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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: **JAN 10 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 section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

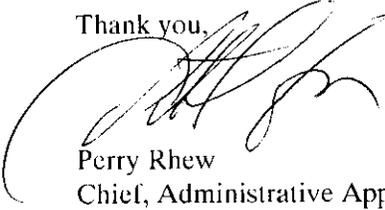
[REDACTED]

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 preference visa petition was denied by the Director, Texas Service Center. The Administrative Appeals Office (AAO) rejected the subsequently filed appeal. The matter is now again before the AAO as a motion to reopen and motion to reconsider pursuant to 8 C.F.R. § 103.5.¹ The motion to reopen and reconsider is denied. The appeal remains rejected.

The petitioner is an individual and seeks to employ the beneficiary permanently in the United States as a housekeeper, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). The petition was filed on April 21, 2008 with a labor certification approved by the Department of Labor (DOL) on August 7, 2007 and valid for 180 days (until February 3, 2008).² The director denied the petition because he determined that the petitioner had failed to submit the initial required evidence to establish its ability to pay the beneficiary the proffered wage. On April 27, 2009, the petitioner filed an appeal of the director's decision to the AAO. The AAO rejected the petitioner's appeal under its authority for *de novo* review. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In its decision, the AAO determined that the petition was not filed within 180 days after the labor certification's approval by February 3, 2008 and, as the labor certification expired by the April 21, 2008 date of filing, the Form I-140 was, therefore, filed without a valid labor certification pursuant to 8 C.F.R. § 204.5(1)(3)(i).

On motion, counsel submits evidence already part of the record to address the grounds of the findings of the AAO. Counsel for the petitioner does not state any reasons that would meet the standard for reconsideration, nor does counsel furnish any new facts to be provided in the reopened proceeding.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "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."

¹ The petitioner filed an appeal following the AAO's dismissal of the petitioner's prior appeal. The proper course would have been to file a Motion to Reopen or Motion to Reconsider. We will consider the filing as a Motion to Reopen and Reconsider.

² The regulation at 20 C.F.R. § 656.30(b) states:

(b) Expiration of labor certifications. For certifications resulting from applications filed under this part and 20 CFR part 656 in effect prior to March 28, 2005, the following applies:

(1) An approved permanent labor certification granted on or after July 16, 2007 expires if not filed in support of a Form I-140 petition with the Department of Homeland Security within 180 calendar days of the date the Department of Labor granted the certification.

(2) An approved permanent labor certification granted before July 16, 2007 expires if not filed in support of a Form I-140 petition with the Department of Homeland Security within 180 calendar days of July 16, 2007.

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

On motion, counsel for the petitioner has submitted a photocopy of the certified mail receipt showing a delivery date of August 17, 2007 for a package addressed to United States Citizenship and Immigration Services (USCIS) from the petitioner (Exhibit A), a photocopy of the rejection notice issued by the Texas Service Center dated September 21, 2007 (Exhibit B), and a photocopy of counsel’s cover letter for the petition requesting late acceptance (Exhibit C, which also includes Exhibit A), which were submitted with the initial I-140 filing. Counsel claims in the appeal to have filed the Form I-140 concurrently with the beneficiary’s Form I-485, Application to Adjust Status to Lawful Permanent Resident, on August 17, 2007. According to counsel’s brief on Motion to Reopen, the Forms I-140 and I-485 were rejected by the Texas Service in a notice dated September 21, 2007. This notice states that the “I-485 application (and/or related applications, petitions and fees) is being returned to you for the following reasons: a visa number is not available at the present time.”⁴ According to counsel’s brief, rather than immediately resubmitting the Form I-140 to the Texas Service Center, he instead held the Form I-140 and refiled this petition in April 2008 when an immigrant visa was available. Counsel’s April 9, 2008 letter states, “We are writing to request that the enclosed applications be accepted for filing even though the underlying labor certification is more than 180 days old.” As the labor certification expired on February 3, 2008 (180 days from the date of certification), the Form I-140 was filed with an expired and invalid labor certification.

In his brief, counsel argues that the Texas Service Center denied the Form I-140 on the basis of the petitioner’s ability to pay the proffered wage and not the invalidity of the labor certification. While the Service Center did not reject the petition, the AAO is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 at 3 (E.D. La.), *aff’d*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 534 U.S. 819 (2001).

As argument, counsel states: “It is argued that if the AAO had had an opportunity to consider the said Exhibits, they would not have rejected the Petitioner’s appeal.” A review of the evidence that the petitioner submits on motion reveals no fact that could be considered “new” under 8 C.F.R. § 103.5(a)(2). All evidence submitted with the motion was previously available and was presented in the previous proceeding.

³ 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).

⁴ The notice from the Texas Service Center does not reference rejection/return of the Form I-140. Nothing in the record indicates that the Form I-140 was accepted on August 17, 2007 for filing. Instead, USCIS records show that Form I-140 was only accepted for filing on April 21, 2008. Pursuant to 8 C.F.R. § 103.2(a)(7)(i), an application or petition which is not properly filed shall be rejected as improperly filed, and no receipt date can be assigned to an improperly filed petition.

Motions for the reopening 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. *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 to reopen will be dismissed.

Furthermore, 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

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 Service 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.

Counsel does not submit any document that would meet the requirements of a motion to reconsider. Counsel does not state any reasons for reconsideration nor cite any precedent decisions in support of a motion to reconsider. Counsel does not argue that the previous decisions were based on an incorrect application of law or Service policy, but instead admits error in filing the labor certification with Form I-140 after the 180 day expiration date.

The petition was filed on April 21, 2008 with a labor certification approved by the DOL on August 7, 2007 and valid until February 3, 2008. 78 days passed after the expiration of the labor certification’s validity date and prior to the filing of the I-140 petition with USCIS. As the filing of the I-140 petition was after 180 days of the labor certification’s expiration, the I-140 petition was therefore filed without a valid labor certification pursuant to 8 C.F.R. § 204.5(l)(3)(i).

The AAO’s jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO’s jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.). Among the appellate authorities are appeals from denials of petitions for immigrant visa classification based on employment, “except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act.” 8 C.F.R. § 103.1(f)(3)(iii)(B) (2003 ed.).

As the labor certification is expired, the petition is not accompanied by a valid labor certification, and this office lacks jurisdiction to consider an appeal from the director’s decision.⁵

⁵ Although this office does not have jurisdiction to consider the instant appeal, we note that the proffered job requires grade school and high school education and three months of experience in the proffered position, yet the record of proceeding does not contain evidence reflecting that the beneficiary has the required education or qualifying employment experience conforming to the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A). The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as

8 C.F.R. § 103.5(a)(4) states that “[a] motion that does not meet applicable requirements shall be dismissed.” Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion to reopen and reconsider is denied. The appeal remains rejected.

certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Nor has the petitioner met the burden of establishing that she had the ability to pay the proffered wage from the time the priority date was established (April 30, 2001). The regulation at 8 C.F.R. § 204.5(g)(2) 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 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.

In support of the first appeal to the AAO, counsel submitted copies of the petitioner's 2001, 2005 and 2007 tax returns/transcripts. No evidence was provided for the years 2002, 2003, 2004 or 2006. If all required initial evidence is not submitted with the application or petition, or does not demonstrate eligibility, USCIS, in its discretion, may deny the petition. 8 C.F.R. § 103.2(b)(8)(ii). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).