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]

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DATE: JUL 20 2012 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as an 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:

[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,

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION**: The preference visa petition was initially approved and then improperly revoked by the district director. The petition was reopened and subsequently denied by the Director, Nebraska Service Center after issuance of a Notice of Intent to Deny on October 2, 2007. The director additionally invalidated the labor certification. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The AAO approved a motion to reconsider and affirmed the previous decisions of the director denying the petition and the AAO dismissing the appeal. The matter is now before the AAO on a second motion to reconsider. The motion will be dismissed, and the decisions of the director, and the AAO's decisions of March 2, 2010, and May 4, 2011 will remain undisturbed.

The petitioner is a kosher bakery. It sought to employ the beneficiary permanently in the United States as a baker.[1] As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage beginning as of the priority date. The director also determined that the petitioner had not established that the beneficiary had acquired the necessary qualifying training as of the priority date of the visa petition. The director additionally determined that petitioner had willfully misrepresented on the labor certification that a *bona fide* full-time permanent job offer existed and invalidated the labor certification.[2]

On the petitioner's initial appeal,[3] the petitioner, through counsel, submitted additional evidence relating to the petitioner's ability to pay the proffered wage and asserted that the director erred in this determination and in determining that the job offer was not *bona fide.*

The AAO dismissed the appeal on March 2, 2010. Counsel submitted a motion to reconsider the decision rendered on appeal. The AAO approved the motion and considered the argument and evidence that counsel provided. The AAO rendered a decision on counsel's motion on May 4, 2011. For the reasons set forth therein and in the AAO's March 2, 2010, decision rendered on appeal, the AAO concluded that the petitioner had not established that the beneficiary possessed the requisite

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[1] Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

[2] It is noted that Section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i) provides that "[A]ny alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible."

[3] The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

qualifying employment experience as set forth in the terms of the labor certification. The AAO further determined that the petitioner had failed to establish its continuing financial ability to pay the proffered wage. Finally, the AAO concluded that the petitioner's job offer was not *bona fide* based on the beneficiary's undisclosed relationship interest to the petitioning company and the other owner, which constituted willful misrepresentation of a material fact underlying eligibility of the benefit sought. The AAO affirmed its prior decision of March 2, 2010 in invalidating the labor certification.[4]

The petitioner has filed a second motion to reconsider. The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision.

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[4] The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The regulation at 8 C.F.R. § 204.5(l)(3) further provides:

> (ii) *Other documentation*—
>
> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

Further, the regulation at 20 C.F.R. § 656.30(d) (1998) provided in pertinent part:

> (d) After issuance labor certifications are subject to invalidation by the INS or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to a RA or to the Director, the RA or Director, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notification shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

On the Form I-290B, Notice of Appeal or Motion, the petitioner indicates that a brief and/or evidence will be submitted to the AAO within 30 days. The petitioner also requests that the I-290B be treated as a motion to reconsider. In an attached statement, she requests additional time to provide supplemental documentation relevant to the ability to pay the proffered wage, the beneficiary's qualifications, and the "identity of the petitioning officer."

The petitioner dated the motion May 26, 2011. As of this date, more than 13 months later, the AAO has received nothing further.

The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. As stated above, the regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or USCIS policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision.

The instant motion did not meet the applicable filing requirements in that it did not offer the reasons for reconsideration supported by pertinent legal authority showing that the decision was based on an incorrect application of law or USCIS policy. Further, it failed to demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision.

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.