED] contains no indication that the petitioner would employ the beneficiary in a specialty occupation position. Counsel implied that the evidence from [REDACTED] demonstrates that the May 3, 2012 decision erred in concluding that the petitioner's motion did not qualify as a motion to reconsider. The AAO finds, however, that the evidence pertinent to [REDACTED] does not show that the petitioner would employ the beneficiary in a specialty occupation position; does not show, therefore, that the March 5, 2012 decision to deny the visa petition was incorrect based on the evidence in the record when that decision was issued; and does not, therefore, demonstrate that counsel's motion qualified as a motion to reconsider.

The regulation at 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, and the previous decisions of the director will not be disturbed.

The AAO finds that the director did not err in her determination that the motion before her failed to meet the requirements of a motion to reopen and failed to meet the requirements of a motion to reconsider. Accordingly, the appeal will be dismissed and motion dismissed on this basis.

Finally and beyond the decision of the director, 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 be dismissed for this additional reason.

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 and underlying motion will be dismissed.

(b)(6)

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ORDER: The appeal is dismissed. The motion is dismissed, and the denial of the underlying petition is not disturbed.