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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

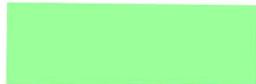


DATE:

**FEB 28 2014**

Office: TEXAS SERVICE CENTER

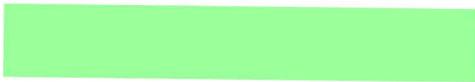
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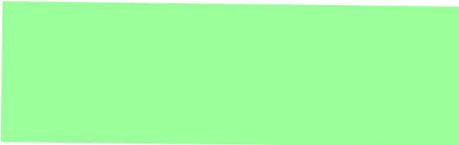
Petitioner:

Beneficiary:



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,

  
Ron Rosenberg

Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center (the director) denied the employment-based preference visa petition. The petitioner filed a motion to reopen or reconsider that decision, which was granted and the original decision affirmed. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The petitioner filed an appeal of that decision, which was rejected by the AAO. The petitioner then filed a motion to reopen and reconsider, which was granted by the AAO and the previous decision affirmed, with the petition remaining denied. The petitioner then filed a motion to reopen, which was dismissed by the AAO as untimely filed, with the petition remaining denied. The petitioner filed another motion to reopen, which is currently before the AAO. The motion will be dismissed, the previous decisions of the AAO will be affirmed, and the petition will be denied.

On motion, counsel submits a Form I-290B, Notice of Appeal or Motion, a brief, a declaration, tuition payment statement, liquid asset statement and household/personal expense statements from the sole proprietor; various financial records for the sole proprietor and a letter from the sole proprietor's CPA; information and Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, for the beneficiaries on whose behalf the petitioner has filed Form I-140 immigrant petitions; as well as general information on the tax calendar and IRS national standards for allowable living expenses and copies of AAO case law. The AAO finds that the petitioner has not filed a proper 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 found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.<sup>1</sup>

In his brief on motion, counsel states that the AAO's decision of September 6, 2013 was the latest in a series of dismissals and denials. This is incorrect. Counsel makes no mention in his brief of the AAO's decision of November 26, 2013, which rejected the petitioner's motion to reopen as untimely filed. In the AAO's November 26, 2013 rejection of the motion, the AAO stated that the motion was filed 53 days after the September 6, 2013 decision granting the petitioner's motion to reopen and reconsider and again dismissing the appeal. No new evidence or allegation of error in the November 26, 2013 decision is submitted with the current motion.<sup>2</sup>

On motion, counsel states that the petitioner submits documentation to clarify the inconsistencies in the record regarding household expenses and to establish the petitioner's ability to pay the proffered

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<sup>1</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>2</sup> With the previous motion, counsel submitted an explanation for the delay in filing and requested that the AAO exercise discretion in accepting the untimely motion due to circumstances beyond the petitioner's control. Counsel asserted that the deadline to file the motion fell amidst two important IRS filing deadlines and that the petitioner's owner, a certified tax preparer, devoted "all his emotional and intellectual resources to completing his clients' taxes" during this time and was unable to prepare for the filing of the motion. The AAO found that the delay in filing the motion was not reasonable, nor outside the petitioner's control. The instant motion does not disagree with this finding.

wages of all immigrant petition beneficiaries through the sole proprietor's adjusted gross income, personal assets and escrow deposits. On motion, the AAO notes that the documentation which purports to clarify the inconsistencies in the petitioner's household expenses is not independent and objective, does not clarify the inconsistencies and creates additional inconsistencies.<sup>3</sup> See *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

On June 21, 2007, the director issued a request for evidence (RFE), instructing the petitioner to submit evidence of the petitioner's ability to pay the proffered wage, including full lists of household expenses and evidence of wages paid to the other immigrant beneficiary. In response, counsel submitted some financial records for the petitioner, but failed to submit the requested household expenses and evidence of wages paid to the other immigrant beneficiary. On motion before the director, the petitioner again failed to provide the requested full list of household expenses and evidence of wages paid to the other immigrant beneficiary. The director's decisions and the AAO's following decisions all stated that the petitioner failed to submit the required full household expenses and evidence of wages paid to the other immigrant beneficiary.<sup>4</sup>

The purpose of an RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence or at least with the original appeal to the

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<sup>3</sup> The petitioner provides a personal statement of varying tuition expenses from 2007 through 2010 without documentation to support those statements. Furthermore, the household expense statements provided on appeal indicate expenses in 2010 that conflict with previously provided estimates. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). Expenses were originally listed as \$58,733.60 in 2010, whereas more recent household expense statements provided by the petitioner indicate household expenses of \$122,218.00 in 2010. Although counsel explains that the petitioner miscalculated expenses in the past, no explanation is presented as to why these inconsistencies were not resolved in previous filings. The CPA's statement cannot be considered new, as this evidence could have been presented earlier. Further, the expenses for 2010 through 2012 are more than double the expenses provided for 2007 through 2009. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

<sup>4</sup> On the current motion, the petitioner provides a statement regarding the prevailing wage, actual wages paid and the difference between the actual wages paid and prevailing wage for the instant beneficiary and the beneficiary of another Form I-140 immigrant petition filed by the petitioner. The statement is accompanied by copies of IRS Forms W-2 for the instant beneficiary and the other beneficiary. However, as discussed above, this documentation is not new as it is not a new fact that was not available and could not have been discovered or presented in the previous proceedings. Further, this documentation does not overcome the inconsistencies in the record.

AAO. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on motion as it does not constitute "new" evidence.<sup>5</sup>

Motions for the reopening 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 to reopen 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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not sustained that burden. 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motions 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.

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<sup>5</sup> Even if the AAO were to consider the evidence submitted on motion (the beneficiary's paystubs) the evidence does not cover the complete relevant time period from the priority date in 2007 to the present. Further, there is no evidence that the beneficiary actually cashed the checks.