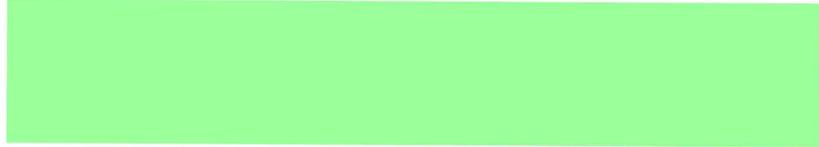


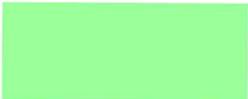


U.S. Citizenship  
and Immigration  
Services

(b)(6)



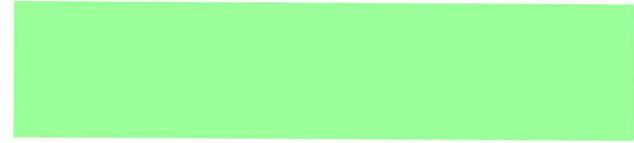
DATE: **AUG 01 2013** OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner:   
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based visa petition was denied by the Director, Texas Service Center (director). The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion to reopen. The motion will be dismissed. The petition will remain denied.

The petitioner describes itself as a stone mason. It seeks to employ the beneficiary permanently in the United States as a stone mason helper. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established the ability to pay the proffered wage. The director also found that the petitioner had not established that the beneficiary possessed the minimum experience requirements of the offered position as set forth in the labor certification. The director denied the petition accordingly.

The AAO found that the petitioner had established the ability to pay the proffered wage. However, the AAO agreed with the director's conclusion that the petitioner had failed to establish that the beneficiary possessed the minimum employment experience detailed on the labor certification. Therefore, the AAO dismissed the appeal.

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.<sup>1</sup>

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 evidence submitted on motion was originally requested by the AAO in a Request for Evidence dated December 27, 2012.<sup>2</sup> Counsel states on motion that the beneficiary "previously tried to obtain [this evidence] but because he was not there personally to request the letter, he couldn't obtain it." However, this assertion is not supported by any evidence of unsuccessful attempts by the beneficiary to obtain this documentation. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute

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<sup>1</sup>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).

<sup>2</sup> The AAO's dismissal noted discrepancies between letters from the beneficiary's claimed employers; specifically, one letter stated he had worked as a bricklayer while another letter stated he had worked as a stone mason helper. On motion, counsel explained that this seeming discrepancy was simply a translation error, with both job titles being the same word in the original Spanish – "albañil." However, albañil can mean either "bricklayer" or "mason" and neither letter describes the beneficiary's duties. Therefore, this explanation is not sufficient to satisfy the deficiencies in the employment letters.

evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The documentation submitted in support of the motion was previously available and could have been discovered or presented in the previous proceeding. As the petitioner was previously put on notice and provided with a reasonable opportunity to provide the required evidence, the evidence submitted on motion will not be considered "new" and will not be considered a proper basis for a motion to reopen.

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.

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 dismissed. The petition remains denied.