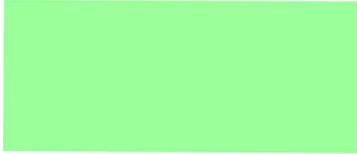


(b)(6)

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: **AUG 0 1 2013**

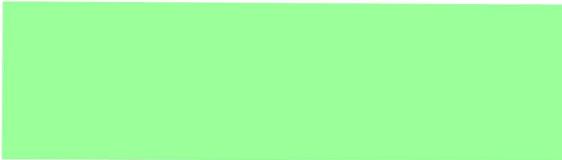
OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner: 
 Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Professional Pursuant to Section 203(b)(3)(A)(ii) of
 the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(ii)

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 Director, Texas Service Center (director), denied the immigrant visa petition. The petitioner appealed the denial to the Administrative Appeals Office (AAO), which dismissed the appeal. The petitioner now files a motion to reopen and reconsider the AAO's prior decision. The motion will be dismissed.

The petitioner is a health care provider. It seeks to permanently employ the beneficiary in the United States as a registered nurse. The petitioner requests classification of the beneficiary as a professional pursuant to section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii).¹

The director issued a Request for Evidence (RFE) on January 26, 2010, specifically requesting the following: 1) evidence of the beneficiary's qualifications as a professional nurse; 2) a copy of the job opportunity notice posted to the bargaining representative, or if there is no bargaining representative, a copy of the notice posted at the beneficiary's actual intended worksite, and; 3) a prevailing wage determination (PWD) from the State Workforce Agency (SWA) having jurisdiction over the beneficiary's actual intended worksite location. The petitioner denied the petition because the petitioner failed to provide notice of the filing of an ETA Form 9089, Application for Permanent Employment Certification, in accordance with 20 C.F.R. § 656.10(d)(1), and failed to submit a valid prevailing wage determination in accordance with 20 C.F.R. § 656.40.

On appeal, counsel stated that "Notice was properly published. There is no newsletter or other publication, no collective bargaining agreement or representative, and no electronic media within the petitioner's operations. There is a bulletin board where positions are normally posted. Petitioner complied with all publication requirements given the circumstances." No copy of the Notice was submitted with the appeal. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Therefore, the petitioner failed to submit evidence that notice was posted in accordance with 20 C.F.R. § 656.10(d)(1).

Additionally, the petitioner failed to submit a PWD that met the requirements of 20 C.F.R. § 656.40. The petitioner must obtain a PWD and file the petition and accompanying ETA Form 9089 with USCIS within the validity period specified on the PWD. *See* 20 C.F.R. § 656.40(c). The instant petition was filed on December 9, 2009. No PWD was submitted with the initial filing, nor in response to the RFE, nor on appeal.

In response to the director's RFE, the petitioner submitted a print out from <http://www.careerinfonet.com>, which purports to show high, median, and low wages for registered nurses in Florida. In his decision denying the petition, the director clearly outlines the regulatory requirements for PWDs. On appeal, counsel asserted that the source of the prevailing wage report

¹ Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

was the State of Florida. However, as noted by the director and the AAO in the prior decision, this print out is not a PWD issued by the SWA. Rather it is a collection of data on wages for registered nurses for which the SWA is the source.

Therefore, on appeal the petitioner failed to submit a PWD issued by the SWA pursuant to 20 C.F.R. § 656.40.

A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

The director properly denied the petition because the petitioner failed to provide Notice in accordance with 20 C.F.R. § 656.10(d)(1), and failed to submit a valid PWD in accordance with 20 C.F.R. § 656.40.

The AAO also found, beyond the decision of the director, the instant petition was filed on December 9, 2009, more than four years after the introduction of the ETA Form 9089. However, the petitioner submitted Form ETA 750 with its petition, which was no longer in use for Schedule A filings at that time. Therefore, the petition does not comply with 20 C.F.R. § 656.17, or 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i).

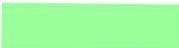
The AAO dismissed the appeal for all of the above noted reasons.

The petitioner filed the instant motions and includes photographs of what appears to be a bulletin board, with photos of what purports to be a November 10, 2009, posting notice. The record contains no evidence indicating where the bulletin board and posting notice were located. The record also contains an ETA Form 9089, signed by the petitioner, counsel and the beneficiary on November 16, 2012; and, Form ETA 9141 submitted electronically on November 15, 2012.

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.²

The petitioner has not established how the photograph of the bulletin board and posting notice were not previously available. Thus, it has failed to meet its burden. Furthermore, the photograph and posting notice still do not satisfy the regulation because they fail to show that the posting notice was placed in a regulatory prescribed location.

² 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).



Therefore, 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.

Furthermore, the ETA Form 9089 and ETA Form 9141 fail to meet the requirements of 20 C.F.R. § 656.15(b)(2), as both were submitted after the initial filing date of the petition on October 19, 2010.

The regulations at 8 C.F.R. § 103.5(a)(3) state 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 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.”

Here petitioner makes no argument and provides no legal authority which indicates the AAO’s previous decision was legally incorrect. Counsel therefore has not identified any legal error in the AAO’s dismissal. Accordingly, the motion to reconsider must be dismissed.

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.

As the motions do not surmount the high burden, they must be denied.

ORDER: The motions to reopen and reconsider are dismissed. The petition remains denied.