

(b)(6)

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

DATE: **JUL 19 2012** OFFICE: TEXAS SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 preference visa petition was denied by the Director, Texas Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be denied.

On June 27, 2011, the petitioner filed a Form I-290B, and a brief entitled "Motion Requesting Reopening of Denial of Appeal of Decision Denying Immigrant Petition For Alien Worker." The motion produced no new facts, and raised no new law or analysis that was not raised in the brief which was submitted with the initial appeal.

The petition was denied, and the appeal was dismissed based upon the same facts present in the motion to reopen. The beneficiary of the instant petition, on the Form ETA 750B when describing his qualifications for the proffered job, stated that his experience was acquired from 1990 to "present,"¹ as an "[i]ndependent contractor for various employers within the NYC area."

The petitioner is required to provide evidence to substantiate the beneficiary's experience claimed on the labor certification application with letters from previous employers which state include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. See 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes 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.

To demonstrate the beneficiary's experience, the petitioner provided a letter from one employer, [REDACTED] of Medellin, Colombia, dated March 23, 2001. However, this employer was not listed on the Form ETA 750B. See *Matter of Leung*, *supra*. The director sent a Request For Evidence (RFE) to the petitioner explaining that [REDACTED] was not listed on the Form ETA 750B, and directing the petitioner to provide experience letters from the beneficiary's current or former employer(s) stating the beneficiary's job title, job duties, and dates of employment. The RFE stated that the letter(s) must also contain the printed name and signature of the author of the letter, along with the author's position with the company. The RFE specifically requested the beneficiary's contract with the company, along with Form 1099 as evidence of pay. In response, the petitioner offered another letter from [REDACTED]. Although the letter clearly differs from the original letter submitted with the petition, the same English translation was submitted. It is clear that the translation provided does not relate to the second letter. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. The petition was denied by the director.

On appeal, and now in the motion to reopen, counsel asserts that [REDACTED] was one of the "various employers" claimed on the ETA 750B for whom the beneficiary worked for "in the New York City area." Such an assertion, if true, would resolve the obstacle of *Matter of Leung*. However, counsel

¹ The application for labor certification was submitted to the Department of Labor on October 19, 2001.

failed to explain in its response to the director's request for evidence or on appeal how a letter from an employer in Medellin, Colombia, describing employment from 1986 to 1990 can substantiate experience gained in New York from 1990 to 2001.²

In its motion to reopen, the petitioner does not provide previously unseen evidence substantiating the beneficiary's experience. Neither does the petitioner provide new law or analysis which indicates that the decisions below were in error.

The regulations at 8 C.F.R. § 103.5(a)(2) states, 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.³

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. All evidence submitted on motion was previously available and could have been discovered or presented in the previous proceeding.

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 met that burden.

ORDER: The motion to reopen is denied. The petition remains denied.

² In its decision dismissing the appeal, the AAO noted that it is unclear why the beneficiary's former employer would issue two different letters both dated March 23, 2001. The AAO also noted that the translation of the letters was identical. Although the AAO specifically noted that it is incumbent on the petitioner to resolve these inconsistencies, no additional evidence is provided in the motion to reopen.

³The 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).