

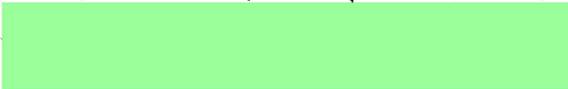
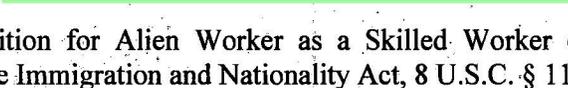


U.S. Citizenship
and Immigration
Services

(b)(6)

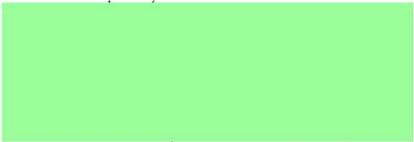


DATE **FEB 05 2013** OFFICE: TEXAS SERVICE CENTER FILE: 

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 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,

Elizabeth McCormack

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, (director) and an appeal was dismissed by the Administrative Appeals Office (AAO). The AAO granted the petitioner's first subsequent motion to reconsider, and affirmed its previous decision to dismiss the appeal. The AAO dismissed a second motion as untimely filed. The case is again before the AAO on motion to reopen and motion to reconsider. The motions will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as a professional or skilled worker. The director determined that the petitioner had failed to demonstrate a continuing ability to pay the proffered wage beginning as of the priority date. The director also found that the petitioner had failed to establish that the beneficiary possessed the minimum work experience required by the labor certification. The director denied the petition on June 11, 2008.

On appeal, counsel merely stated that the director's decision was erroneous. While counsel indicated that a brief or additional evidence would be submitted within 30 days; however, no further response was received. Accordingly, the AAO summarily dismissed the appeal on April 6, 2009.

On motion to reopen and motion to reconsider, counsel asserted that the AAO "was still obligated to fully review the appeal and the decision of the Service Center." In a decision dated May 18, 2010, the AAO concluded that the appeal "points to no specific error in the director's consideration of the [petitioner's income tax] returns or beneficiary's experience letter and submits no additional evidence to overcome the denial." Therefore, the AAO affirmed its previous decision to summarily dismiss the appeal.

The petitioner filed a second motion to reopen and motion to reconsider on June 22, 2010. The AAO dismissed the motions on September 2, 2011, as having been untimely filed.

Counsel dated the current motion to reopen and motion to reconsider September 30, 2011. The motion is supported by an affirmation from counsel stating that the petitioner's payments to its officers were discretionary and would be available to pay the proffered wage.¹ The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503; 506 (BIA 1980).

¹ It is noted that the record contains no statements from the officers of the petitioning company indicating their ability or willingness to forego their officer compensation to pay the beneficiary's salary of \$37,440. Furthermore, even if the petitioner had established the willingness and ability of its officers to forego their entire compensation for the years in question, the record shows that the amounts paid by the petitioner in officer compensation are not sufficient to cover the deficiencies in net income and net current assets listed in the director's decision—particularly in 2002 (no tax return submitted), 2004 (officer compensation of \$0), and 2005 (officer compensation of \$5,000). Thus, the petitioner would still have failed to establish the ability to pay the proffered wage as of the priority date.

The motion was accompanied by a copy of the petitioner's responsive letter to the Request for Evidence (RFE) dated February 7, 2008.² 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.³

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. All evidence submitted on motion was previously available and could have been discovered or presented in the previous proceeding. It is further noted that the petitioner has submitted evidence with this motion that was originally requested by the director in a request for additional evidence dated January 10, 2008. 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.

Counsel reasserts that the petitioner has the ability to pay the proffered wage and that the beneficiary is qualified for the offered job, but fails to address the basis for the AAO's September 2, 2011, dismissal of the previous motion to reopen and motion to reconsider.⁴

The regulation at 8 C.F.R. § 103.5(a)(3) states, 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 [USCIS] policy." The petitioner does not support the reasons for reconsideration with relevant precedent decisions not previously considered establishing that the previous decisions were based on an incorrect application of law or policy.

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.

ORDER: The motions are dismissed. The petition remains denied.

² It is noted that while the letter states that numerous documents were enclosed with the letter, no such evidence was submitted with the letter.

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 current motions make no substantive response to any of the three decisions already issued in this case. The current motions completely ignore the basis for the AAO's May 18, 2010, decision to dismiss an earlier motion to reopen and motion to reconsider. The current motions state counsel's displeasure with the AAO's initial decision in this case (the April 6, 2009, summary dismissal of the appeal) but the current motions fail to identify specifically any erroneous conclusion of law or statement of fact by the AAO.