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

B6

[redacted]

DATE: DEC 2 7 2012

OFFICE: NEBRASKA SERVICE CENTER

FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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

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 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be dismissed, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that "[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]

In this matter, counsel submitted the petitioner's balance sheets for 2001 through 2003, an updated beneficiary experience letter, a description of Las Delicias, and copies of the petitioner's bank statements for 2001 through 2003. The submitted documents are not new facts, in that they were available and could have been discovered or presented in the previous proceedings, and cannot be considered a proper basis for a motion to reopen. Counsel also submits copies of the beneficiary's Forms W-2s for 2008 and 2009. While these documents are new, in that they were not available at the time of the initial appeal (May 1, 2008), the petitioner would still fail to establish its ability to pay the beneficiary the proffered wage from the priority date onwards. As noted in the AAO's decision, dated July 27, 2010, the petitioner failed to establish its ability to pay the proffered wage from 2001 through 2005. Given the above, the evidence submitted on motion will not be considered a proper basis for a motion to reopen.

8 C.F.R. § 103.5(a)(3) 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.

Although counsel failed to check the box on Form I-290B for a motion to reconsider, counsel does allege an error.[2]

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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).

[2] On Form I-290B, counsel asserts that USCIS erroneously analyzed the proffered wage based on a 40 hour work week, rather than the 35 hour work week specified on Form ETA 750. It is noted that even if counsel had properly filed a motion to reconsider, the petitioner would not have established its ability to pay the proffered wage for 2001 through 2003 based on 35 hours per week. The proffered wage as stated on Form ETA 750 is $16.21 per hour ($29,502.20 per year based on 35 hours per week). The petitioner's net income and net current assets for 2001 and 2003 are reported on the tax returns as:

Year	Net Income	Net Current Assets
2001	$(34,575.00)	$(505,754.00)

Furthermore, United States Citizenship and Immigration Services (USCIS) regulations require that motions shall be dismissed for failing to meet an applicable requirement. The regulation at 8 C.F.R. §§ 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and motions to reconsider. Section 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 requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must be dismissed for this reason.

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. The motion will be dismissed.

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 proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed. The petition remains denied.

2002	$(15,931.00)	$(507,542.00)
2003	$0	$(334,592.00)

The petitioner paid the beneficiary $28,369.96 in 2001, $21,044.10 in 2002, and $12,199.48 in 2003. Therefore, the petitioner has not established through either its net income, net current assets or wages paid to the beneficiary that it has the ability to pay the proffered wage for the years in question.