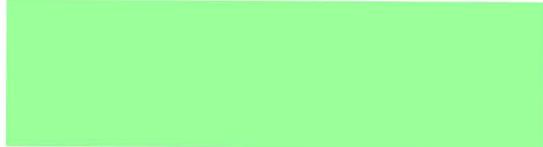


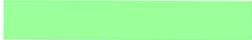


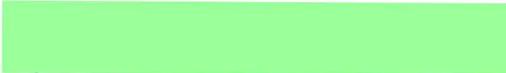
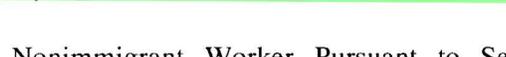
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **OCT 28 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:

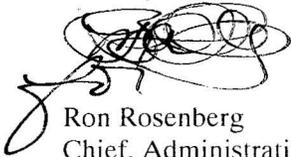
SELF-REPRESENTED

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,



Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The director initially approved the nonimmigrant visa petition. Upon subsequent review of the record of proceeding, the director issued a notice of intent to revoke (NOIR), and ultimately did revoke the approval of the petition. The petitioner filed an appeal and the Administrative Appeals Office (AAO) dismissed the appeal. The matter is again before the AAO on a combined motion to reopen and reconsider. The joint motion will be dismissed. The approval of the petition will remain revoked.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on May 12, 2011. In the Form I-129 visa petition, the petitioner described itself as a business providing medical and cardiology consultant services that was established in 1979. In order to continue to employ the beneficiary in what it designated as a computer analyst/programmer position, the petitioner sought to continuously 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 position was approved for what was designated as a computer analyst/programmer position. Thereafter, a site visit was conducted. The director reviewed the report regarding the site visit and issued a NOIR. The petitioner provided a response to the NOIR, which the director reviewed. However, the director found that the petitioner did not overcome the grounds for revocation. Consequently, the director revoked the approval of the petition. The petitioner submitted an appeal, which the AAO dismissed on June 28, 2013.

Thereafter, the petitioner filed this combined motion to reopen and motion to reconsider as indicated by the check mark at box F of Part 2 of the Form I-290B. Thus, the matter is once again before the AAO. On motion, the petitioner submits a brief and additional documentation. The AAO reviewed the record of proceeding in its entirety before issuing its decision.

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 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).

In this matter, the motion consists of the Form I-290B along with the petitioner's brief, as well as the following documents: (1) an educational credential evaluation from the [REDACTED] dated July 12, 2001 (previously submitted); (2) printouts of three decisions (issued in 1966 and 1988); (3) an excerpt from the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* (2012-2013 edition) regarding the occupational category Computer Systems Analysts; (4) a document entitled "Project Plan" for electronic medical records from the petitioner dated July 22,

¹ 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).

2013, which provides a list of "modules"; and (5) printouts described by the petitioner as the beneficiary's work product, which include screen shots from "EMR-Microsoft Visual Basic.NET [design]-about "Electronic Medical Records," as well as several pages of Visual Basic script (previously submitted). In addition, the petitioner submitted its letter in response to the NOIR (dated May 25, 2012), the director's revocation notice (dated October 1, 2012), and the AAO's prior decision.

Upon review of the documentation, the AAO finds that the petitioner failed to state new facts that were not available and could not have been discovered or presented in the previous proceeding. For instance, several of the documents submitted with the motion were provided by the petitioner with the H-1B petition or in response to the notice of intent to revoke the approval of the petition. Moreover, the three decisions were issued in 1966 and 1988, thus, they were previously available. Furthermore, the excerpt from the *Handbook* was also previously available.

On motion, the petitioner submitted a document entitled "Project Plan" that lists the "modules" for an "Electronic Medical Records" project. The petitioner states that "[t]he beneficiary besides working on this project also performs the duties mentioned in the petition as needed." Upon review, the petitioner has not established that the document is material and was not previously available or discoverable.²

The petitioner claims that the "reason for not submitting the documents with [the] NOIR was because, when the site inspector visited our site he saw the beneficiary's work station and the software which we are using for development (which led us to believe that he noted the beneficiary's work down)." The petitioner continues by stating that "when asked to look in depth into our new programs/applications, [the site inspector] declined, leading us to believe that he had seen enough."

Notably, the director's NOIR contained a detailed statement regarding the information that had been obtained from the site visit, and it notified the petitioner that it was afforded an opportunity to submit additional evidence or arguments to overcome the stated grounds for revocation. Furthermore, the record indicates that the petitioner submitted a brief and supplemental documentation in its response to the NOIR. The petitioner's failure to provide any additional documents does not establish that the evidence was material and was not previously available or discoverable. 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; see e.g., *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

The AAO reviewed the information presented but notes that the petitioner has not submitted factual information or changed factual circumstances that were not considered and could not have been presented in the prior proceeding. Here, the evidence submitted on motion does not contain

² The documentation is insufficient to overcome the grounds for revocation of the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

material, new facts that were previously unavailable. As the documentation submitted on motion was previously available or could have been obtained prior to the motion, and as none of it is "new" or supports material new facts, there is no basis for the AAO to reopen the proceeding. 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. The motion to reopen will be dismissed.

Further, the AAO finds that the current motion also does not meet the requirements of a motion to reconsider. 8 C.F.R. § 103.5(a)(2) 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.

The purpose of a motion to reconsider is to contest the correctness of the original decision based on the previously established factual record. A motion to reconsider based on a legal argument that could have been raised earlier in the proceedings will be denied. *See Matter of Medrano*, 20 I&N Dec. 216, 219-20 (BIA 1990, 1991). The "reasons for reconsideration" that may be raised in a motion to reconsider should flow from new law or a *de novo* legal determination reached by the AAO in its decision that could not have been addressed by the party. *See Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). Further, a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. *Id.* Instead, the moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *Id.* at 60.

On the Form I-290B, the petitioner asserts that "the decision was based on the incorrect application of law (cases cited) and USCIS policy." However, the AAO finds that the petitioner failed to support its assertion. In the brief filed with the Form I-290B, the petitioner refers to section 214(i)(1) of the Act, which states that a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. The petitioner claims that according to the *Handbook*, "a bachelor's degree in a computer or information science field is common, although not always a requirement." The petitioner further states that the "duties (analysis, designing, writing codes/scripts, debugging, using computer language visual basic, SQL for programming etc.) of this position are so specialized and complex that they can be performed only by an individual with knowledge, training, or working experience in the respected specialty." The petitioner also claims that the beneficiary meets all of the requirements by having

"knowledge in that field and by having two and half years of working experience in that specialty occupation." In support of the assertion, the petitioner cited *Matter of Devnani*, 11 I&N Dec. 800 (BIA 1966), *Matter of Caron International, Inc.*, 19 I & N Dec. 791 (BIA 1988), and *Hong Kong T.V. Video Program, Inc. Ilchert*, 685 F. Supp 712 (N.D. Cal 1988).

The AAO notes that the basis of the prior decision is that the petitioner failed to provide sufficient documentation to support its claim that the beneficiary is performing the caliber of work to qualify the proffered position as a specialty occupation.³ The petitioner references several cases but has furnished no evidence to establish that the facts of the instant petition are analogous to the cited cases. That is, although the petitioner states its disagreement with the prior decision, it does not cite a statutory or regulatory authority, case law, or precedent decision to establish that the decision was based on an incorrect application of law or USCIS policy. The petitioner has not established that the decision was incorrect based upon the evidence of record at the time of the initial decision. In short, the petitioner has not submitted any evidence that would meet the requirements of a motion to reconsider.

Furthermore, a review of the record and the prior decisions indicates that the director and the AAO properly applied the statute and regulations to the petitioner's case. The petitioner's primary complaint is that the petition has been revoked; however, both the director and the AAO have provided the petitioner with detailed statements regarding the grounds for the revocation. As previously discussed, the petitioner has not met its burden of proof and the revocation was the proper result under the applicable statutory and regulatory provisions. Accordingly, the claim is without merit. Thus, the motion to reconsider must be dismissed.

Finally, 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 also be dismissed for this reason.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *Matter of Otiende*, 26 I&N Dec. 128. Here, that burden has not been met.

³ The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In the prior decision, the AAO noted that as the appeal was dismissed and the petition revoked (for the reasons discussed in-detail in that decision), the AAO would not further discuss the additional issues and deficiencies that it observed in the record of proceeding.

(b)(6)

NON-PRECEDENT DECISION

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ORDER: The joint motion is dismissed. The previous decision of the AAO, dated June 28, 2013, is affirmed. The petition is revoked.