

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: OCT 11 2012      OFFICE: NEBRASKA SERVICE CENTER      FILE: [REDACTED]

IN RE:      Petitioner: [REDACTED]  
             Beneficiary: [REDACTED]

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:  
[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 Director, Nebraska Service Center, denied the employment-based immigrant visa petition on April 9, 2008. The petitioner filed an appeal on May 5, 2008, which the Administrative Appeals Office (AAO) dismissed on July 26, 2010. The petitioner filed a motion to reconsider on August 25, 2010, which the AAO dismissed on May 3, 2011. The petitioner filed an additional motion to reconsider on June 2, 2011, which is now before the AAO. The motion will be dismissed, the previous May 3, 2011 decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is a warehouse distribution business seeking to employ the beneficiary as a floor supervisor in accordance with section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii).

On April 9, 2008, the director denied the petition, finding that the petitioner had failed to establish its ability to pay the beneficiary the proffered wage listed on the Application for Alien Employment Certification, Form ETA 750, from the date the application was filed with the U.S. Department of Labor, April 30, 2001, until the present. On July 26, 2010, the AAO dismissed the petitioner's appeal on the same ground, its failure to establish the continuing ability to pay the beneficiary the proffered wage from the priority date onwards. The AAO specifically noted that the petitioner had failed to establish its ability to pay the beneficiary the proffered wage of \$20,080.00 during 2003 and 2006. On May 3, 2011, the AAO dismissed the petitioner's motion to reconsider, finding that counsel for the petitioner had failed to establish a reasonable basis for the motion to reconsider, as counsel had not established that the AAO incorrectly applied any law or U.S. Citizenship and Immigration Services (USCIS) policy and as counsel had not cited any precedent decisions on point. The AAO additionally found counsel's analysis of the record of proceeding to be substantively flawed. The AAO concluded that the motion to reconsider did not meet the requirements set forth in 8 C.F.R. § 103.5(a)(3).

On June 2, 2011, the petitioner filed a timely motion to reconsider the AAO's May 3, 2011 decision. In order to file a motion properly, the regulation at 8 C.F.R. § 103.5(a)(1)(iii) requires that the motion must 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." Furthermore, the regulation at 8 C.F.R. § 103.5(a)(4) requires that "[a] motion that does not meet applicable requirements shall be dismissed." In this case, the petitioner failed to submit a statement regarding whether the validity of the decision of the AAO has been or is subject of any judicial proceeding.

On motion, counsel asserts that the decisions of the service center and the AAO were arbitrary and capricious and that both entities had failed to consider the petitioner's taking of dividends. According to counsel, these dividends made the difference as to whether or not the petitioner had the ability to pay the beneficiary the proffered wage.

The petitioner additionally submitted a letter from the beneficiary, [REDACTED] dated May 24, 2011, stating that she previously had difficulties accessing an immigration attorney to help her file her relevant paperwork with USCIS due to economic and familial hardships. [REDACTED] states that a prior attorney had mistakenly submitted both her and her daughter's Internal Revenue Service (IRS) Forms W-2 Wage and Tax Statements to USCIS, causing her petition to be held back. She claims

that she was unable to confirm that her prior attorney was handling her immigration matters properly. [REDACTED] also states that her petition had previously been denied in part due to a discrepancy between the certified wage and the wage that she was earning. She asserts that her employer had, at first, agreed to raise her salary, but was ultimately unable to do so due to the economic recession in the United States. [REDACTED] states her desire to assist USCIS in resolving any misunderstandings that may have arisen, and she highlights the overall investment of time and money she has made regarding her Form I-140 petition.

The USCIS regulation at 8 C.F.R. § 103.5(a)(3) states that:

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.

In the present motion to reconsider, counsel states that the decisions of the director and the AAO were arbitrary and capricious and that they had failed to consider the petitioner's taking of dividends. According to counsel, the dividends made the difference in the petitioner having the ability to pay the beneficiary the proffered wage. Counsel does not further elaborate as to how these prior USCIS decisions may have been arbitrary and capricious, nor does he provide any supplemental evidence or explanation to bolster his statement regarding the petitioner's dividends. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Rather, the petitioner submits a letter from the beneficiary, [REDACTED]. Essentially, she states that she had difficulties with her prior counsel, she seeks to resolve any misunderstandings that may have arisen with USCIS, and she has invested a great deal of time and money with regard to the instant petition. The AAO finds that neither counsel nor [REDACTED] cited any pertinent precedent decisions to establish that the AAO's decision was based on an incorrect application of law or USCIS policy.

For the reasons discussed above, counsel has failed to demonstrate a reasonable basis for the motion to reconsider. Counsel has not established that the AAO incorrectly applied any law or USCIS policy and has not cited any precedent decisions on point.

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).

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

**ORDER:** The motion is dismissed, the decision of the AAO dated May 3, 2011 is affirmed, and the petition remains denied.