



U.S. Citizenship  
and Immigration  
Services

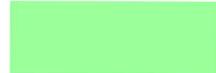
(b)(6)



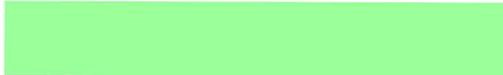
DATE: OFFICE: TEXAS SERVICE CENTER

JAN 24 2013

FILE:

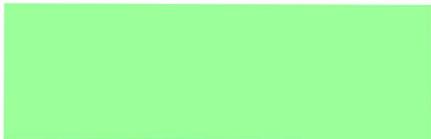


IN RE: Petitioner:  
Beneficiary:



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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on October 5, 2010, the AAO dismissed the appeal. The petitioner filed a motion to reopen the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be dismissed pursuant to 8 C.F.R. §§ 103.5(a)(1)(iii)(C), 103.5(a)(2), and 103.5(a)(4).

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.<sup>1</sup>

On motion, the petitioner claims that the appeal was denied because the petitioner failed to establish its ability to pay the proffered wage since the acceptance of the Form ETA 750, Application for Alien Employment Certification, by the Department of Labor (DOL) on August 23, 1999 and onwards. Counsel has offered additional evidence, the same arguments presented in the appeal, and no relevant precedent decisions.

Specifically the AAO found that the petitioner could not establish its ability to pay the proffered wage for the years 2002, 2003, 2004, and 2005. Counsel is arguing that the AAO failed to consider the totality of the petitioner's circumstances, the wages paid to previous employees, and the petitioner's intent to replace former employees with the beneficiary. Counsel's arguments and evidence provide no "new" evidence that was not available at the time of the appeal or the director's decision. The AAO did conduct a review of the petitioner's total circumstances in line with *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). Further, counsel does not argue against the director's and the AAO's findings, but only offers the same arguments in attempting to establish the petitioner's ability to pay the proffered wage in 2002, 2003, 2004, and 2005.

Counsel advised that the beneficiary will replace two predecessor workers. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the replaced worker involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the workers who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her. We also note that the replaced worker was a nonimmigrant temporary worker petitioned for by the petitioner.

Additionally, upon review of the record at hand, counsel argues that the following salaries were available to pay the beneficiary's proffered wage; \$195,007, \$120,000, \$110,000, and \$111,000 for

---

<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).

2002, 2003, 2004, and 2005 respectively. However, a discrepancy is noted between the claimed salaries paid and the petitioner's submitted income tax returns for the same years. In 2007 the petitioner claimed to employ six employees, and its 2002, 2003, 2004, and 2005 federal tax returns provide paid salaries in the amount of \$85,603, \$80,968, \$133,041, and \$228,000 respectively. The salaries provided for in those federal tax returns do not appear to reasonably compensate six employees, and in fact the salaries appear to have been under reported in the petitioner's federal tax returns. For instance counsel argues that in 2002 \$195,007 was available to pay the beneficiary, but the petitioner only reported \$85,603 in salaries paid. This casts a shadow of doubt over all the evidence provided by the petitioner in support of its ability to pay the proffered wage. Therefore, we find that the petitioner through counsel has not provided any "new" evidence or precedent decisions to overcome the director's and the AAO's findings and decisions.<sup>2</sup>

Although the petitioner has submitted a motion to reopen, the petitioner does not submit any argument that would meet the requirements of a motion to reconsider. The petitioner does not state any reasons for reconsideration nor cite any pertinent 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 USCIS policy. Assuming, arguendo that the petitioner intended to file a motion to reconsider, the petitioner's motion will 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.

It is further noted that, according to USCIS records, the petitioner has filed eight I-140 petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

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 sustained that burden. Accordingly, the motion will be

---

<sup>2</sup> *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

(b)(6)

Page 4

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

**ORDER:** The motion is dismissed.