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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: **SEP 04 2012** OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional 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, Texas Service Center, denied the immigrant visa petition, which was then appealed to Administrative Appeals Office (AAO). The appeal was summarily dismissed. This motion to reconsider that dismissal was filed on May 19, 2009.

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.¹

We note that counsel provides neither new evidence nor new law with its motion. Counsel merely provides the text of 8 C.F.R. § 204.5(g)(2), and exhorts the AAO to come to a favorable conclusion. In its appeal of the director's decision, the petitioner provided no brief or additional evidence. Counsel stated on Form I-290B that the director "erred" in finding that the petitioner did not submit sufficient evidence to demonstrate by a preponderance of the evidence that it maintained the continued ability to pay the proffered wage. No specific allegation of error was made.

In his motion, counsel states that it did not intend to submit additional evidence and that the petitioner intends to rely on the evidence of record. Counsel requests a decision on the merits.

In her June 5, 2007 denial, the director determined that the petitioner had not demonstrated its ability to pay the proffered wage of \$48,000 per year for the years 2005 or 2006. The director reviewed the petitioner's 2004, 2005, and 2006 federal income tax returns, Form W-2 issued by the petitioner to the beneficiary in 2004, pay stubs issued by the petitioner to the beneficiary in 2006, and several of the petitioner's bank statements for 2007. A review of the evidence of record reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2). All evidence submitted was reviewed by the director and considered in her denial. No specific errors in the director's calculations are alleged.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss [REDACTED] movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion

¹ 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).

design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner's net income and net current assets in 2005 and 2006 are less than the proffered wage. Although on Form ETA 750B, the beneficiary claimed to have worked for the petitioner since 2001, the petitioner did not submit evidence demonstrating that it employed and paid the beneficiary in 2005. The petitioner's 2007 bank statements have no bearing on the petitioner's ability to pay the proffered wage in 2005 or 2006. The petitioner provided no evidence of its reputation or any uncharacteristic business losses or expenditures, such as in *Sonegawa*. Thus, viewing the totality of the circumstances, the petitioner did not establish it possessed the continued ability to pay the proffered wage.

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. The petitioner was previously put on notice in the dismissal of its appeal, yet no new evidence was submitted on motion.

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.

Further, 8 C.F.R. § 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, and, if so, the court, nature, date, and status or result of the proceeding." The instant motion did not contain such statement.

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

ORDER: The motion to reopen or reconsider the dismissed appeal is denied, the petition remains denied.