U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

[redacted]

B6

DATE: DEC 21 2011 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or a Professional pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)

ON BEHALF OF PETITIONER:

[redacted]

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was originally approved by the Director, Texas Service Center (TSC Director). The approval was subsequently revoked by the Director, Nebraska Service Center (NSC Director). The petitioner filed an appeal, which was dismissed by the Chief, Administrative Appeals Office (AAO). The matter is now before the AAO again on a motion to reopen and reconsider. The motion will be dismissed.

The petitioner is a travel agency. It seeks to employ the beneficiary permanently in the United States as "manager, travel & tours" and to classify him as a skilled worker under section 203(b)(3)(A)(i) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1153(b)(3)(A)(i). This provision of the Act allows for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning, of performing skilled labor (requiring two years of training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The immigrant visa petition (Form I-140) was filed on April 7, 2006. As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).[1] On May 10, 2006, the TSC Director approved the petition.

On September 4, 2009 the NSC Director issued a Notice of Intent to Revoke (NOIR) based on evidence that the petitioner had submitted false information on its labor certification (ETA Form 9089). The petitioner responded to the NOIR with a brief from counsel, a letter from the petitioner's president, and additional documentation. On November 30, 2009, the NSC Director issued a decision revoking the prior approval of the petition on two grounds: (1) the petitioner engaged in fraud or a willful misrepresentation of material facts on its labor certification, and (2) the petitioner failed to establish its continuing ability to pay the proffered wage of the subject position. Based on the finding of fraud or willful misrepresentation on the ETA Form 9089, the NSC Director also invalidated the labor certification.

The petitioner filed a timely appeal with another brief from counsel. In a comprehensive decision issued on September 28, 2010, the AAO dismissed the appeal. After a thorough discussion of the evidence in the record, the AAO agreed with the NSC Director's findings and affirmed his decision to revoke the approval of the petition and invalidate the underlying labor certification. In a further order at the close of its decision, the AAO found that both the petitioner and the beneficiary knowingly misrepresented the petitioner's business operation, concealed their familial relationship, and concealed the beneficiary's ownership interest in the petitioner with the intention of misleading the government on material elements of the beneficiary's eligibility for the immigration benefit sought under the Act.

On October 26, 2010, the petitioner's counsel filed a motion to reopen and reconsider the AAO's decision, accompanied by supporting documentation. The procedural history of this case – including, in particular, the decisions previously issued by the NSC Director and the AAO – is

[1] The ETA Form 9089 had been filed with the DOL on November 2, 2005, and was certified by the DOL on February 17, 2006.

documented in the record and incorporated into the instant decision. Further elaboration of the procedural history will be made only as necessary in the adjudication of the petitioner's motion.

The requirements for a motion to reopen are set forth in the regulation at 8 C.F.R. § 103.5(a)(2):

> 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. [2]

The requirements for a motion to reconsider are set forth at 8 C.F.R. § 103.5(a)(3):

> 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 United States Citizenship and Immigration Services (USCIS) 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.

As further provided in 8 C.F.R. § 103.5(a)(4):

> A motion that does not meet applicable requirements shall be dismissed.

The NSC Director's finding of fraud or willful misrepresentation, which led him to revoke the approval of the petition and invalidate the labor certification, is based on two specific items in the labor certification. The first involves the primary worksite location. While the employer's address (headquarters or main office) was identified on page 1 of the ETA Form 9089 (Part C, lines 2-3) as [redacted] the address of the primary worksite location was identified on page 2 of the ETA Form 9089 (Part H, lines 1-2) as [redacted] A site visit by USCIS to the Alhambra address discovered that it is a United Parcel Service (UPS) store and that [redacted] is a private mailbox rented by the beneficiary. Thus, it was clearly not the primary worksite location of the proffered position. Another site visit by USCIS to the [redacted] address revealed no evidence that it served as the petitioner's main office, but confirmed that the beneficiary worked there for another travel agency – [redacted] (The labor certification identified the beneficiary as the "manager" of this business in 2005). Only after the USCIS site visit at the [redacted] address did signage appear indicating a business presence by the petitioner. The NSC Director determined that the petitioner had no operating business at the [redacted] address and that the job offer to the beneficiary was not *bona fide*. According to the petitioner, the Alhambra address entered at Part H, lines 1-2, of the labor certification was a typographical error. The primary worksite location of the proffered position, the

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[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 RIVERSIDE UNIVERSITY DICTIONARY 792 (1984) (emphasis in original).

petitioner claims, is actually the same as the employer's alleged address in [redacted] entered at Part C, lines 2-3, of the labor certification.

The second item on the labor certification involves the question on page 1 of the ETA Form 9089 (Part C, line 9) of whether there is a business or familial relationship between the petitioner and the beneficiary. While the employer checked the "No" box to that question, USCIS records revealed that [redacted] who signed the labor certification as the employer's "President," is the beneficiary's sister. According to the petitioner, the entry at Part C, line 9 was also a typographical error. The petitioner meant to check the "Yes" box.

Counsel claims that the petitioner has filed two motions with the DOL to reopen its certified labor certification for the purpose of correcting the two typographical errors on the ETA Form 9089. The record appears to support that claim. In its response to the NOIR the petitioner submitted copies of two motions addressed to the DOL's Employment and Training Administration, Atlanta Processing Center, and two letters from the Board of Alien Labor Certification Appeals (BALCA) which seem to confirm the filing of each motion.

The first motion to the DOL – entitled "Motion to Reopen to Correct Typo Mistake on Certified Labor Certification" – was dated 06/09/09 (presumably June 9, 2009) and signed by the petitioner's counsel. It alleges that the erroneous information in the ETA Form 9089 about the primary worksite location of the proffered position resulted from "a mistake in the information supplied by the employer. Therefore, a typographical mistake occurred." The first letter from BALCA, dated June 11, 2009, was addressed to the Certifying Officer at the Chicago National Processing Center and enclosed a motion to reopen from the petitioner "for appropriate processing."

The second motion to the DOL – similarly entitled "Motion to Reopen to Correct Typographical Mistake on the Certified Labor Certification" – was dated September 18, 2009 and also signed by the petitioner's counsel. It alleges that the erroneous information in the ETA Form 9089 about the existence of a business or familial relationship between the petitioner and the beneficiary "was a typographical mistake . . . committed by the secretary," who checked "No" instead of "Yes" on the form. The second letter from BALCA, dated September 23, 2009, was addressed to the petitioner's counsel, acknowledged its receipt of the motion to reopen and advised that "it appears that the motion . . . is directed at the Certifying Officer, and that you have only provided [BALCA] with an informational copy."

Counsel asserts that the AAO should stay its decision on the current motion to reopen and reconsider until the DOL rules on the petitioner's pending motions to correct the alleged typographical errors in the labor certification. In support of its claim that the petitioner should be allowed to correct its labor certification, counsel cites a decision by BALCA in 2006, *In the Matter of Healthamerica*, BALCA Case No. 2006-PER-1, which held that the ETA Certifying Officer abused his discretion by not considering a motion filed by an employer to correct a typographical error in a labor certification application (ETA Form 9089) filed under the new Program Electronic Review Management (PERM) regulations that became effective on March 28, 2005. The typographical error in that case involved an incorrect date in the employer's recruitment process. The employer mistakenly stated on the ETA Form 9089 that the date of one of its newspaper postings was March 7, 2005, a Monday, whereas the labor certification process required a Sunday posting. In fact, the employer had posted the job

announcement on Sunday, March 6, but mistakenly entered the date as March 7 on the ETA Form 9089. The motion filed in that case, therefore, clearly involved a typographical error that was at odds with the true facts of the case.

The BALCA ruling in *Healthamerica* has little application to the instant case. First, there is no evidence that the motions filed by the petitioner with the DOL have been approved or would likely be approved. As noted by counsel, PERM does not include a mechanism for correcting or altering ETA Forms 9089 after submission. As the ETA Form 9089 in this case was approved by the DOL, unlike the case in *Healthamerica*, it appears that the motions were frivolous at best. Second, as BALCA decisions are not binding on USCIS, the decision in *Healthamerica* is irrelevant to this proceeding. While the regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all of its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. *See* 8 C.F.R. § 103.9(a).

Third, addressing the merits of the petitioner's argument, the "mistakes" on the petitioner's labor certification do not appear to be "typographical" in nature. Unlike in *Healthamerica*, they were not the product of typing a wrong key by mistake (like the "6" located next to the "7" on the keypad) or mixing up two days that were very close to each other on the calendar. Unlike in *Healthamerica*, the "mistakes" on the petitioner's labor certification were not minor deviations from the actual facts and do not appear to be careless oversights. On the contrary, the "mistakes" on the petitioner's labor certification involved the deliberate presentation of "facts" that were fundamentally at odds with the truth and went to the heart of the beneficiary's eligibility for an employment-based immigrant visa classification. In its *Healthamerica* decision, BALCA limited its ruling to the "precise circumstances of this specific case" and expressly identified one of those circumstances as follows: "There was obviously no intentional misrepresentation of the facts in the ETA Form 9089; the error was clearly typographical." The evidence of record in the instant case does not demonstrate that the petitioner meets these criteria of no intentional misrepresentation of the facts and clear typographical error.

The address entered on the ETA Form 9089 as the primary worksite location of the proffered position – [redacted] – is completely different from the address identified on that form as the employer's headquarters or main office – [redacted] The petitioner's president (in a letter dated September 28, 2009) claims that the "wrong" address entered on the ETA Form 9089 as the primary worksite location resulted from a miscommunication from a sales associate who mixed up the worksite of the proffered position with the beneficiary's personal mailbox. In view of the sibling relationship between the petitioner's president and the beneficiary, the AAO is not persuaded that this was an inadvertent "typographical" error. The other alleged "typographical" error strains the AAO's credulity even further. There is no innocent explanation for checking the "No" box rather than the "Yes" box in response to the question of whether there was a business or familial relationship between the petitioner and the beneficiary. Both counsel and the petitioner's president (in her letter of September 28, 2009) assert that a secretary entered the incorrect answer on the form. This claim rings hollow.

The ETA Form 9089 was prepared by counsel on behalf of the petitioner and signed by counsel beneath a declaration that reads: "I hereby certify that . . . to the best of my knowledge the

information contained herein is true and correct." The form is also signed by the petitioner's president, [redacted] below a similar declaration that reads: "I declare under penalty of perjury that I have read and reviewed this application and that to the best of my knowledge the information contained herein is true and accurate." Both counsel and the petitioner's president claim that the two glaring errors in the labor certification were nothing more than a careless oversight on their part of misinformation inadvertently furnished by a sales associate and a secretary. The AAO is not persuaded. The failure to apprise oneself of the contents of an immigration document before signing it is generally not recognized as a defense to misrepresentation. *See Hanna v. Gonzalez*, 128 Fed. Appx. 478, 480 (6th Cir. 2005) (unpublished) (*citing Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11th Cir. 2005) and *United States v. Puente*, 982 F.2d 156, 159 (5th Cir. 1993)).

The AAO also notes that the date of the petitioner's second motion with the DOL – relating to the incorrect information about the business and familial relationship between the petitioner and the beneficiary – was September 18, 2009. This was two weeks after the date the NSC Director issued the NOIR (September 4, 2009) advising the petitioner that USCIS had discovered information demonstrating that that the above "fact" as presented in the labor certification was not true. The timing of the NSC Director's NOIR and the petitioner's motion with the DOL to correct the "typographical mistake" on the labor certification raises questions as to the petitioner's motivation. The ETA Form 9089 had been filed nearly four years previously (November 2, 2005), so the petitioner had plenty of time before September 2009 to file a motion to correct the mistake. Yet it did not do so until after it received word of the NSC Director's intention to revoke the approval of the immigrant visa petition.

The petitioner's first motion with the DOL – relating to the incorrect information about the primary worksite location of the proffered position – appears to have been filed in June 2009, shortly before the NSC Director's issuance of the NOIR. Though it may not have been prompted by the immediate prospect of visa revocation, this motion nevertheless postdates the filing of the labor certification by more than three and a half years. Counsel asserts that the new PERM regulations, implemented on March 28, 2005, did not include a mechanism for labor certification applicants to correct or alter information on the ETA Form 9089 after its submission to the DOL. BALCA's decision in *Healthamerica*, however, established that typographical errors on the ETA Form 9089 could be corrected with the DOL. The date of that decision was July 18, 2006, yet the petitioner waited nearly three years before submitting its first motion to reopen to the DOL in June 2009. Regardless, as the ETA Form 9089 was approved in this case, the *Healthamerica* decision appears to be inapplicable to the petitioner's situation, even assuming the relevance of a BALCA decision to a USCIS proceeding.

Based on the foregoing analysis, the AAO determines that the factual allegations, legal arguments, and documentation submitted by the petitioner in support of its motion to reopen and reconsider fail to demonstrate any reasonable basis for favorable action with regard to the AAO's first ground for dismissal of the appeal. The petitioner has presented no new facts or documentation, as required in a motion to reopen, to refute the AAO's prior determination that the petitioner made fraudulent or willful misrepresentations of material facts in the ETA Form 9089. Nor has the petitioner presented any persuasive argument and/or precedent decisions which show that the AAO's initial decision was based on an incorrect application of law or USCIS policy, as required in a motion to reconsider.

With regard to the other ground for the revocation of the petition's approval – the failure of the petitioner to establish its ability to pay the proffered wage – counsel asserts that the AAO erred in dismissing the appeal. Counsel acknowledges "deficiencies" in the petitioner's tax returns (which the AAO previously found did not show an ability to pay the proffered wage on the basis of the petitioner's net income or net current assets in the years 2006, 2007, or 2008) but asserts that the beneficiary has been paid the proffered wage of $22.04/hour ($45,843.20/year). This claim is contradicted by the only documents in the record of the beneficiary's pay from the petitioner – the beneficiary's 2008 Form W-2, Wage and Tax Statement, and the petitioner's 2008 Form 1120, U.S. Corporation Income Tax Return – which show that the beneficiary was paid just $10,500 that year. No new documentation has been submitted in support of the current motion. Counsel asserts that the AAO misread and misapplied *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967), in evaluating the petitioner's ability to pay the proffered wage, but has not explained how.

Thus, the petitioner has not provided any new facts or documentation demonstrating the petitioner's ability to pay the proffered wage. Nor has the petitioner established that the AAO incorrectly applied *Matter of Sonegawa*, or any other case law, statutory law, or USCIS policy, in its previous decision. On the ability to pay issue, therefore, the petitioner's motion does not meet the requirements of a motion to reopen under 8 C.F.R. § 103.5(a)(2) or of a motion to reconsider under 8 C.F.R. § 103.5(a)(3).

Considering the weakness of the petitioner's case on the fraud and willful misrepresentation issue, the AAO is not persuaded that it should stay a decision on this motion to reopen and reconsider, as requested by counsel, until decisions are issued by the DOL on the petitioner's motions to reopen the labor certification. Even if the AAO were more favorably inclined on this issue, the petitioner has still failed to provide any reason for the AAO to grant its motion to reopen and reconsider the other issue pending – the petitioner's failure to establish its ability to pay the proffered wage. Since each of these grounds for the NSC Director's original revocation of the approval of the petition, and for the AAO's dismissal of the appeal, is considered an independent and alternative basis for denial, the AAO would dismiss the motion to reopen and reconsider on the ability to pay issue alone. Thus, regardless of the ultimate outcome of its motions before the DOL, the petitioner has failed to establish that the AAO should rule favorably on its motion to reopen and reconsider its decision affirming the NSC Director's revocation of the approval of the petition.

Motions for the reopening or reconsideration 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. *See 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. Therefore, the motion will be dismissed in accordance with 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reopen and reconsider is dismissed. The AAO's September 28, 2010 decision is affirmed.