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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

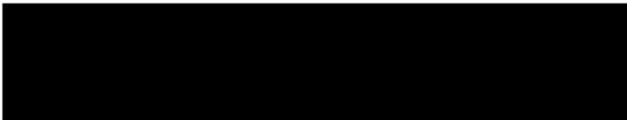


U.S. Citizenship
and Immigration
Services



B6

DATE: **AUG 02 2012** OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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, which was then appealed to Administrative Appeals Office (AAO). Prior to the director's denial, on December 16, 2008, a Request for Evidence (RFE) was issued to the petitioner and counsel using addresses provided in the filings. The RFE directed the petitioner to provide: evidence that it was in good standing with the state of California; evidence that it had the ability to pay the proffered wage as of the priority date, April 30, 2001, to include federal income tax returns from 2001 through 2007; and, Forms W-2 which indicate the beneficiary was employed by the petitioner. The petitioner did not respond to the RFE, and a decision was entered. The petitioner appealed the director's decision, claiming it had never received the RFE. However, with that appeal the petitioner did not provide new evidence which was responsive to the prior RFE. The AAO issued a notice of derogatory information (NDI), noting that according to the California Secretary of State records, it was "suspended." The NDI directed the petitioner to provide evidence that it was in good standing with the state of California. The NDI was sent to both the petitioner and counsel at their provided addresses. Neither the RFE nor the NDI were returned as undeliverable. The petitioner did not respond, and the appeal was dismissed as moot. The AAO's decision dismissing the appeal detailed the information regarding the petitioner's business status as identified in the NDI.

A motion to reopen or reconsider was filed by counsel, stating again that the petitioner did not receive the AAO's NDI asking for evidence. Although a copy of the AAO's decision dismissing the appeal was included with the motion, the petitioner did not provide evidence which was requested in the initial RFE or the NDI, nor did the petitioner provide evidence that it was in good standing with the state of California. Counsel provided copies of the beneficiary's personal income tax returns for 2010, and Forms W-2 for 2008 to 2010, and a Form 1099 for 2008, which purport to show payments from the petitioner to the beneficiary.¹

The regulations at 8 C.F.R. § 103.5(a)(2) state, 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.²

The petition was denied by the director because the petitioner failed to comply with the regulation at 8 C.F.R. § 204.5(g)(2) which states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be

¹ The address of the petitioner on all Forms W-2 and Form 1099 matches the address of the beneficiary on these forms. This address does not match any address for either the petitioner or beneficiary provided on any form or document in the record of proceeding.

² 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).

accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Nearly five years after filing the petition, the petitioner has yet to provide *any* evidence of its continued ability to pay the proffered wage beginning at the priority date until 2007. Furthermore, as the petitioner was informed in the AAO's NDI, the California Secretary of State website continues to show that the petitioner is "suspended." See <http://kepler.sos.ca.gov/cbs.aspx> (accessed July 11, 2012). The petitioner provided what purports to be Forms W-2, evidencing payments from the petitioner to the beneficiary. However, according to the State of California, the petitioner is no longer in operation. This is an inconsistency in the record. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The record does not contain any annual reports, federal tax returns, or audited financial statements for the petitioner.

The petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this motion. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation.

Accordingly, the petitioner has failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

Beyond the decision of the director,³ the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8

³ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. 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'r 1986). *See also, Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires six years of grade school. On the labor certification, the beneficiary claims to qualify for the offered position based on attending [REDACTED] completed in 1970. However, the record contains no evidence related to the beneficiary's education.

In this matter, the petitioner presented no facts or evidence on motion that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen. As the petitioner was previously put on notice and provided with a reasonable opportunity to provide the required evidence, the evidence submitted on motion will not be considered "new" and will not be considered a proper basis for a motion to reopen.

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.

As the motion does not surmount the high burden, it must be denied.

ORDER: The motion to reopen or reconsider is denied and the petition remains denied.