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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

Bf

BAIRES POOL PLASTERING
ATTN: REMBERTO BAIRES
1292 GEORGE ST.
PLAINFIELD, NJ 07060

FILE: [REDACTED]
EAC 01 251 50731

Office: VERMONT SERVICE CENTER

Date: **AUG 02 2010**

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

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must 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, Vermont Service Center, denied the petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal and motion to reopen. The visa petition is now before the AAO on a second motion to reopen/reconsider. The motion will be dismissed.

The regulation at 8 C.F.R. § 103.5(a)(2) states in pertinent part:

Requirements for motion to reopen. 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. . . .

In the instant case, the petitioner has not submitted any new facts nor has he submitted any affidavits or documentary evidence. Therefore, the motion does not meet the requirements of a motion to reopen.

On motion, the petitioner states:

I understand that the reason for denial of this case is that I didn't present the evidence that I could pay [the beneficiary] the salary of \$53,248.00.¹ This is because there was a mistake when I originally filed the I-140 Form, and instead of my lawyer that I had at that time, [REDACTED] in NY, putting a[n] estimate[d] salary amount [sic] of \$33,248.00, they went and put \$53,248.00.² I know that the mistake is mine as I should of saw that mistake and fix it before this time. However, I, myself, have been in and out of hospitals because of heart problems and also in and out of U.S. and El Salvador, and I left this case to my secretarys [sic] and without my knowing this case continued with this mistake until [sic] recently I send letters to the Washington Offices asking for information on this case. I deeply apologize [sic] for this mistake. [The beneficiary] have been and will continue to make a salary estimated at \$33,248.00 a year. Please understand that not every year is the same in my company. We have years that we work installing pools and having a lot of contracts and other years we work steady. So there

¹ The AAO noted in its prior dismissal of the petitioner's motion to reopen that the record lacks conclusive evidence as to whether the petition is based on a bona fide job offer or whether the pre-existing family (the beneficiary is the petitioner's brother), business, or personal relationship may have influenced the labor certification. See 20 C.F.R. §§ 626.20(c)8 and 656.3, *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987), *Matter of Summart* 374, 00-INA-93 (BALCA May 15, 2000), and *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986). The petitioner has failed to address this issue.

² Although the petitioner claims that its counsel was incompetent, in this matter, the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1st Cir. 1988). A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, to explain why not. The instant motion does not address these requirements. Accordingly, the petitioner did not articulate a proper claim based upon ineffective assistance of counsel.

will be years that he will be making less and/or more as you see his W-2 tax forms are never the same.

USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the certified labor certification stated the proffered wage as \$25.60 per hour or \$53,248 annually. As USCIS may not ignore a term of the labor certification, the petitioner is obligated to show that it had sufficient funds to pay the proffered wage listed on the certified labor certification and not a lesser amount on motion. The petitioner's actual minimum wage requirements could have been clarified or changed before labor certification was certified by the Department of Labor (DOL). The petitioner elected not to do so. Therefore, the AAO is obligated to adjudicate the petition as certified by DOL.

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

Requirements for motion to reconsider. 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.

Since the petitioner has not provided a reason for reconsideration supported by pertinent precedent decisions indicating that the decision was based on an incorrect application of law or USCIS policy, and has not established that the decision was incorrect based on the evidence of record at the time of the initial decision, the motion does not meet the requirements for reconsideration.

The regulation at 8 C.F.R. § 103.5(a)(4) states in pertinent part:

Processing motions in proceedings before the Service. A motion that does not meet applicable requirements shall be dismissed. . . .

Because the motion does not meet the applicable requirements of a motion to reopen or a motion to reconsider, it must be dismissed.

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.