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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

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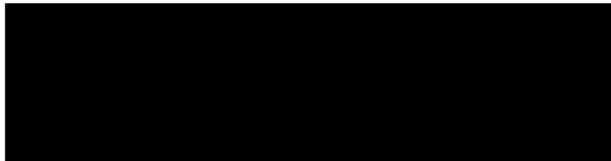
FILE: 

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 immigrant visa petition was denied by the Director, Nebraska Service Center (Director). The petitioner filed an appeal, which was dismissed by the Chief, Administrative Appeals Office (AAO). The matter is now before the AAO again on a motion to reconsider. The motion will be dismissed.

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 (Act), 8 U.S.C. § 1153(b)(3)(A)(iii).

On April 9, 2008, the Director denied the petition on the ground that the record failed to demonstrate that the petitioner had the ability to pay the beneficiary at the wage offered in the Application for Alien Employment Certification, Form ETA 750, from the date that application was filed with the U.S. Department of Labor (April 30, 2001) up to the present. On July 26, 2010, the AAO dismissed the appeal on the same ground – failure of the petitioner to establish its continuing ability to pay the proffered wage during the requisite time period – noting in particular that the record did not establish the petitioner’s ability to pay the proffered wage in 2003 and 2006. The decisions by the Director and the AAO were both quite thorough in their analysis, and are incorporated by reference into the current decision.

Counsel filed a timely motion to reconsider, asserting that the decisions of the Director and the AAO were arbitrary and capricious, and that they failed to consider the “taking of dividends” by the petitioner. According to counsel, the dividends “through authorized accounting methods are tak[en] as a deduction: therefore, indicating that the petitioner does indeed have the ability to pay the proffered wage.” Counsel contends that the AAO “erred in stating that the petitioner did not provide evidence of paying the beneficiary a wage” by ignoring the Form W-2s in the record showing that the beneficiary has been employed by the petitioner. As further evidence of the petitioner’s ability to pay the proffered wage, counsel claims that “bank statements of the employer are enclosed which indicate that [it] carr[ies] an average monthly balance of nearly \$20,000-40,000.” In conclusion, counsel asserts that the Director and the AAO “erred in their analysis that the petitioner did not have the ability to pay [the beneficiary’s] wages.”

The requirements for a motion to reconsider are set forth at 8 C.F.R. § 103.5(a)(3):

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 United States Citizenship and Immigration Services (USCIS) 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.

As further provided in 8 C.F.R. § 103.5(a)(4):

A motion that does not meet applicable requirements shall be dismissed.

The various arguments advanced by counsel are completely without merit. While asserting that the petitioner’s dividends should be taken into account in determining its ability to pay the proffered

wage, counsel fails to cite any specific documentation in the record showing that dividends were "taken" by the petitioner over the years, or the amount of such dividends. Moreover, counsel has not cited any pertinent precedent decisions to establish that the AAO's decision was based on an incorrect application of law or USCIS policy. Counsel's assertion that the AAO did not properly consider the Form W-2s in the record as evidence of the beneficiary's payment of wages by the petitioner is incorrect. The AAO reviewed the W-2s in detail, noted in its earlier decision that they were full of inconsistent social security numbers and that some of them were for a different employee, and concluded that the W-2s lacked credibility. Finally, counsel's reference to "enclosed" bank statements showing an average monthly balance of \$20,000 to \$40,000 is an empty claim, since no such bank statements were enclosed with the motion to reconsider and no such bank statements are present anywhere else in the record.¹

For the reasons discussed above, counsel has failed to demonstrate any reasonable basis for the motion to reconsider. Counsel has not established that the AAO incorrectly applied any law or USCIS policy, or cited any precedent decision(s) on point. Moreover, counsel's analysis of the existing record is substantively flawed.

The AAO concludes that the motion to reconsider does not meet the requirements set forth in 8 C.F.R. § 103.5(a)(3). Furthermore, it does not meet the filing requirement listed at 8 C.F.R. § 103.5(a)(1)(iii)(C), which specifies that a motion 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."

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).

¹ As a technical matter, the final part of counsel's motion is more in the nature of a motion to reopen, the requirements for which are set forth at 8 C.F.R. § 103.5(a)(2): "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." However, the documentation cited in support of the "new facts" alleged in the motion – the bank statements showing monthly balances of \$20,000-40,000 as evidence of the petitioner's ability to pay the proffered wage – was in fact not submitted by counsel. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). It is further noted that only evidence submitted on motion that was previously unavailable or could not have been discovered or presented in the previous proceedings would qualify as new evidence for consideration under a motion to reopen. 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).

ORDER: The motion to reconsider is dismissed. The prior decision of the AAO is affirmed.