

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

(b)(6)



U.S. Citizenship
and Immigration
Services

DATE:

FEB 27 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 AAO 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.

Thank you,


Ron Rosenberg

Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner appealed the director's decision which was dismissed by the Administrative Appeals Office (AAO). The petitioner filed a motion to reopen and reconsider the AAO's decision. The matter is again before the AAO. The motion to reopen and reconsider will be dismissed pursuant to 8 C.F.R. § 103.5(a)(1)(i).

The petitioner is a Korean restaurant. It seeks to employ the beneficiary permanently in the United States as a Korean specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director additionally determined that the petitioner had not demonstrated that the beneficiary met the requirements of the position by the priority date. The director denied the petition accordingly. On May 6, 2008, the petitioner filed an appeal of the director's decision to the AAO. On August 1, 2011, The AAO dismissed the petitioner's appeal under its authority for *de novo* review. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In its decision, the AAO found that the petitioner did not have the ability to pay the prevailing wage, and dismissed the appeal.¹

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "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

In the instant case, the petitioner submits with this motion the labor certification; a copy of the beneficiary's work permit; a declaration of [REDACTED] a case status search for two petitions previously filed by the petitioner for different beneficiaries; Forms W-2 for the beneficiary for 2007, 2008, 2009, and 2010; paycheck stubs for the beneficiary for the periods January 1, 2011 to April 30, 2011 and June 16, 2011 to August 15, 2011;³ the sole proprietor's Form 1040 tax returns for 2003,

¹ The AAO additionally found that the beneficiary did meet the requirements of the labor certification as of the priority date, and withdrew that portion of the director's decision.

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).

³ The AAO notes that the paycheck stubs from July 26, 2011 to August 15, 2011, are issued by [REDACTED] and the paycheck stubs for the period January 1, 2011 to April 30, 2011 are issued by the petitioner, [REDACTED]. The address on both sets of paycheck stubs is the same and corresponds to the petitioner's address in the record of proceeding. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If [REDACTED] is now owned by [REDACTED] then it is a different entity than the petitioner/labor certification employer and appellant, and it must

2004, and 2005 with corresponding schedules and Forms 4562, Depreciation and Amortization; a Seller Closing Statement dated June 25, 2004; a copy of a Buyer/Borrower Statement dated July 31, 2005; a copy of Escrow Instructions/Sale of Business dated June 1, 2005; copies of the sole proprietor's 2004, 2005, 2006, and 2007 personal checking account statements; copies of the petitioner's 2005, 2006, and 2007 business checking account statements; a declaration of the sole proprietor regarding his household expenses; and a copy of a spread sheet showing the the amount that remains after household expenses and wages to seven beneficiaries.

The evidence submitted with the motion to reopen does not qualify for consideration under 8 C.F.R. § 103.5(a)(2) because the evidence was previously available and the petitioner does not provide any new facts with supporting documentation not previously submitted.

In its motion, the petitioner presented no facts or evidence 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.

In its motion, the petitioner submits additional evidence which does not meet the requirements for a motion to reopen under 8 C.F.R. § 103.5(a)(2) because a review of this evidence reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2). Moreover, most of the evidence has already been submitted.

In his brief on motion, counsel argues that the petitioner has the ability to pay the prevailing wage for the relevant years. Counsel asserts that in determining the petitioner's ability to pay the prevailing wage, the sole proprietor's losses from "non-business related investments," depreciation, and amortization should not be considered; the sole proprietor's personal and business checking accounts should be considered; the totality of the circumstances should be considered per *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967); and the sole proprietor's household expenses should be considered. Counsel further argues that seven beneficiaries should be included in the petitioner's ability to pay the prevailing wage instead of nine because two of the petitions were approved prior to the instant petition.

The petitioner has had ample opportunity to submit the above-referenced evidence and make the above-referenced arguments. The director issued a Request for Evidence (RFE) requesting, among other things, any evidence in support of the petitioner's ability to pay the proffered wage, a list of the sole proprietor's monthly household expenses, and copies of the petitions and labor certifications filed on behalf of any other beneficiaries. The petitioner failed to submit any of this evidence.

On appeal, the petitioner had another opportunity to submit additional evidence both with its initial appeal and in response to the AAO's Request for Evidence/Notice of Derogatory Informaiton (RFE/NDI) issued on December 1, 2010. The RFE/NDI requested that the petitioner submit additional evidence of its ability to pay the proffered wage and of the beneficiary's employment

establish that it is a successor-in-interest to that entity. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

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history. In response to the RFE/NDI, the petitioner submitted the sole proprietor's Forms 1040 with Schedule C for 2005, 2006, 2007, 2008, and 2009; a CD showing a Korean-language television interview with the beneficiary at the petitioner's place of business; and Forms W-2 issued by the petitioner to the beneficiary for 2007, 2008, and 2009.

As stated above, there is no evidence submitted on motion or any argument made by counsel that supports a "new" fact under 8 C.F.R. § 103.5(a)(2). The petitioner had the opportunity to address these issues on appeal.

As the petitioner did not present any new facts with supporting documentation not previously submitted, the petitioner has not established a proper basis for a motion to reopen.

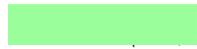
8 C.F.R. § 103.5(a)(3) states, in pertinent part:

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.

The petitioner does not submit any document that would meet the requirements of a motion to reconsider. The petitioner does not state any reasons for reconsideration nor cite any precedent decisions in support of a motion to reconsider. The petitioner does not argue that the previous decisions were based on an incorrect application of law or Service policy. The petitioner does not state any reasons that would meet the standard for reconsideration.

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 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. Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the previous decisions of the director and the AAO will not be disturbed.

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.



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ORDER: The motion to reopen and reconsider is dismissed. The AAO's previous decision is affirmed. The petition remains denied.