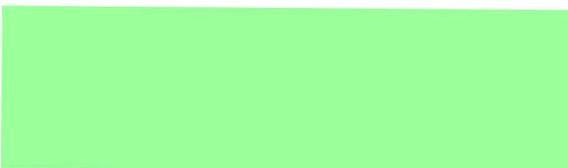


(b)(6)

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



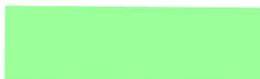
U.S. Citizenship  
and Immigration  
Services



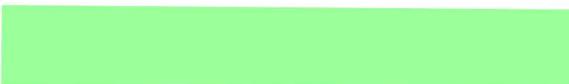
DATE: JUL 17 2013

OFFICE: TEXAS SERVICE CENTER

FILE:

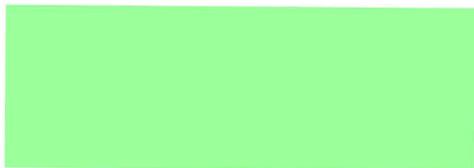


IN RE: Petitioner:  
Beneficiary:



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 (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,

A handwritten signature in cursive script, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO subsequently dismissed the appeal. Counsel to the petitioner filed another appeal to the AAO.<sup>1</sup> As noted, the appeal will be treated as a motion to reopen and reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be dismissed.

United States Citizenship and Immigration Services (USCIS) regulations at 8 C.F.R. § 103.5(a)(3) state, 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. A motion to reconsider... must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision."

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.<sup>2</sup>

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. The petitioner did not submit any new facts or evidence on motion.

In this matter, the petitioner's assertions are not supported by pertinent precedent decisions establishing that the AAO's decision was based on an incorrect application of law or USCIS policy. Furthermore, the petitioner has failed to establish that the AAO's decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). The petitioner does not state the new facts to be proved in the reopened proceeding nor is the motion supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). The motion must be dismissed. 8 C.F.R. § 103.5(a)(4).

Also, 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

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<sup>1</sup> On the Form I-290B, Notice of Appeal or Motion, submitted on February 14, 2013, the petitioner checked Box B, which states "I am filing an appeal." However, the accompanying narrative is characterized as a motion. It is noted that the AAO does not exercise appellate jurisdiction over its own decisions. The AAO exercises appellate jurisdiction over only the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). See DHS Delegation Number 0150.1 (effective March 1, 2003). An appeal of an AAO appeal is not properly within the AAO's jurisdiction. However, because the petitioner characterized its filing as a motion on the Form I-290B it will be accepted as one despite the incorrect box being checked on the form.

<sup>2</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).

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) and does not meet the requirements of a motion to reopen or to reconsider, it must be dismissed for these reasons.

On motion, counsel restates his assertions made on appeal; namely, that USCIS incorrectly based its determination upon the size of the petitioning organization and that USCIS should take into consideration additional evidence such as profit and loss statements, bank account records, or personnel records, etc. However, the record of proceeding shows that all relevant issues were addressed by the AAO on appeal and that the petitioner's evidence was accurately assessed. It is further noted that although counsel indicated on the Form I-290B that he would be filing a brief and evidence within 30 days of the motion, to date no such evidence has been provided.

The record shows that the motion is timely filed. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

Finally, neither counsel's assertions nor any evidence in the record of proceeding would overcome the basis for the director's dismissal and the AAO's dismissal on appeal.

The petitioner seeks to classify the beneficiary as an alien worker pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an advanced degree professional. The record of proceeding shows that the priority date is August 19, 2008, and that the Form I-140 petition was filed on November 18, 2010. The director determined that although the petitioner submitted evidence to show that the beneficiary was awarded a dual Bachelor of Law and Bachelor of Business Administration degree by the Interdisciplinary Center in Israel on May 22, 2003, the evidence of record failed to demonstrate that the beneficiary has the qualifying progressive, post-baccalaureate experience to show equivalence to an advanced degree, as of the priority date of August 19, 2008. The director also determined that the petitioner had established its ability to pay the proffered wage in 2008 but, had failed to establish its ability to pay the proffered wage from 2009 onwards. The director determined that the petitioner had submitted secondary evidence such as unaudited balance sheets and contradictory profit and loss statements for 2009 which was inconsistent with the petitioner's Form 1065 data, and that the petitioner's Form 1065 showed negative income and negative total current assets for 2009. The AAO affirmed the director's decision and dismissed the appeal accordingly.

On motion, the petitioner has failed to address the noted inconsistencies in the evidence regarding the beneficiary's employment history and has failed to demonstrate that the beneficiary has the qualifying five years of progressive, post-baccalaureate experience to show equivalence to an advanced degree, as of the priority date of August 19, 2008. Thus, the beneficiary does not qualify for the preference visa classification under section 203(b)(2) of the Act.

The petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.<sup>3</sup> If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm'r 1967).

In the instant case, the petitioner did not submit sufficient evidence of its ability to pay the proffered wage in 2009, and failed to address the noted inconsistencies in its financial records. Further, the petitioner failed to establish that factors similar to *Sonogawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income and net current assets. Accordingly, after considering the totality of the circumstances, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

Counsel requests oral argument. However, the regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, USCIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. See 8 C.F.R. 103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. Moreover, the written record of proceeding fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

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.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not sustained that burden. Accordingly, the motion will be dismissed,

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<sup>3</sup> See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6<sup>th</sup> Cir. filed Nov. 10, 2011).

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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 is dismissed.