

(b)(6)



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**

Date: **OCT 30 2013**

Office: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

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

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in cursive script that reads "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director of the Nebraska Service Center denied the immigrant visa petition on November 2, 2009 and the Administrative Appeals Office (AAO) dismissed a subsequent appeal on May 11, 2012. The petitioner then filed a motion to reopen and a motion to reconsider the AAO's May 11, 2012 decision. On May 23, 2013, the AAO granted the petitioner's motion to reopen and reconsider its May 11, 2012 decision. The AAO affirmed its May 11, 2012 decision denying the petitioner's appeal. The matter is again before the AAO on a motion to reopen and a motion to reconsider. The motion to reopen will be dismissed. The motion to reconsider will be dismissed. The AAO affirms its decisions dated May 23, 2013 and May 11, 2012. The petition remains denied.

The petitioner is an ornamental plant nursery. It seeks to employ the beneficiary permanently in the United States as a horticulturist/soil and plant scientist. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly. The AAO affirmed the director's decision finding that the petitioner had not established its continuing ability to pay the proffered wage.<sup>1</sup> The AAO additionally noted in both of its decisions that the beneficiary may be related to the petitioner's owner and that the petitioner must address this issue in any further filings.<sup>2</sup> The petitioner failed to address this issue in the current motion and in its prior motion.<sup>3</sup>

The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

### **Motion to Reopen**

The regulation at 8 C.F.R. § 103.5(a)(2) states, 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 evidence that was not

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<sup>1</sup> Similar to a sole proprietorship, the petitioner's adjusted gross income (AGI), assets and personal liabilities are considered as part of the petitioner's ability to pay. Farm operators report annual income and expenses from their farms on their IRS Form 1040, U.S. Individual Income Tax Return. The farm-related income and expenses are reported on Schedule F, Profit or Loss From Farming, and are carried forward to the first page of the tax return. See <http://www.irs.gov/publications/p225/ch03.html> (accessed October 28, 2013). Farm owners must show that they can cover their existing household expenses as well as pay the proffered wage out of their AGI or other available funds. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

<sup>2</sup> The petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Sunmart* 374, 00-INA-93 (BALCA May 15, 2000).

<sup>3</sup> The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

available and could not have been discovered or presented in the previous proceeding.<sup>4</sup> A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The petitioner presented the following documentation with its motion:

- A [REDACTED] Certificate of Deposit (CD) receipt dated November 13, 2000 for account number ending in xxxxx-08787 belonging to the petitioner. The receipt was in the amount of \$107,024.50, and showed a maturity date of August 1, 2001.
- A [REDACTED] CD statement for account number ending in xxxxx-18342, covering the time period of July 1, 2001 through September 7, 2001. The CD was in the name of the petitioner. The statement showed a beginning balance of \$50,000 and an ending balance of \$0.
- A [REDACTED] CD statement for account number ending in xxxxx-08787, covering the time period of January 1, 2002 through March 31, 2002. The CD was in the name of the petitioner. The statement showed a beginning balance of \$151,340.75 and an ending balance of \$152,716.35.
- A [REDACTED] CD statement for account number ending in xxxxx-08787, covering the time period of January 1, 2004 through March 31, 2004. The CD was in the name of the petitioner, with Bank of America as a collateral holder. The statement showed a beginning balance of \$152,755.69 and an ending balance of \$152,755.69.
- A [REDACTED] Merlin CD printout for account number ending in xxx xxx xxxx 8787 in the petitioner's name. The account was opened on February 1, 1999 and had a maturity date of August 6, 2005. The statement indicates a current balance of \$150,055.69.
- A [REDACTED] statement for account number ending in xxx xxx xxxx 8787, covering the time period of November 11, 2005 through December 13, 2005. The listed CD was in the petitioner's name. The statement showed a CD balance of \$150,451.59.<sup>5</sup>
- A statement of "Personal farm living cost from 2001 to 2013."<sup>6</sup>

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<sup>4</sup>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).

<sup>5</sup> This printout was previously submitted to the record.

<sup>6</sup> The director's request for evidence (RFE) dated June 1, 2009 requested, in part, a list of the sole proprietor's recurring monthly household expenses for the period from May 1, 2001 onward. In its response to the RFE, the petitioner submitted a list of the sole proprietor's personal expenses for July to December 2008 and January through June 2009. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

- 2012 Annual Performance Review for the beneficiary dated January 5, 2013.<sup>7</sup>
- Offer of Employment letter for the beneficiary dated September 10, 1997.<sup>8</sup>

In this matter, the petitioner presented no facts or evidence on motion that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen. All evidence submitted on motion was previously available and could have been discovered or presented in the previous proceeding. The petitioner does not contend that the information presented in support of the present motion was not available and could not have been reasonably discovered or presented in the previous proceeding. As such, the documentation will not now be considered in a second motion to reopen. The motion to reopen does not, therefore, meet applicable requirements and shall be dismissed.

### **Motion to Reconsider**

A motion to reconsider must: (1) 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; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The motion to reconsider shall be dismissed as the motion does not state reasons for reconsideration which are supported by pertinent precedent decisions<sup>9</sup> to establish that the decision was based on an incorrect application of law or USCIS policy, and it does not establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).<sup>10</sup>

<sup>7</sup> The beneficiary's 2011 annual performance review was submitted with the first motion.

<sup>8</sup> The Offer of Employment letter was submitted to the record with the petitioner's first motion. The petitioner submitted the beneficiary's performance review and offer of employment to show that the petitioner was the actual employer of the beneficiary. That issue was not the basis of either of the AAO's prior decisions and is not the basis of the AAO's present dismissal of the petitioner's motion to reopen and motion to reconsider. It is noted, however, that the AAO questioned the bona fides of the present position, in part, because it appeared that the beneficiary may be related to the sole proprietor. The petitioner did not address this concern in the documentation submitted with the present motion.

<sup>9</sup> On motion, the petitioner's counsel cites the Memorandum dated May 4, 2004, from William R. Yates, Associate Director For Operations, USCIS, entitled *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*. However, this memorandum is not a precedent decision. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

<sup>10</sup> The petitioner did not address the inconsistencies regarding its IRS Forms W-2 that were noted by the AAO in its May 23, 2013 decision. The AAO stated that the amounts paid to the beneficiary in every year from 2001 to 2007 as reported on the beneficiary's Forms W-2 exceeded the amount listed on the appropriate schedules of the petitioner's IRS Forms 1040 for those years. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile

Furthermore, the regulation at 8 C.F.R. § 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). 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 also 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.

**ORDER:** The motion to reopen is dismissed. The motion to reconsider is dismissed. The AAO's decisions of May 23, 2013 and May 11, 2012 are affirmed. The petition remains denied.

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such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*