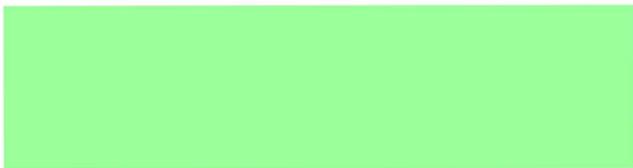




U.S. Citizenship  
and Immigration  
Services

(b)(6)

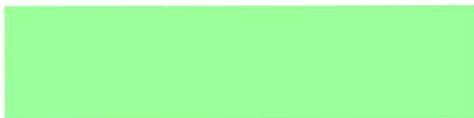


Date: **JUN 14 2013** Office: VERMONT SERVICE CENTER FILE:

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 Director, Vermont Service Center, revoked the approval of the petition for a nonimmigrant visa. The petitioner appealed that decision to the Administrative Appeals Office (AAO). Upon review, the AAO summarily dismissed the appeal. The matter is again before the AAO on a motion to reopen. The motion will be dismissed. The petition will remain revoked.

In the Form I-129 visa petition, the petitioner identified itself as an architectural services company. The revocation that was the subject of the AAO's decision on appeal pertains to approval of a petition to employ the beneficiary as an H-1B nonimmigrant in a specialty occupation position, as an architect, 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).

The director revoked the approval of the petition on December 2, 2009, on the basis that the petitioner had failed to overcome the deficiencies noted in the Notice of Intent to Revoke (NOIR) issued by the Vermont Service Center on October 6, 2009. In particular, the director found that the petitioner had not established that it met the regulatory definition of a U.S. employer at 8 C.F.R. § 214.2(h)(4)(ii). More specifically, the director determined that the petitioner had not established that it had "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii).

The petitioner appealed the director's decision to the AAO on December 23, 2009. At Part 3 of the Form I-290B, the petitioner stated the following:

[The] Petitioner's H-1B visa approval by the Vermont Service Center should not have been revoked as [the] Petitioner provided the necessary evidence of eligibility for issuance of the H-1B visa.

The Vermont Service Center erred in its findings of fact and law and its conclusion that there was no employer-employee relationship between [the] Petitioner and the Beneficiary. [The] Petitioner meets the regulatory definition of a U.S. employer and the H-1B visa approved on behalf of [the beneficiary] should be reinstated.

It is important to note that the Form I-290B was not accompanied by a brief. Rather, as annotated by the check mark at box B of Part 2 of the Form I-290B, the petitioner stated that it would submit a brief and/or additional evidence to the AAO within 30 days. It is critical to note that, in pertinent part, that section of the Form I-290B states "My brief and/or additional evidence *will be submitted to the AAO within 30 days.*" (Italics added.)

However, the record reflects that at the time it issued its summary dismissal of the appeal, on December 15, 2011, the record of proceeding before the AAO did not contain a brief or any supporting materials in support of the appeal. The AAO alluded to this fact within the body of its decision to summarily dismiss the appeal.

The matter is once again before the AAO, this time on a motion to reopen, as indicated by the check mark at box D of Part 2 of the Form I-290B.

In addition to the Form I-290B, the motion to reopen includes copies of the following documents: (1) an I-797C Notice of Action reflecting the approval of the petition that became the subject of the director's revocation; (2) a copy of the I-290B Notice of Appeal pertaining to the appeal which the AAO summarily dismissed; (3) an I-797C Notice of Action, reflecting the issuance of the approval of the H-1B Petition related to this proceeding; (4) the Form I-290B Notice of Appeal filed on December 23, 2009; (5) the AAO Summary Dismissal, dated December 15, 2011, which is the subject of this motion; (7) a letter from the Vermont Service Center, dated March 26, 2010, stating that the petitioner's appeal had been forwarded to the AAO; (6) a copy of a cashier's check for the I-290B filing fee; (8) two tracking information documents, showing that a package from the petitioner was delivered to the Vermont Service Center on December 23, 2009; (9) a parcel shipping order, dated December 22, 2009, from "[REDACTED]"; and (10) a copy of the petitioner's appeal brief and allied documents, dated December 12, 2009, which bears a January 20, 2010 date-stamping that appears to the AAO to have been entered by the Vermont Service Center, to mark January 20, 2010 as the date that those documents were received by that service center. The motion also includes counsel's brief on motion, in the original, entitled "Petitioner's Brief Supplemental to Form I-290B[,] Motion to Reopen and Reconsider."

At Part 3 of the Form I-290B form received by the Service on January 19, 2012, counsel states the following:

Petitioner's [H-1B- visa approval by the Vermont Service Center should not have been revoked as the Petitioner provided the necessary evidence of eligibility for issuance of the [H-1B] visa. The Vermont Service Center erred in its findings of fact and law and its conclusion. The petitioner meets the regulatory definition of a U.S. employer and the [H-1B] visa approved on behalf of [the beneficiary] should be reinstated.

Furthermore, the appeal decided on December 15, 2011 was improperly dismissed. The sole basis for the appeal was the allegation that no supplemental brief was submitted. As stated in the brief attached hereto this is simply incorrect. Based on the foregoing reason in addition to those stated in the supplemental briefs said visa should be reinstated.

In her brief on motion, counsel asserts that the January 20, 2010 date stamp appearing at the bottom, right-hand corner of the first page of the appeal brief indicates that "the AAO received the brief in support of the appeal." However, the AAO finds no indication at all in the stamp that it is an AAO stamp, rather than a Vermont Service Center stamp. In fact, on the copy of the appeal brief that the petitioner submitted into the record of proceeding for the motion, AAO finds discernible at least this broken phrase in the date- stamp in question: "LBANS, VT." This marking, the AAO finds, *one*, indicates that the date stamp likely denotes the date of receipt by the Vermont Service Center, St. Albans, Vermont, and, *two*, rules-out the date-stamping as marking receipt by the AAO, which is not located in Vermont.<sup>1</sup> The AAO concurs with counsel that the petitioner's appeal brief bears the

---

<sup>1</sup> The AAO also observes, as a matter of administrative detail, that if appeal brief dated December 21, 2009 had in fact been received by the AAO on January 20, 2010 – which is not the case – that submission would have been untimely, as beyond the 30 additional days that the Form I-290B allows for a brief to follow the filing of the Form I-290B itself.

Vermont Service Center stamp dated January 20, 2010. This fact, nevertheless, is directly contrary to counsel's contention that the appeal brief was properly filed with the AAO, as is required by the Form I-290B and as reflected in the regulations addressing briefs for which the AAO has granted additional time for submitting a brief, at 8 C.F.R. §§ 103.3(a)(2)(vii) and 103.3(a)(2)(viii).

For the reasons discussed above, the AAO finds that the appeal brief was not properly filed with the AAO as required by the regulations, and, moreover, that the appeal brief and its allied documents were not part of the record of proceeding for consideration when the AAO issued the December 15, 2011 summary dismissal. Accordingly, the AAO finds no basis for entering any finding on motion that the AAO's decision to dismiss the appeal was erroneous.

On this motion to reopen, counsel maintains that the AAO's summary dismissal was incorrect because the petitioner meets the regulatory definition of a U.S. employer. The AAO observes, however, that the instant motion to reopen does not state any new facts and does not contain affidavits and/or documentary evidence in support of new facts that would lead the AAO to conclude that the petitioner meets the regulatory definition of a U.S. employer.

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.<sup>2</sup>

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 petitioner does not submit any new evidence on motion. Therefore, 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.

A review of the evidence submitted on motion reveals no facts that can be considered *new* within the sense required to merit reopening a decision under 8 C.F.R. 103.5(a)(2). Counsel did not assert, let alone demonstrate, that any of the evidence provided on motion was previously unavailable. Accordingly, the motion does not meet the requirements for a motion to reopen.

Further, the instant motion does not contain a statement pertinent to whether the validity of the unfavorable AAO decision has been or is the subject of any judicial proceeding, and it does not, therefore, meet the requirement for a motion imposed by 8 C.F.R. § 103.5(a)(1)(iii)(C). It must be dismissed pursuant to 8 C.F.R. § 103.5(a)(4) for this additional reason.

---

<sup>2</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 Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) (emphasis in original).

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).

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. Accordingly, the motion will be dismissed, the proceeding will not be reopened, and the previous decisions of the director and the AAO will not be disturbed.

**ORDER:** The motion is dismissed. The previous decision of the AAO, dated December 15, 2011, is affirmed. The petition remains revoked.