

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



B6

Date: APR 06 2011 Office: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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:



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 \$630. 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, Nebraska Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on October 1, 2009, the AAO dismissed the appeal. The petitioner filed a Motion to Reopen the AAO's decision in accordance with 8 C.F.R. § 103.5. The Motion will be dismissed pursuant to 8 C.F.R. §§ 103.5(a)(1)(iii)(C), 103.5(a)(2), and 103.5(a)(4).

The petitioner is a solar electric and vinyl constructor and installer. It seeks to employ the beneficiary permanently in the United States as a vinyl solar technician. 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 denied the petition finding the petitioner had not established its continuing ability to pay the proffered wage as of the priority date of the petition and had failed to demonstrate that the beneficiary possessed the required six months of experience as a vinyl solar technician as of the priority date.

The petitioner appealed the denial of the petition to the AAO on March 29, 2009, noting that the director failed to consider all of the submitted evidence relating to beneficiary's experience. The petitioner indicated that a brief and/or additional evidence would be forthcoming within thirty days of the receipt of the appeal. On October 1, 2009, the AAO summarily dismissed the appeal pursuant to 8 C.F.R. § 103.3(a)(1)(v), finding that the petitioner had not specifically addressed the reasons stated for denial and had not provided any additional evidence.

On motion, counsel states that the petitioner had submitted sufficient evidence to meet its burden in these proceedings. Counsel asserts that the petitioner had previously provided evidence relating to the beneficiary's work experience, a statement from [REDACTED] in response to the director's Request for Additional Evidence (RFE) issued on December 30, 2008. Counsel includes a copy of [REDACTED] statement as well as a copy of an advertising mailer publicizing [REDACTED] availability as a plumber and electrician.

However, a review of the petitioner's response to the director's RFE of December 30, 2008 reveals no evidence that either the statement of [REDACTED] regarding the beneficiary's work experience or [REDACTED] advertising mailer was included with the response. Regardless, the employer, [REDACTED] was not listed on the Form ETA 750 and may not be used to establish the beneficiary's work experience. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976) (where the Board noted in dicta that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted. The petitioner failed to submit any independent objective evidence such as W-2 Forms to verify the asserted employment, or any other evidence of other experience on motion.

In addition, it must be noted that neither counsel nor the petitioner submits any evidence on motion demonstrating the petitioner's continuing ability to pay the proffered wage as of the priority date of the petition.

¹ In his statement, [REDACTED] declared that he was a master plumber who employed the beneficiary as a student and helper from 1996 to 1998.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

As counsel fails to assert any new facts supported by documentary evidence on motion as required by the regulation at 8 C.F.R. § 103.5(a)(2), the motion must be dismissed for this reason. The evidence submitted on appeal is not new in that this evidence could have been submitted previously, but the petitioner simply chose not to do so. The AAO did not err in summarily dismissing the appeal.

The motion shall also be dismissed for failing to meet an applicable requirement. The regulation at 8 C.F.R. § 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and motions to reconsider. Section 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). The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. 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 additional 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.

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.