

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

PUBLIC COPY

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 24 2012** OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or a Professional pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)

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 employment-based immigrant visa petition was originally approved by the Director, Texas Service Center (TSC Director). The approval was subsequently revoked by the Director, Nebraska Service Center (NSC Director). The petitioner filed an appeal, which was dismissed by the Chief, Administrative Appeals Office (AAO). The petitioner filed a motion to reopen and reconsider with the AAO, which was also dismissed. The petitioner has now filed another motion to reopen and reconsider. The motion will be dismissed for failing to meet applicable requirements.

The petitioner is a travel agency. It seeks to employ the beneficiary permanently in the United States as “manager, travel & tours” and to classify him as a skilled worker under section 203(b)(3)(A)(i) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1153(b)(3)(A)(i).

The immigrant visa petition (Form I-140) was filed on April 7, 2006. As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).<sup>1</sup> On May 10, 2006, the TSC Director approved the petition.

On November 30, 2009, however, the NSC Director issued a decision revoking the prior approval of the petition on two grounds: (1) the petitioner engaged in fraud or a willful misrepresentation of material facts on its labor certification, and (2) the petitioner failed to establish its continuing ability to pay the proffered wage of the subject position. Based on the finding of fraud or willful misrepresentation on the ETA Form 9089, the NSC Director also invalidated the labor certification.

The petitioner filed an appeal, which the AAO dismissed in a decision issued on September 28, 2010. The AAO agreed with the NSC Director’s findings and affirmed his decision to revoke the approval of the petition and invalidate the underlying labor certification. In a further order at the close of its decision, the AAO found that both the petitioner and the beneficiary knowingly misrepresented the petitioner’s business operation, concealed their familial relationship, and concealed the beneficiary’s ownership interest in the petitioner with the intention of misleading the government on material elements of the beneficiary’s eligibility for the immigration benefit sought under the Act.

On October 26, 2010, the petitioner’s counsel filed a motion to reopen and reconsider the AAO’s decision, accompanied by supporting documentation. In dismissing the motion on December 21, 2011, the AAO determined that the petitioner had presented no new facts or documentation, as required in a motion to reopen, to refute the AAO’s prior determination that the petitioner made fraudulent or willful misrepresentations of material facts in the ETA Form 9089. In particular, the petitioner supplied a false address for the primary worksite of the proffered position and falsely denied that there was a familial relationship between the petitioner’s owners and the beneficiary. The AAO also determined that the petitioner had not presented any persuasive argument and/or precedent decisions, as required in a motion to reconsider, showing that the AAO’s initial decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS)

---

<sup>1</sup> The ETA Form 9089 had been filed with the DOL on November 2, 2005, and was certified by the DOL on February 17, 2006.

policy. In addition, the AAO determined that the petitioner had not provided any new facts or documentation demonstrating the petitioner's ability to pay the proffered wage, as required in a motion to reopen, nor established that the AAO incorrectly applied *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), or any other case law, statutory law, or USCIS policy, in its previous decision. The documentation of record, the AAO observed, did not establish the petitioner's ability to pay the proffered wage in any year from 2006 up to the present.

Counsel for the petitioner filed a new motion to reopen and reconsider on January 19, 2012. In the motion counsel asserts that the AAO did not properly consider all of the evidence previously submitted by the petitioner. Counsel has not cited any specific piece of evidence, however, that the AAO failed to consider in its prior decision.

Counsel reiterates the claim it made in the first motion to reopen and reconsider that the two items of false information entered by the petitioner on the labor certification were actually typographical errors, not deliberate misrepresentations of fact. Counsel points out that the petitioner filed motions with the DOL to reopen the certified labor certification for the expressed purpose of correcting the "typographical errors" and that these motions remain outstanding. In counsel's view, the AAO should stay its decision on the instant motion until the DOL has ruled on the motions to reopen and correct the typographical errors on the certified labor certification. The AAO already considered and rejected this line of argument in its prior decision. No new factual or legal grounds have been presented for staying the AAO's decision. Counsel contends that the AAO misinterpreted a ruling of the Board of Alien Labor Certification Appeals (BALCA) in another case involving "typographical errors" on a labor certification – *In the Matter of Healthamerica*, BALCA Case No. 1 2006-PER-1 – but does not explain how the AAO misinterpreted that decision. Counsel's final line of defense is more in the nature of a plea that the AAO's decision could have "serious adverse consequences" for the petitioner and the beneficiary in future immigration proceedings. The AAO finds no basis in that plea to stay or alter a decision on the fraud and misrepresentation issue.

As for the petitioner's ability to pay the proffered wage, counsel claims that the AAO has misinterpreted the Board of Immigration Appeals (BIA) ruling in *Matter of Sonogawa*, 12 I&N Dec. 612. Once again, however, counsel has not explained how the AAO misinterpreted that decision. Counsel submits evidence of the petitioner's ability to pay the proffered wage – \$45,843.20 per year – in the form of Form W-2, Wage and Tax Statements, issued to the beneficiary for the years 2009 and 2010, showing that the beneficiary was paid \$50,400.00 each of those years. However, no documentation has been submitted showing the petitioner's ability to pay the proffered wage in any of the years 2006-2008, or in 2011. Thus, the petitioner still fails to establish its continuing ability to pay the proffered wage from the priority date (November 2, 2005) up to the present.

The requirements for a motion to reopen are set forth in the regulation 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.

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 [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.

Based on the foregoing analysis, the AAO determines that the petitioner has presented no new facts or documentation, as required in a motion to reopen, to refute the AAO's prior determination that the petitioner made fraudulent or willful misrepresentations of material facts in the ETA Form 9089. While the petitioner has submitted additional documentation of its ability to pay the proffered wage in two of the years at issue, this evidence could have been submitted earlier in the proceeding and does not, in any event, establish the petitioner's continuing ability to pay the proffered wage over the entire time period required in this petition. Furthermore, the petitioner has not presented any persuasive argument and/or precedent decisions showing that the AAO's initial decision on either of these issues was based on an incorrect application of law or USCIS policy, as required in a motion to reconsider. Therefore, the petitioner's current motion does not meet the requirements of a motion to reopen under 8 C.F.R. § 103.5(a)(2) or of a motion to reconsider under 8 C.F.R. § 103.5(a)(3).

With regard to the fraud and misrepresentation issue, the AAO notes that if the DOL should rule favorably on the petitioner's motions to reopen and correct typographical mistakes on the certified labor certifications, the petitioner may so advise USCIS in any future proceedings. However, while 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all of its employees in the administration of the Act, BALCA decisions are not similarly binding.

As stated in the AAO's prior decision, 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).

**ORDER:** The motion to reopen and reconsider is dismissed. The AAO's decisions of September 28, 2010, and December 21, 2011, are affirmed.