



U.S. Citizenship
and Immigration
Services

B6



DATE: Office: NEBRASKA SERVICE CENTER

FILE:

OCT 24 2012

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 preference visa petition was approved by the Director, California Service Center. On May 9, 2008, the Director, Nebraska Service Center (NSC) served the petitioner with a Notice of Intent to Revoke (NOIR). On December 23, 2008, the NSC director revoked the approval of the petition based on the familial relationship between the beneficiary and one of the general partners of the petitioner. The director determined that because the job opening was not open to United States workers, the described job opportunity listed in the labor certification application was not a bona fide offer of employment. The director also concluded that the petitioner did not intend to "employ" the beneficiary, since it has never employed anyone in the past except as an independent contractor. Additionally, the director determined the petitioner had not established it employed nine persons as claimed on the Form I-140, Immigrant Petition for Alien Worker, filed on September 1, 2005. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on August 1, 2011, the AAO dismissed the appeal. The petitioner filed a motion to reopen/reconsider the AAO's decision. The motion will be dismissed for failing to meet applicable requirements.

First, the motion shall be dismissed for failing to meet one of the applicable requirements listed in 8 C.F.R. § 103.5(a)(1)(iii), which sets forth 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 motion 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. Therefore, because the instant motion did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must be dismissed for this reason.

Furthermore, upon review, the AAO will dismiss the motion for failure to meet the substantive applicable requirements set forth in 8 C.F.R. §§ 103.5(a)(2) and (a)(3).

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, either before the director or the AAO.¹

In this matter, the petitioner presented no facts or relevant 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. No additional evidence was submitted other than a self-serving letter dated August 29, 2011 reiterating the petitioner's intention to employ the beneficiary. Not only is this evidence not "new," it would be insufficient to overcome the AAO's conclusion that, based on prior practices, it is unlikely that the petitioner truly intends and desires to "employ" the beneficiary.

¹The 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).

Likewise, the regulations at 8 C.F.R. § 103.5(a)(3) state, in pertinent part, that "[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 [U.S. Citizenship and Immigration Services (USCIS)] policy."

In this matter, the petitioner does not cite to any pertinent precedent decisions in arguing that there was an incorrect application of law or policy. Counsel cites to decisions of the Board of Alien Labor Certification Appeals (BALCA) on motion. These decisions are not precedent decision binding upon USCIS. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Immigration and Nationality Act (the Act), BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

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 will be dismissed.

Finally, it should be noted for the record that, unless USCIS directs otherwise, the filing of a motion to reopen or reconsider does not stay the execution of any decision in a case or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

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.

Title 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 or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.