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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B6

DATE: MAY 03 2011

OFFICE: NEBRASKA SERVICE CENTER

FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 immigrant visa petition was denied by the Director, Nebraska Service Center (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. The motion will be dismissed.

The petitioner is a metal painting business seeking to employ the beneficiary as a metal painter in accordance with section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1153(b)(3)(A)(iii). The record indicates that the beneficiary has worked for the petitioner since the fall of 2002.

On April 9, 2008, the Director denied the petition on three grounds – in particular: (1) the failure of the petitioner to establish its ability to pay the beneficiary the wage offered in the labor certification application ($10.96/hour, or $22,076.80/year) from the date that application was originally filed with the U.S. Department of Labor (July 12, 2001) up to the present; (2) the failure of the alien, the form preparer, and the employer to sign the ETA Form 9089, Application for Permanent Employment Certification, that was submitted to U.S. Citizenship and Immigration Services (USCIS) with the Form I-140, Immigrant Petition for Alien Worker, in May 2007; and (3) the petitioner's failure to show that the beneficiary met the training and experience requirements of the position (listed in the ETA Form 9089 as 6 and 12 months, respectively) as of the date the labor certification application was filed (July 12, 2001).

On appeal the petitioner submitted additional documentation addressing the three grounds of denial. The documentation included (1) copies of the petitioner's federal income tax returns for the years 2002-2006, along with the beneficiary's Form W-2, Wage and Tax Statements, and federal income tax returns for the years 2002-2007; (2) a new copy of ETA Form 9089, signed by the alien, the form preparer, and the employer's owner/president on May 13-14, 2008; and (3) a letter from a previous employer of the beneficiary [redacted] attesting to the beneficiary's employment as an industrial painter for 13 months in 2001-2002.

On May 10, 2010, the AAO dismissed the appeal on two grounds – in particular, that the petitioner still had not established: (1) its ability to pay the offered wage for the entire period required by law and (2) the beneficiary's qualifications for the position. More specifically, while determining that the petitioner's income tax returns (and the beneficiary's income tax records) demonstrated the petitioner's ability to pay the offered wage for the tax years 2002-2006, the AAO found that the petitioner did not establish its ability to pay the offered wage from July 12, 2001 (the priority date) through July 31, 2002 (the company's yearly tax reporting period is August 1 to July 31), because no tax return(s) had been submitted covering that time period. As for the beneficiary's qualifications, the AAO noted that the record contained conflicting evidence. The letter from [redacted] submitted on appeal, attesting to the beneficiary's employment with that company in 2001-2002 (and an earlier letter from [redacted] submitted in response to the Director's request for evidence, referring to the beneficiary's employment with the company in 2000) conflicted with information in the ETA Form 9089, which identified two other companies as employers of the beneficiary between 1996 and 2002 and contained no mention of [redacted]. The AAO concluded that these unresolved evidentiary conflicts precluded a finding that the beneficiary satisfied the requisite training (6 months) and experience (12 months) qualifications for the proffered position.

The AAO's decision on the appeal was quite thorough in its analysis, and is incorporated by reference into the current decision.

The petitioner has filed a timely motion to reopen, and submits some additional documentation addressing the grounds of denial. Claiming that no previous request had been made for its 2001 tax return, the petitioner submits a copy of its 2001 Form 1120, U.S. Corporation Income Tax Return, covering the time period of August 1, 2001 to July 31, 2002, as evidence of its ability to pay the offered wage in 2001-2002. With regard to the training and experience requirements for the position, the petitioner submits a third letter from [redacted], a letter from one of the companies identified on the ETA Form 9089 as a previous employer of the beneficiary in 1996-1997 [redacted] of Orange, California), pay statements to the beneficiary in 2002 from the other company listed on the ETA Form 9089 as a previous employer of the beneficiary from 1998 to 2002 [redacted] also of Orange, California), and another letter from the petitioner's president asserting that the beneficiary was well qualified for the metal painter position when he was hired in the fall of 2002.

The requirements for a motion to reopen are set forth 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. [1]

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

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

The petitioner's claim that no previous request had been made for its 2001 tax return does not square with the record. Nevertheless, taking the petitioner at his word (since the Director did not specifically ask for the "2001 tax return" by name) and applying the same analytical criteria to that document as it applied to the previously submitted tax returns for the years 2002-2006, the AAO determines that the petitioner had the ability to pay the offered wage for the metal worker position during the time period covered by the tax return in 2001-2002. In particular, the 2001 tax return shows that the petitioner's net current assets for that reporting period (lines 1-6 of Schedule L minus lines 16-18 of Schedule L) amounted to $44,832, which was greater than the annualized wage of $22,796.80 for the proffered position (the beneficiary had not yet been hired by the petitioner). Based on the entire record, the AAO concludes that the petitioner has established its continuing ability to pay the offered wage from the priority date up to the present. That ground for denial, therefore, has been overcome.

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[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).

The same cannot be said, however, with regard to the beneficiary's fulfillment of the training and experience requirements of the proffered position – the other ground for denial. The documentation submitted by the petitioner in support of the motion to reopen fails to clear up the discrepancies cited by the AAO in its previous decision. The following is a recapitulation of the materials in the record.

The ETA Form 9089 states that the metal painting position proffered by the petitioner requires 6 months of training and 12 months of experience. It also identifies two metal painting jobs held by the beneficiary before he started working for the petitioner in the fall of 2002. The two previous employers are listed (in chronological order) as [redacted] in Orange, California, where the beneficiary allegedly worked from June 1, 1996 to January 30 1997, and [redacted] also located in Orange, California, where the applicant allegedly worked from January 2, 1998 to August 30, 2002.

In response to the Director's request for evidence – in particular, letters from previous employers demonstrating the beneficiary's experience as a metal painter – the petitioner submitted a letter from the aforementioned [redacted] dated November 8, 2007, stating that the beneficiary was employed "for over a year in 2000 as a painter of industrial metal and plastic parts." The petitioner did not explain why [redacted] was not listed as a previous employer of the beneficiary on ETA Form 9089, or why no letters were submitted from the employers [redacted] listed on that form. On appeal the petitioner submitted another letter from [redacted] dated May 9, 2008, reiterating that it had employed the beneficiary as a painter of industrial metal and plastic parts, but altering the time frame somewhat from October 8, 2001 to November 11, 2002. Now, in support of the motion to reopen, the petitioner submits yet another letter from [redacted], dated May 24, 2010, stating that the beneficiary worked "as a trainee" for "over six months in the year 2000." His training duties included "cleaning and preparing the metal for painting." The beneficiary then worked part-time for [redacted] from October 2001 to November 2002, before leaving for a full-time position elsewhere.

The three letters from [redacted] are internally inconsistent. The first states that the beneficiary was employed for over a year in 2000, while the second moves that 13-month time frame back to 2001-2002. The third letter states – for the first time – that the beneficiary was employed by [redacted] during both of those time periods – in 2000 as a trainee for a time period vaguely described as "over six months" and from October 2001 to November 2002 as a part-time metal painter. The petitioner has provided no explanation for these inconsistent accounts of the beneficiary's previous association with [redacted] or why [redacted] was not listed as a previous employer on the ETA Form 9089. In *Matter of Leung*, 16 I&N 2530 (BIA 1976), the Board of Immigration Appeals (BIA)'s dicta notes that the beneficiary's alleged experience, without certification of such fact by the Department of Labor on the beneficiary's ETA Form 9089, lessens the credibility of the evidence and facts asserted.

It is incumbent upon an applicant to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's evidence also reflects on the reliability of the applicant's remaining evidence. *See id.*

The documentation from [redacted] submitted in support of the motion to reopen, does nothing to clarify the beneficiary's employment status in the years 2000-2002. In fact, the pay statements from [redacted] muddy the waters even more because they date from February to August 2002, a time period when [redacted] claims it was employing the beneficiary. Moreover, the pay statements from [redacted] (which has gone out of business, according to the petitioner) are essentially useless for the purpose of establishing the beneficiary's qualifications for the proffered position, since they are internally generated and not accompanied by any letter from a company official describing the beneficiary's job experience and/or training with [redacted] and confirming the duration of his employment.

Further undermining the utility of the documentation from [redacted] and [redacted] none of the training and/or experience the beneficiary may have gained with those two companies after July 12, 2001 counts for the purpose of establishing his qualifications for the metal painter position, since the training and experience requirements must be fulfilled as of the date the labor certification was filed. See *Matter of Katigbak*, 14 I&N Dec. 2125 (Reg. Comm. 1971) and *Matter of Wing's Tea House*, 16 I&N Dec. 2570 (Reg. Comm. 1977).

As for the letter from [redacted] written by a former supervisor of the beneficiary, it describes the beneficiary's progression from a painter assistant, to training as a metal painter, to promotion as a metal painter during an eight-month stay at the company in 1996 and early 1997. The letter does not clearly distinguish between the training and experience components of the beneficiary's employment with [redacted] In any event, eight months of training and experience is well short of the requisite total – 18 months of training and experience – to qualify for the proffered position in this case.

For the reasons discussed above, the documentation submitted in support of the motion to reopen fails to support the petitioner's claim that the beneficiary meets the training and experience requirements to qualify for the proffered position of metal painter. Moreover, the petitioner presented no facts or evidence on motion in regard to the training and experience issue that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and a proper basis for a motion to reopen. All of the evidence submitted on motion in relation to the beneficiary's training and experience was previously available and could have been discovered or presented in the previous proceeding. The letters from the beneficiary's previous employers submitted with this motion were originally requested by the Director in his "Request for Evidence" sent to the petitioner on October 23, 2007.

Based on the foregoing analysis, the AAO concludes that the motion to reopen does not meet the requirements set forth in 8 C.F.R. § 103.5(a)(2). Furthermore, it does not meet the filing requirement listed at 8 C.F.R. § 103.5(a)(1)(iii)(C), which specifies that a motion 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 and, if so, the court, nature, date, and status or result of the proceeding." Since the motion to reopen does not meet applicable requirements, it must be dismissed in accordance with 8 C.F.R. § 103.5(a)(4).

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 US. 314, 323 (1992) (citing *INS v. Abudu*, 485 US. 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.

ORDER: The motion to reopen is dismissed. The AAO withdraws the finding in its previous decision that the petitioner did not establish its ability to pay the offered wage throughout the requisite time period. However, the AAO affirms its previous dismissal based on the petitioner's lack of persuasive evidence that the beneficiary met the training and experience requirements of the proffered position on the date the labor certification application was filed.