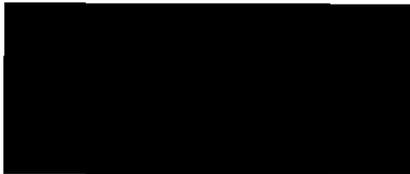


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



B6

Date: **AUG 16 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:

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 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. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on April 27, 2011, the AAO dismissed the appeal. The petitioner filed an appeal; however, a dismissal of an appeal, allows the petitioner only to file a motion to reopen or reconsider. The appeal will be treated as a motion to reopen and reconsider 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)(3), and 103.5(a)(4).

United States Citizenship and Immigration Services (USCIS) regulations require that motions to reconsider be filed within 30 days of the underlying decision. 8 C.F.R. § 103.5(a)(1)(i). Similarly, USCIS regulations require that motions to reopen be filed within 30 days of the underlying decision, except that failure to timely file a motion to reopen may be excused in the discretion of USCIS where it is demonstrated that the delay was reasonable and was beyond the affected party's control. *Id.* In this matter, the motion was filed on May 25, 2011 and is deemed timely filed.

The motion shall be dismissed for the following reasons:¹

The regulation at 8 C.F.R. § 103.5 provides 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." "New" facts are those that were not available and could not reasonably have been discovered or presented in the previous proceeding. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). The petitioner submitted with the motion the following documentation:

- A brief in support of the motion;
- A statement from the petitioner requesting contact "to explain abatement of approvals;"
- Eight approval notices for sponsored workers;
- A letter from the petitioner's accountant dated May 17, 2011;
- Copies of the petitioner's 2007, 2008 and 2009 tax returns (the 2008 and 2009 tax returns were previously submitted; the 2007 and 2008 tax returns predate the January 23, 2009 priority date in this action);
- A letter from the Bank of the West attesting to a line-of-credit for the petitioner;
- An appraisal report for T Bone Stone Quarries dated March 28, 2011 and prepared by [REDACTED], Senior Commercial Review Appraiser Bank of the West;
- Insurance policy liability reports for years 2008, 2009 and 2010; and

¹ 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 filing 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. The fact that the instant motion did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C) detailed above is another ground for dismissal.

- W-2 Form listing reports for years 2008, 2009 and 2010.

The petitioner has not stated new facts to be provided in a reopened proceeding and the motion must, accordingly, be dismissed. The substance of all statements presented by the petitioner in support of its motion to reopen and reconsider were presented in its previous appeal to the AAO which was dismissed on April 27, 2011. Much of the documentation presented was submitted in the prior proceeding or could have reasonably been obtained at that time with the exercise of due diligence including evidence of bank statements and lines of credit.² Indeed, the petitioner had been asked by the director in a Request for Evidence (RFE) dated July 29, 2010 to provide evidence of its ability to pay the required wages of all sponsored workers (including the present beneficiary) plus additional financial documentation to establish its ability to pay the required wages of all sponsored workers. The W-2 Statements for the beneficiary (2008) and other workers (2008 and 2009) could have been submitted at that time or on appeal. Where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

As also noted above, a motion to reconsider must: (1) 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; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The motion submitted by the petitioner is not supported by pertinent precedent decisions to establish that the prior decision was based on an incorrect application of law or USCIS policy, nor does the motion establish that the prior decision was incorrect based on the evidence of record at the time of the initial decision. The petitioner did not previously, nor has it now, established that the petitioner had the continuing ability to pay the proffered wage of all sponsored workers (including the present beneficiary) from each worker's respective priority date onward. This conclusion is based upon all evidence of record presented in the prior proceeding including: the petitioner's tax returns; evidence

² The petitioner's reliance on its bank account balances to establish the ability to pay the proffered wage is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that were considered in determining the petitioner's net current assets address in the AAO's April 27, 2011 decision. The AAO additionally considered and discussed lines of credit in its April 27, 2011 decision.

of a line-of-credit; costs of labor; assets of the petitioner's owner;³ the accountant letter submitted⁴ or a totality of the circumstances.

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.

Even if all the evidence were considered, it would not establish the petitioner's continuing ability to pay the beneficiary the proffered wage from the priority date onward and all the wages of the sponsored workers. Critically, the W-2 Statements for 2009, the year of the priority date, do not include a W-2 Form for the beneficiary in that year, or the other named sponsored workers. As noted in the AAO's April 27, 2011 decision, the petitioner's net income and negative net current assets would not support payment of the total proffered wages of all sponsored workers (\$291,200). While the 2008 W-2 Statements show some payments to most of the sponsored workers, 2008 is before the January 23, 2009 priority date and will only be considered generally when assessing the petitioner's ability to pay the proffered wage based on a totality of the circumstances. The petitioner must establish its continuing ability to pay the proffered wage from the priority date onward. 8 C.F.R. § 204.5(g)(2). Similarly, while the petitioner sent W-2 Statements for 2010, the W-2s do not reflect full payment of the proffered wage to the beneficiary or any of the other sponsored workers, and the record lacks the petitioner's 2010 federal tax return, audited financial statement or annual report to conclude that the petitioner can pay the difference between the proffered wages and wages actually paid to sponsored workers. The AAO previously considered the petitioner's totality of the circumstances pursuant to *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighbena*, 19 I&N Dec. 533 (BIA 1988). The petitioner's tax returns from 2007 to 2009 exhibit declining gross receipts and declining costs of labor. As pointed out in the AAO's April 27, 2011 decision, the petitioner had negative net income and net current assets for 2008 and low net income and negative net current assets for 2009. Nothing in the record demonstrates that the petitioner can pay the total proffered wages in the amount of \$291,200 for all of its sponsored workers.

³ Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

⁴ The petitioner submitted an accountant's letter dated May 17, 2011, which essentially asserts that the petitioner's gross income should be considered as a "more realistic" figure. The petitioner made a similar argument in the underlying filing and has already been addressed. Courts have recognized that net income rather than a petitioner's gross income is the proper figure to rely on. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881; *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084.

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's April 27, 2011 decision will not be disturbed.

ORDER: The motion is dismissed.