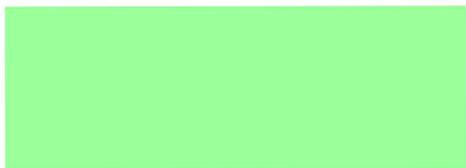




U.S. Citizenship
and Immigration
Services

(b)(6)



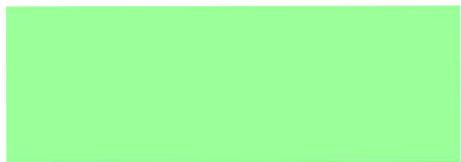
DATE: JUN 03 2013 OFFICE: TEXAS SERVICE CENTER

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 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 (director), denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the subsequent appeal. Counsel filed a motion to reopen and reconsider the AAO's decision. The motions will be dismissed.

The petitioner describes itself as a meat processing company. It seeks to permanently employ the beneficiary in the United States as a butcher/de-boner. 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).¹

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is February 12, 2008. *See* 8 C.F.R. § 204.5(d).

The AAO decision dismissing the appeal concluded that the petitioner did not establish that the beneficiary possessed the minimum experience required to perform the offered position by the priority date. The decision also noted that the labor certification was not valid because it was not signed by the required parties. On motion, counsel submits an employment experience letter from [REDACTED] dated July 30, 2012. The letter states that the beneficiary worked on the author's chicken farm from 1984 until 1989. The letter does not state the title or duties of the position.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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

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 United States Citizenship and Immigration Services (USCIS) 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. 8 C.F.R. § 103.5(a)(3).

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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).

A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The motion contains an employment experience letter relating to claimed employment from 1984 to 1989. This does not constitute new evidence unavailable at the time of the appeal.³ The motion is also not supported by any pertinent precedent decisions, nor does it claim that the decision was based on an incorrect application of law or policy. Therefore, the motions to reopen and reconsider are dismissed for failing to meet the requirements of a motion.

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.

³ Even if the motion to reopen were granted, the AAO would have affirmed its initial decision. The petitioner must establish that the beneficiary has met all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977). In the instant case, the labor certification states that the offered position requires 24 months of experience in the job offered. The labor certification also states that the beneficiary qualifies for the offered position based on experience as a butcher/de-boner for the petitioner from May 1997 to the present. No other experience is listed.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

Since the employment letter submitted on appeal does not accurately state the title or duties of the claimed employment, it does not meet the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A). In addition, the beneficiary did not list this claimed employment on the labor certification. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976)(a claim to possess experience that is not listed on the labor certification is less credible). An experience letter from an employer not listed on the labor certification is not only less credible pursuant to *Matter of Leung*, but it also creates an inconsistency in the record of proceeding. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The record does not contain any independent, objective evidence reconciling this inconsistency.

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The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. With the current motions, the petitioner has not met that burden.

ORDER: The motions to reopen and reconsider are dismissed.