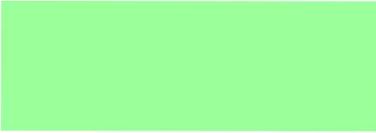




U.S. Citizenship  
and Immigration  
Services

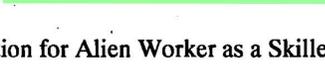
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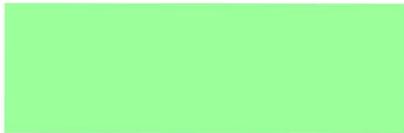
OFFICE: NEBRASKA SERVICE CENTER

FILE: 

IN RE: Petitioner:   
Beneficiary: 

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or a Professional pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)

ON BEHALF OF PETITIONER:

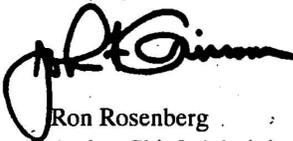


INSTRUCTIONS:

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 employment-based immigrant visa petition was originally approved by the Director, Texas Service Center (TSC Director). The approval was subsequently revoked by the Director, Nebraska Service Center (NSC Director). The petitioner filed an appeal, which was dismissed by the Chief, Administrative Appeals Office (AAO). The petitioner has filed three previous motions to reopen and reconsider with the AAO, all of which were dismissed. The petitioner has now filed a fourth motion to reopen and reconsider. It too will be dismissed for failing to meet applicable requirements.

The petitioner is a travel agency. It seeks to employ the beneficiary permanently in the United States as “manager, travel & tours” and to classify him as a skilled worker under section 203(b)(3)(A)(i) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1153(b)(3)(A)(i).

The immigrant visa petition (Form I-140) was filed on April 7, 2006. As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).<sup>1</sup> On May 10, 2006, the TSC Director approved the petition.

On November 30, 2009, however, the NSC Director issued a decision revoking the prior approval of the petition on two grounds: (1) the petitioner engaged in fraud or a willful misrepresentation of material facts on its labor certification, and (2) the petitioner failed to establish its continuing ability to pay the proffered wage of the subject position. Based on the finding of fraud or willful misrepresentation on the ETA Form 9089, the NSC Director also invalidated the labor certification.

The petitioner filed an appeal, which the AAO dismissed in a decision issued on September 28, 2010. The AAO agreed with the NSC Director’s findings and affirmed his decision to revoke the approval of the petition and invalidate the underlying labor certification. In a further order at the close of its decision, the AAO found that both the petitioner and the beneficiary knowingly misrepresented the petitioner’s business operation, concealed their familial relationship, and concealed the beneficiary’s ownership interest in the petitioner with the intention of misleading the government on material elements of the beneficiary’s eligibility for the immigration benefit sought under the Act.

On October 26, 2010, the petitioner’s counsel filed a motion to reopen and reconsider the AAO’s decision, accompanied by supporting documentation. In dismissing the motion on December 21, 2011, the AAO determined that the petitioner had presented no new facts or documentation, as required in a motion to reopen, to refute the AAO’s prior determination that the petitioner made fraudulent or willful misrepresentations of material facts in the ETA Form 9089. In particular, the petitioner supplied a false address for the primary worksite of the proffered position and falsely denied that there was a familial relationship between the petitioner’s owners and the beneficiary. The AAO also determined that the petitioner had not presented any persuasive argument and/or precedent decisions, as required in a motion to reconsider, showing that the AAO’s initial decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS)

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<sup>1</sup> The ETA Form 9089 had been filed with the DOL on November 2, 2005, and was certified by the DOL on February 17, 2006.

policy. In addition, the AAO determined that the petitioner had not provided any new facts or documentation demonstrating the petitioner's ability to pay the proffered wage, as required in a motion to reopen, nor established that the AAO incorrectly applied *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), or any other case law, statutory law, or USCIS policy, in its previous decision. The documentation of record, the AAO observed, did not establish the petitioner's ability to pay the proffered wage in any year from 2006 up to the present.

Counsel for the petitioner filed a second motion to reopen and reconsider on January 19, 2012. In the motion counsel asserted that the AAO did not properly consider all of the evidence previously submitted by the petitioner. Counsel did not cite any specific piece of evidence, however, that the AAO failed to consider in its prior decision.

Counsel reiterated the claim it made in the first motion to reopen and reconsider that the two items of false information entered by the petitioner on the labor certification were actually typographical errors, not deliberate misrepresentations of fact. Counsel pointed out that the petitioner filed motions with the DOL to reopen the certified labor certification for the expressed purpose of correcting the "typographical errors" and that these motions remained outstanding. Counsel expressed the view that the AAO should stay its decision on the instant motion until the DOL ruled on the motions to reopen and correct the typographical errors on the certified labor certification. The AAO had already considered and rejected this line of argument in its prior decision. No new factual or legal grounds were presented for staying the AAO's decision. Counsel contended that the AAO misinterpreted a ruling of the Board of Alien Labor Certification Appeals (BALCA) in another case involving "typographical errors" on a labor certification – *In the Matter of Healthamerica*, BALCA Case No. 1 2006-PER-1 – but did not explain how the AAO misinterpreted that decision. Counsel's final line of defense was more in the nature of a plea that the AAO's decision could have "serious adverse consequences" for the petitioner and the beneficiary in future immigration proceedings. The AAO found no basis in that plea to stay or alter a decision on the fraud and misrepresentation issue.

As for the petitioner's ability to pay the proffered wage, counsel claimed that the AAO had misinterpreted the ruling in *Matter of Sonogawa*, 12 I&N Dec. 612. Once again, however, counsel did not explain how the AAO misinterpreted that decision. Counsel submitted evidence of the petitioner's ability to pay the proffered wage – \$45,843.20 per year – in the form of Form W-2, Wage and Tax Statements, issued to the beneficiary for the years 2009 and 2010, showing that the beneficiary was paid \$50,400.00 each of those years. However, no documentation was submitted showing the petitioner's ability to pay the proffered wage in any of the years 2006-2008, or in 2011. Thus, the petitioner still failed to establish its continuing ability to pay the proffered wage from the priority date (November 2, 2005) up to the present. The motion was dismissed on April 24, 2012.

In its third motion to reopen and reconsider, filed on May 29, 2012, the petitioner reiterated its previous arguments and submitted copies of several documents that were already in the record. The petitioner indicated that some new documentation was being submitted – including income tax returns for 2002-2007, bank statements and returned checks from 2005-2006, tour package contracts with clients, and other materials – but no such documentation accompanied the motion. With no new arguments or documentation to consider, the AAO dismissed the motion on September 25, 2012.

In its current motion, filed on October 26, 2012, the petitioner advises that it has hired a new attorney. In its brief filed on December 6, 2012, counsel reiterates the claims made on appeal and in prior motions that neither the petitioner nor the beneficiary committed any fraud or willful misrepresentation of material fact(s) and that the petitioner has had the continuing ability to pay the proffered wage from the priority date up to the present.

With regard to the fraud and misrepresentation issue, counsel asserts that the petitioner was misled by previous counsel, who filled out all documents on behalf of the petitioner and should be held responsible for any misrepresentations or fraud existing in those documents. Once again, counsel requests that the AAO stay the instant proceedings until the DOL has ruled on the motions the petitioner filed in 2009 to reopen the certified ETA Form 9089 for the purpose of correcting the "typographical errors" on the labor certification. Regarding the ability to pay issue, counsel resubmits copies of the petitioner's federal tax returns (Forms 1120) and the beneficiary's wage and tax statements (Forms W-2) that were already in the record, and asserts that the petitioner's historical growth from 2005 to 2011 demonstrates its continuing ability to pay the proffered wage over the years.

The requirements for a motion to reopen are set forth in the regulation at 8 C.F.R. § 103.5(a)(2):

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.

The requirements for a motion to reconsider are set forth at 8 C.F.R. § 103.5(a)(3):

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 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.

As further provided in 8 C.F.R. § 103.5(a)(4):

A motion that does not meet applicable requirements shall be dismissed.

The petitioner has presented no new facts or documentation, as required in a motion to reopen, to refute the prior determinations of the NSC Director and the AAO that the petitioner made fraudulent or willful misrepresentations of material facts in the ETA Form 9089. (*See*, in particular, the AAO's decision dated December 21, 2011, dismissing the petitioner's first motion to reopen and reconsider.) Counsel's claim that the petitioner should be exonerated because former counsel allegedly provided incompetent legal representation has no merit. The petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1<sup>st</sup> Cir. 1988). A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint

has been filed, to explain why not. The instant motion does not address these requirements, and there is no evidence that any such complaint has been filed by the petitioner.<sup>2</sup>

Nor has the petitioner submitted any new facts or documentation to refute the prior determinations of the NSC Director and the AAO that the petitioner – except for the years 2005, 2009, and 2010 – has not established its continuing ability to pay the proffered wage from the priority date (November 2, 2005) up to the present. The photocopied federal income tax returns for the years 2006-2008, like those already in the record, bear no signature of the petitioner or an authorized representative, are not dated, and are not even signed by the tax and consulting service that allegedly prepared the returns.<sup>3</sup> Accordingly, the documents are not reliable evidence of the petitioner's tax returns in those years, and counsel's reliance upon them as evidence of the petitioner's ability to pay the proffered wage in the years 2006-2008 is misplaced. Moreover, as discussed in the AAO's previous decisions of September 28, 2010 and December 21, 2011, the information in the subject tax returns, even if they were judged to be reliable, does not demonstrate the petitioner's ability to pay the proffered wage in the years 2006-2008.

The petitioner has not presented any persuasive argument and/or precedent decisions showing that the AAO's prior decisions with regard to the fraud or misrepresentation issue and the petitioner's ability to pay the proffered wage were based on an incorrect application of law or USCIS policy, as required in a motion to reconsider. Counsel complains that the petitioner did not receive notice from the DOL certifying officer that the labor certification was revoked, which robbed the petitioner of its opportunity to file a timely appeal of the revocation to BALCA. This argument is not persuasive, because it was not the DOL certifying officer who revoked the labor certification. Rather, it was U.S. Citizenship and Immigration Services (USCIS) – specifically, the NSC Director – that invalidated the labor certification in accordance with its regulatory authority under 20 C.F.R. § 656.30(d). The subject regulation – "Invalidation of labor certifications" – provides as follows:

After issuance, a labor certification may be revoked by ETA using the procedures described in Sec. 656.32. Additionally, after issuance, **a labor certification is subject to invalidation by the DHS** or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to the CO or to the Chief, Division of Foreign Labor Certification, the CO, or the Chief

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<sup>2</sup> The failure to apprise oneself of the contents of paperwork or information before submission constitutes deliberate avoidance and does not absolve one of responsibility for the contents of a petition or the materials submitted in support. *See Hanna v. Gonzales*, 128 Fed. Appx. 478, 480 (6<sup>th</sup> Cir. 2005) (unpublished) (an applicant who signed his application for adjustment of status but who disavowed knowledge of the actual contents of the application because a friend filled it out on his behalf was still charged with knowledge of the application's contents). The law generally does not recognize deliberate avoidance as a defense to misrepresentation. *See Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11<sup>th</sup> Cir. 2005); *United States v. Puente*, 982 F.2d 156, 159 (5<sup>th</sup> Cir. 1993).

<sup>3</sup> The same deficiencies apply to the 2005 tax return, which undermines the finding by the AAO on September 28, 2010, that the petitioner established its ability to pay the proffered wage that year.

of the Division of Foreign Labor Certification, as appropriate, shall notify in writing the DHS or Department of State, as appropriate. A copy of the notification must be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

20 C.F.R. § 656.30(d) (*emphasis added*). Since the DHS (in this case, USCIS, NSC Director) invalidated the certified ETA Form 9089, the petitioner's right to appeal lay with the AAO, not BALCA. The petitioner has availed itself of that right in this proceeding.

The petitioner requests that the AAO stay this proceeding to preserve the beneficiary's right to port to a new employer under section 204(j) of the Act, 8 U.S.C. § 1154(j), as amended by the American Competitiveness in the 21<sup>st</sup> Century Act (AC-21), citing the AAO's decision in *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010). Although section 204(j) of the Act provides that an employment-based immigrant visa petition shall remain valid with respect to a new job if the beneficiary's application for adjustment of status has been filed and remained unadjudicated for 180 days, the petition must have been "valid" to begin with if it is to "remain valid with respect to a new job." *Matter of Al Wazzan, id.* The instant petition was not "valid" to begin with, however, because a revocation has retroactive effect to the date the petition was approved. See section 205 of the Act.<sup>4</sup>

For the reasons discussed above, the AAO determines that the petitioner's current motion does not meet the requirements of a motion to reopen under 8 C.F.R. § 103.5(a)(2) or of a motion to reconsider under 8 C.F.R. § 103.5(a)(3).

As stated in the AAO's prior decisions, 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 motion will be dismissed in accordance with 8 C.F.R. § 103.5(a)(4).

With regard to the fraud and misrepresentation issue, the AAO notes, as in its previous decisions, that if the DOL should rule favorably on the petitioner's motions to reopen and correct typographical mistakes on the certified labor certifications, the petitioner may so advise USCIS in any future proceedings. However, while 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all of its employees in the administration of the Act, BALCA decisions are not similarly binding.

**ORDER:** The motion to reopen and reconsider is dismissed. The AAO's decisions of September 28, 2010, December 21, 2011, April 24, 2012, and September 25, 2012, are affirmed.

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<sup>4</sup> Thus, the effective date of the revocation of the immigrant visa petition by the NSC Director on November 30, 2009, was the date of its approval by the TSC Director – May 10, 2006.