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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: JUN 24 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

[REDACTED]

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 employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The denial was appealed to the Administrative Appeals Office (AAO) which summarily dismissed the appeal. The petitioner filed a motion to reopen and a motion to reconsider, which was dismissed because the petitioner failed to provide new evidence or legal authority which established error. On January 28, 2013, the petitioner submitted a Form I-290B, indicating that it was filing an appeal of the AAO's most recent decision and that it would provide a brief or additional evidence within thirty days.

The AAO, however, does not exercise appellate jurisdiction over its own decisions.¹ The petitioner provided additional evidence with the Form I-290B, but as of this date has not provided a brief. The additional evidence provided with the Form I-290B is the petitioner's owner's federal income tax returns. The AAO will treat the petitioner's Form I-290B as a motion to reopen and reconsider the AAO's most recent decision.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as a skilled worker. The director determined that the petitioner failed to demonstrate a continuing ability to pay the proffered wage beginning on the priority date.

The petitioner is a sole proprietor who operates a fast food franchise. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The Director's Decision

¹ The AAO only exercises appellate jurisdiction over matters that were specifically listed at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). For instance, in the event that a petitioner disagrees with an AAO decision, the petitioner can file a motion to reopen or a motion to reconsider in accordance with 8 C.F.R. § 103.5. In this matter, the petitioner did not check box D ("I am filing a motion to reopen a decision"), box E ("I am filing a motion to reconsider a decision"), or box F ("I am filing a motion to reopen and a motion to reconsider a decision") on the Form I-290B, Notice of Appeal or Motion. Rather, counsel checked box B ("I am filing an appeal. My brief and/or additional evidence will be submitted to the AAO within 30 days.").

The director issued a request for evidence (RFE) on March 28, 2008, informing the petitioner that it must provide certified copies of its federal income tax returns for 2003 through 2007, and a list of monthly personal expenses for that same time period. In reply to the RFE, the petitioner, through counsel, stated that the petitioner was reluctant to provide this information, and provided sworn profit and loss statements instead. The petitioner provided what purports to be transcripts of the data which would be on IRS Forms 1040, Schedule C, but did not provide the entire certified Forms 1040 as requested.

Without the required evidence, the director was unable to approve the petition.

The AAO's Decision on Appeal

On appeal, the petitioner provided a "statement of income tax basis" for years 2003, 2004, 2005, 2006, and 2007, which are unaudited financial statements. The AAO likewise did not have the required evidence needed to approve the petition, and dismissed the appeal accordingly.

The AAO's Decision on the Petitioner's First Motion

We reiterated that in visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). With its motion to reopen and reconsider, the petitioner made no attempt to provide the evidence needed and specifically requested by the director to approve the petition. It provided a letter from [REDACTED] CPA, which states that he has reviewed the petitioner's books for the period of 2003 to 2008, and in his opinion the petitioner can pay the proffered wage. However, this was not an audited financial report. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The letter from the accountant provides no independently verifiable facts or figures with which the AAO can determine if the petitioner does indeed have the ability to pay the proffered wage.

Expert opinions must be supported by facts and analysis in order to be given their proper weight. Here, the CPA letter did not provide the underlying basis of its opinion, or how it came to this conclusion. The letter does not state if the opinion is based up on the petitioner's depreciation expenses, which USCIS does not allow when determining the ability to pay the proffered wage. *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009).

The petitioner also provided copies of non-precedent AAO decisions, and a copy of a Board of Alien Labor Certification Appeals (BALCA) decision. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

We noted that 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.² Nothing provided by the petitioner with its motion, as it impacts the prior decisions in this case, could be considered new. The petitioner has had in its possession all evidence requested by the director, but had been "reluctant" to provide it. Thus, the motion failed to meet the standard of a motion to reopen.

The regulations at 8 C.F.R. § 103.5(a)(3) state 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 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 has not provided any new law or binding decisions affecting the petition. Thus, the motion fails to meet the standard of a motion to reconsider.

With the first motion, 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. All evidence submitted with that motion was previously available and could have been discovered or presented in the previous proceedings. As the petitioner was previously put on notice and provided with a reasonable opportunity to provide the required evidence, the evidence submitted on motion was not considered "new" and could not be considered a proper basis for a motion to reopen.

Furthermore, the motion was 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.

The Instant Motion

We note that the petitioner, with the most recent Form I-290B, provided its owner's Forms 1040 for 2003 through 2007. These are the same documents the directed requested several years ago. These are the same documents the AAO, in its first decision noted were necessary to properly adjudicate the petition. The AAO in its most recent decision again stated that these documents were required evidence.

²The 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).

Previously, the petitioner had stated that these documents were not provided because it did not feel comfortable providing them to USCIS. The petitioner did not explain or even articulate that these documents were unavailable. Nothing in the record indicates that these documents are "new" evidence. As such, they are not adequate to support a motion to reopen.

Furthermore, the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted with the motion. Consequently, the motion will be denied.

The petitioner has not provided a brief or other allegation of legal error, and thus the motion cannot qualify as a motion to reconsider.

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 motions will be dismissed.

ORDER: The motions to reopen and to reconsider are dismissed and the decision of the AAO dated December 26, 2013 is affirmed. The petition remains denied.