



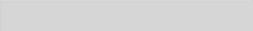
U.S. Citizenship  
and Immigration  
Services

(b)(6)



**JUL 09 2015**

DATE:

PETITION RECEIPT #: 

IN RE:

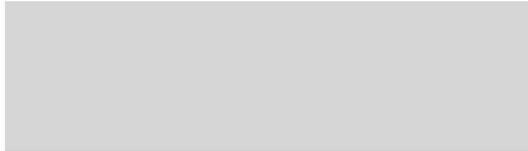
Petitioner:

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 is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page ([www.uscis.gov/i-290b](http://www.uscis.gov/i-290b)) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the nonimmigrant visa petition and dismissed a subsequent motion to reopen. The matter is currently before the Administrative Appeals Office on appeal. The appeal will be dismissed.

## I. PROCEDURAL HISTORY

The Form I-129 visa petition states that the petitioner is an information technology consulting company. In order to employ the beneficiary in what it designates as a programmer analyst 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 Director denied the petition, concluding that the petitioner had not established: (1) that it had a valid employer-employee relationship with the beneficiary; and (2) that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The petitioner filed a motion to reopen, which was dismissed by the Director. The matter is now before us on appeal.

It is noted that the Director stated: "If you desire to appeal *this* decision, you may do so." (Emphasis added). As this language indicates, where, as here, an appeal is filed in response to a Director's unfavorable action on a motion, the scope of the appeal is limited to the Director's decision on that motion. The regulatory provision at 8 C.F.R. § 103.3(a)(2)(i) states: "The affected party must submit the complete appeal including any supporting brief as indicated in the applicable form instructions *within 30 days after service of the decision.*" (Emphasis added). Thus, if the petitioner wished to appeal the Director's decision to deny the appeal, it should have elected to file that appeal within 30 days of the Director's denial decision. Here, though, the petitioner elected to file a motion instead and, thereby, limited the scope of the appeal to the merits of the Director's decision to dismiss that motion.

The record of proceeding contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the Director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the Director's decision dated May 5, 2014; (5) the Notice of Appeal or Motion (Form I-290B) ( [REDACTED] ); (6) the Director's decision dated July 9, 2014; (7) the Form I-290B ( [REDACTED] ) and supporting documentation; (8) our Notice dated May 4, 2015; and (9) the petitioner's response to our Notice.

We have focused our review and analysis upon determining whether – based upon the record of proceeding at the time the Director decided to deny the petition – the Director's decision to dismiss the motion to reopen was correct.

## II. LAW AND ANALYSIS

### A. Overarching Requirement for Motions by a Petitioner

The provision at 8 C.F.R. § 103.5(a)(1)(i) includes the following statement limiting a USCIS officer's authority to reopen the proceeding or reconsider the decision to instances where "proper cause" has been shown for such action:

[T]he official having jurisdiction may, for proper cause shown, reopen the proceeding or reconsider the prior decision.

Thus, to merit reopening or reconsideration, the submission must not only meet the formal requirements for filing (such as, for instance, submission of a Form I-290B that is properly completed and signed, and accompanied by the correct fee), but the petitioner must also show proper cause for granting the motion. As stated in the provision at 8 C.F.R. § 103.5(a)(4), *Processing motions in proceedings before the Service*, "[a] motion that does not meet applicable requirements shall be dismissed."

#### B. Requirements for Motion to Reopen

The regulation at 8 C.F.R. § 103.5(a)(2), "*Requirements for motion to reopen*," states:

A motion to reopen must [(1)] state the new facts to be provided in the reopened proceeding and [(2)] be supported by affidavits or other documentary evidence. . . .

This provision is supplemented by the related instruction at Part 3 of the Form I-290B, which states:<sup>1</sup>

**Motion to Reopen:** The motion must state new facts and must be supported by affidavits and/or documentary evidence.

Further, the new facts must possess such significance that, "if proceedings . . . were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case." *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992); *see also Maatougui v. Holder*, 738 F.3d 1230, 1239-40 (10th Cir. 2013).

#### C. Discussion and Analysis

The Director's initial decision to deny the petition was based upon the Director's determinations that the evidence of record had not established: (1) that it had a valid employer-employee relationship

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<sup>1</sup> The regulation at 8 C.F.R. § 103.2(a)(1) states in pertinent part :

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, such instructions are incorporated into the regulations requiring its submission.

with the beneficiary; and (2) that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. Specifically, the Director found that the evidence of record established that the beneficiary would be assigned to work for a different employer at a different job site than the one for which the initial petition had been filed. However, the issue currently before us is whether the Director's July 9, 2014 decision was correct in dismissing the petitioner's motion to reopen upon the grounds that it did not meet the pertinent regulatory requirements for a motion to reopen. As will be discussed below, we find that the Director's decision to dismiss the motion was correct. Accordingly, the appeal will be dismissed and the petition will be denied.

Again, the regulation at 8 C.F.R. § 103.5(a)(2), "*Requirements for motion to reopen*," states:

A motion to reopen must [(1)] state the new facts to be provided in the reopened proceeding and [(2)] be supported by affidavits or other documentary evidence. . . .

In addition to satisfying the minimum requirements at 8 C.F.R. § 103.5(a)(2), the petitioner must also establish that the new facts to be proven in a motion to reopen possess such significance that they would likely change the results of the case. *Matter of Coelho*, 20 I&N Dec. at 473; *see also Maatougui v. Holder*, 738 F.3d at 1239-40.

We find that the petitioner's submissions on motion did not meet the requirements of a motion to reopen. Our review of the record and the adverse decision demonstrates that the Director properly applied the statute and regulations to the petitioner's case. Despite the petitioner's submission of documents not previously included in the record, a review of the evidence submitted on motion reveals no fact that could have been considered new under 8 C.F.R. § 103.5(a)(2).

In making this determination, we note that Part 5 of the Form I-129 petition identified [REDACTED] as the entity to which the beneficiary would be assigned during the requested three-year validity period from January 4, 2014 through January 3, 2017. After reviewing the submission of the petitioner in response to the RFE, which introduced evidence of a new assignment for the beneficiary not previously disclosed, the Director found that such evidence constituted a material change in the terms and conditions of employment outlined in the initial petition. Noting that the petitioner did not establish eligibility at the time of filing, the petition was denied.

The motion to reopen was accompanied by an Amendment to an agreement between the petitioner and [REDACTED], dated June 6, 2013, and a letter from [REDACTED] Head of Practice Management for [REDACTED] confirming the beneficiary's contractual assignment with that company from January 2012 through January of 2013. 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. Generally, the new facts submitted on motion must be material and unavailable previously, and could not have been discovered earlier in the proceeding. *See* 8 C.F.R. § 1003.23(b)(3).

The Amendment submitted on motion was executed in 2013 and could have been submitted previously. The letter from [REDACTED], though dated May 21, 2014, confirms that the beneficiary's

assignment with that company ended in December of 2013, the month in which the instant petition was filed. Again, noting that the petition was denied in part due to a lack of evidence establishing that the beneficiary's assignment with [REDACTED] would continue through 2017, it is evident that had this document mistakenly been viewed as constituting "new facts," its content would not have merited the reopening of the proceeding, either.

As noted above, in addition to satisfying the minimum requirements at 8 C.F.R. § 103.5(a)(2), the petitioner must also establish that the new facts to be proven in a motion to reopen possess such significance that they would likely change the results of the case. *Matter of Coelho*, 20 I&N Dec. at 473; *see also Maatougui v. Holder*, 738 F.3d at 1239-40. Such is not the case here. It is not apparent that if the Director had considered the contents of these documents in a reopened proceeding, they would likely have changed the outcome of the adjudication.

On appeal, the petitioner addresses the basis for the May 5, 2014 denial of the petition, which is not the subject of the instant appeal and is not now before us. Aside from discussing the procedural history of the petition, the petitioner does not address the July 9, 2014 decision dismissing the motion. The only issue correctly before us on appeal is whether the immediate prior decision – that is, the Director's decision to dismiss the motion to reopen – was correctly decided. However, the petitioner does not address that issue.

The appeal does not establish that the Director's decision to dismiss the motion to reopen was incorrect. The appeal will be dismissed, and the petition will remain denied.

#### IV. CONCLUSION

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.

**ORDER:** The appeal is dismissed.