



U.S. Citizenship  
and Immigration  
Services

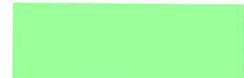
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Date:

Office: NEBRASKA SERVICE CENTER

FILE:

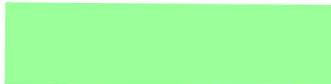


**JUN 03 2013**

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 preference visa petition was denied by the Director, Nebraska Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and motion to reconsider. The motion to reopen and motion to reconsider will be dismissed. The AAO's decision will be affirmed.

The petitioner is an accounting firm. It seeks to employ the beneficiary permanently in the United States as an administrative assistant. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).

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). The motion was timely filed.

The AAO's decision dismissing the appeal concluded that the petitioner, a sole proprietorship, failed to establish that it had the continuing ability to pay the proffered wage beginning on the priority date of the visa petition. The AAO also noted:

USCIS records indicate that the petitioner has filed several petitions since the petitioner's establishment in 1999, including I-129 petitions and I-140 petitions. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

### **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.<sup>1</sup>

The matter sought to be reopened is the AAO decision dated June 6, 2012, which stated that in 2007, the petitioner's estimate of monthly expenses was inconsistent with the evidence in the record. Therefore, the AAO stated that the sole proprietor's expenses exceed the proprietor's adjusted gross

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<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).

income in 2007, leaving a deficit to pay the proffered wage. The AAO concluded that it was improbable that the sole proprietor could support a family of four on a deficit that year.<sup>2</sup>

In support of the motion, counsel asserts that the AAO misinterpreted the petitioner's tax returns and arbitrarily concluded that the petitioner's budget was inconsistent with the evidence. Counsel submits a letter dated June 25, 2012 from the petitioner explaining the expenses listed on the sole proprietor's 2007 and 2008 tax returns.<sup>3</sup> However, the petitioner's letter was not an affidavit or other documentary evidence stating new facts to be provided in the reopened proceeding.<sup>4</sup> Further, the letter did not address the petitioner's ability to pay multiple beneficiaries.

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 evidence submitted on motion is not new evidence of the petitioner's continuing ability to pay the proffered wage. Therefore, the evidence submitted on motion will not be considered "new" and will not be considered a proper basis for a motion to reopen.

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

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<sup>2</sup> On appeal, counsel asserted that discretionary expenses should not have been included in the analysis. However, counsel did not specify which expenses were discretionary or explain why they should not have been included in the analysis of the petitioner's ability to pay the proffered wage. Counsel asserted on appeal that he would file a brief within 30 days; however, before issuing its decision on June 6, 2012, the AAO received nothing further from counsel regarding the appeal. The petitioner could have submitted its explanation regarding the sole proprietor's expenses in the previous proceedings.

<sup>3</sup> The petitioner's letter states that an individual's adjusted gross income (AGI) is calculated after deduction of itemized expenses such as mortgage, donations, taxes and other items. AGI is defined as gross income minus adjustments to income. Contrary to the petitioner's assertion, AGI is calculated before deduction of itemized (below-the-line) expenses such as mortgage interest, taxes and gifts to charity. See <http://www.irs.gov/uac/Definition-of-Adjusted-Gross-Income> (accessed May 28, 2013).

<sup>4</sup> The petitioner asserts that he/she received a \$6,800 gift from his/her mother to help pay his/her expenses, but does not provide evidence to verify the gift. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Further, evidence relating to the gift could have been submitted in the previous proceedings.

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.

In support of the motion, counsel asserts that the AAO misinterpreted the petitioner's tax returns and arbitrarily concluded that the petitioner's budget was inconsistent with the evidence and submitted a letter from the petitioner. However, 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 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 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 Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the motion to reopen and the motion to reconsider will be dismissed, the previous decision of the AAO will be affirmed and the petition will remain denied.

**ORDER:** The motion is dismissed. The AAO's decision dated June 6, 2012 is affirmed. The petition remains denied.