



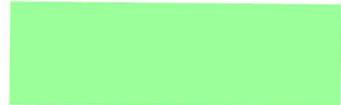
U.S. Citizenship
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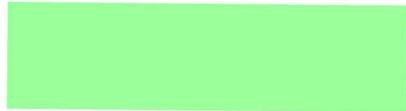


DATE: JUN 24 2013

OFFICE: NEBRASKA SERVICE CENTER

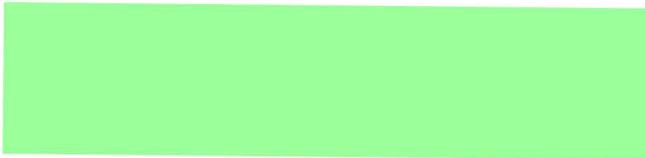


IN RE: Petitioner:
Beneficiary:



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.

Thank you,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based preference visa petition on April 15, 2009. The petitioner appealed the decision to the Administrative Appeals Office (AAO) on May 15, 2009. The AAO dismissed the appeal on August 2, 2012. The petitioner filed a subsequent appeal with the AAO on August 31, 2012. The petitioner's August 31, 2012 appeal will be rejected.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). As required by statute, an alien employment certification, which the Department of Labor (DOL) approved, accompanied the petition.

In his April 15, 2009 decision, the director determined that the petitioner had failed to establish that the beneficiary possessed the requisite experience for the position as of the priority date or its ability to pay the beneficiary the proffered salary from the priority date and subsequently. The AAO dismissed the petitioner's appeal on August 2, 2012. The cover page of the AAO's decision instructed the petitioner that it may file either a motion to reopen or a motion to reconsider the decision pursuant to the requirements found at 8 C.F.R. § 103.5 and that any motion must be filed with the office that originally decided the case within 30 days of the decision that the motion seeks to reconsider or reopen as required by 8 C.F.R. § 103.5(a)(1)(i).

Counsel subsequently attempted to file another appeal on the petitioner's behalf on August 31, 2012. The AAO, however, does not exercise appellate jurisdiction over its own decisions. 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. Counsel checked box B ("I am filing an appeal. My brief and/or additional evidence will be submitted to the AAO within 30 days"), instead. Therefore, the appeal is improperly filed and must be rejected on this basis pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(I).

Therefore, as the appeal was not properly filed, it will be rejected. 8 C.F.R. §103.3(a)(2)(v)(A)(I).

However, even if the petitioner had merely checked the incorrect box on the Form I-290B and intended to file a motion to reopen and a motion to reconsider, those motions would be dismissed.

A motion to reopen must state the new facts to be provided 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.¹ Counsel fails to explain why any of the evidence currently submitted could not

¹ The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just

have been discovered or presented in the previous proceeding. A review of the evidence that the petitioner submits reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2) and, therefore, cannot be considered a proper basis for a motion to reopen.

Counsel also does not allege that the issues, as raised on appeal, involved the application of precedent to a novel situation or that there is a new precedent or a change in law that affects the AAO's prior decision.

The USCIS regulation at 8 C.F.R. § 103.5(a)(3) states 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 AAO finds that counsel did not cite any pertinent precedent decisions to establish that the AAO's decision was based on an incorrect application of law or USCIS policy.

Additionally, in order to file a motion properly, the regulation at 8 C.F.R. § 103.5(a)(1)(iii) requires that the motion must 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 and, if so, the court, nature, date, and status or result of the proceeding." Furthermore, the regulation at 8 C.F.R. § 103.5(a)(4) requires that "[a] motion that does not meet applicable requirements shall be dismissed." In this case, counsel does not state whether the validity of the unfavorable decision has been the subject of any judicial proceedings.

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. Therefore, the motions will be dismissed in accordance with 8 C.F.R. § 103.5(a)(4).

With the instant appeal, the petitioner submitted an undated signed letter from [REDACTED] on [REDACTED] letterhead, stating that the beneficiary worked there from April 1998 to August 1999. The AAO finds that the letter fails to list the beneficiary's position title there or to state whether the beneficiary's employment was full-time or not. Further, the letter lists different dates of employment than that which are listed on the labor certification. The petitioner additionally submitted copies of the beneficiary's pay stubs from [REDACTED] from 1997 and 1998. However, the beneficiary claimed on the labor certification to have stopped working there in 1997. *See Matter of Ho*, 19 I&N

discovered, found, or learned <new evidence>" WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

Dec. at 591-92. Further, pay stubs do not constitute sufficient evidence under 8 C.F.R. § 204.5(l)(3)(ii)(A) that would demonstrate the beneficiary's work experience before the priority date, as the pay stubs do not provide any insight into the beneficiary's job title or duties.

Therefore, the evidence fails to demonstrate that the beneficiary met the minimum requirements as set forth in the labor certification for classification as a skilled worker under section 203(b)(3)(A) of the Act as of the priority date.

With the instant appeal, counsel concedes that the petitioner did not pay the beneficiary the proffered wage from 2001 through 2005 because the beneficiary was a student and could only work then on a part-time basis. The petitioner submitted the Forms W-2 that it issued to the beneficiary for 2008 through 2011. Despite these submitted Forms W-2 that the petitioner issued to the beneficiary in excess of the proffered salary, the AAO finds that the petitioner has failed to provide tax returns or other regulatory-prescribed evidence of its ability to pay the proffered wage for 2001 through 2005.

Accordingly, the petitioner has failed to demonstrate that the beneficiary possessed the requisite experience for the position as of the priority date or that it had the ability to pay the beneficiary proffered wage from the priority date onwards.

ORDER: The appeal is rejected. The AAO's previous decision dated August 2, 2012 shall not be disturbed. The petition remains denied.