



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

Date: **FEB 19 2013**

Office: TEXAS SERVICE CENTER

FILE: [Redacted]

IN RE:

Petitioner:

Beneficiary:

[Redacted]

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:

[Redacted]

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,

Ron Rosenberg for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on combined motion to reopen and motion to reconsider. The motion to reopen and motion to reconsider will be dismissed.

United States Citizenship and Immigration Services (USCIS) regulations require that motions to reopen or reconsider be filed within 30 days of the underlying decision. 8 C.F.R. § 103.5(a)(1)(i). Both motions were timely filed.

Motion to Reopen

The regulation at 8 C.F.R. § 103.5(a)(2) states, 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

Counsel seeks to reopen the AAO decision dated November 17, 2009 (decision), which determined that the petitioner did not establish its ability to pay the proffered wage in 2003 and 2004. In support of the motion, counsel asserts that the petitioner had the ability to pay the proffered in 2003 and 2004 and submits a report from [REDACTED], an enrolled agent with the Internal Revenue Service.² However, on appeal, the petitioner submitted a report prepared by Mr. [REDACTED] addressing

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).

² The AAO notes that on motion, Mr. [REDACTED] asserts that insurance proceeds received by the petitioner in 2004 should not have been reflected as a current liability on the petitioner's tax return. However, this assertion was presented in the previous proceeding in Mr. [REDACTED]'s report and is not new evidence. No amended tax returns were provided to reflect any changes in the petitioner's financial evidence for 2004. Mr. [REDACTED]'s report also addresses the issue of wages paid by the petitioner. He states that the reason the petitioner's 2003 and 2004 tax returns did not list officer compensation on page 1, line 7 or salaries and wages on page 1, line 8 of its 2003 and 2004 tax returns is that the petitioner leased employees in those years and the labor costs were shown on page 1, line 19 as other deductions and detailed on Statement 2 to the petitioner's 2003 and 2004 tax returns. For 2003, the petitioner's Statement 2 lists “Leased Payroll \$200,440” and for 2004, the petitioner's Statement 2 lists “Leased Payroll \$204,862.” The statements were provided presented in the previous proceeding. Mr. [REDACTED]'s report states the employees were leased through a leasing company called [REDACTED] and submits copies of two documents from [REDACTED], listing employees and the amount of the employees' gross and overtime pay in 2003 and 2004. For 2003, the amount of gross and overtime pay amounted to \$233,808.53 and for 2004 the amount was \$237,360.09. The name of the employee leasing company and the amounts shown on the documents submitted on motion are inconsistent with Mr. [REDACTED]'s report and the amounts shown on the petitioner's 2003 and 2004 tax returns for “Leased Payroll.” Further, the information contained in the payroll documents is not considered new evidence. The amounts paid by the petitioner through a leasing company were

the petitioner's ability to pay the proffered wage in 2003 and 2004. The petitioner's 2003 and 2004 federal tax returns served as the basis for both of Mr. [REDACTED]'s reports, and the financial information presented in those returns did not change. Counsel has presented no facts on motion that may be considered "new" under 8 C.F.R. § 103.5(a)(2).

The evidence submitted on motion is not new evidence of the petitioner's ability to pay the proffered wage in 2003 and 2004.³ Therefore, the motion to reopen will be dismissed.

Motion to Reconsider

The regulation at 8 C.F.R. § 103.5(a)(3) provides:

Requirements for a motion to reconsider. 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.

Counsel asserts that this office incorrectly concluded that the petitioner failed to establish its continuing ability to pay in the years 2003 and 2004, because this office did not combine the petitioner's net income and net current assets in those years. However, counsel's assertion is not supported by any precedent decisions to establish that this office's decision was based on an incorrect application of law or USCIS policy.⁴

The motion to reconsider does not qualify for consideration under 8 C.F.R. § 103.5(a)(3) because counsel's assertion is not supported by any precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. The motion to reconsider will be dismissed.

Furthermore, the motion shall be dismissed for failing to meet an applicable requirement. The regulation at 8 C.F.R. §§ 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and

reflected on the petitioner's 2003 and 2004 tax returns, and the information was available in the previous proceeding.

³ It is noted that on motion counsel submitted copies of the petitioner's 2007 and 2008 tax returns, but they will not be considered as they do not address the issue on motion, namely, the petitioner's ability to pay the proffered wage in 2003 and 2004.

⁴ To support his assertion, counsel submitted a copy of a Request for Evidence (RFE) issued by the Texas Service Center in an unrelated case that states that the petitioner receiving the RFE may demonstrate its ability to pay by combining its net income and net current assets. 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, Requests for Evidence 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 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 also be dismissed for this reason.

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 burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the motion to reopen and motion to reconsider 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 to reopen or reconsider is dismissed. The petition remains denied.