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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

[Redacted]

DATE: **MAR 18 2013**

OFFICE: VERMONT 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 preference visa petition was approved by the Director, Vermont Service Center (director) on November 2, 2001, and the approval was revoked on May 14, 2004. A motion to reconsider the revocation was dismissed by the director on October 4, 2004. The matter was subsequently before the Administrative Appeals Office (AAO) on appeal, which was dismissed on August 15, 2006. The petitioner submitted a motion to reopen and reconsider to the AAO on September 14, 2006. In a decision issued on January 22, 2009, the motion to reopen was granted and the AAO's August 15, 2006 decision was affirmed. On February 20, 2009, the petitioner again submitted a motion to reopen and reconsider to the AAO. The motion to reopen and reconsider will be dismissed. The petition's approval will remain revoked.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as an assistant manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL).

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, 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.

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). Both motions were timely filed.

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.¹

The matter sought to be reopened is the AAO's decision dated January 22, 2009, which determined (1) that the petitioner did not establish that it had the ability to pay the proffered wage of all workers sponsored by the petitioner for fiscal years 2000² and 2001;³ and (2) that the beneficiary attempted or conspired to enter into a marriage for the purpose of obtaining an immigration benefit.⁴

¹The 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).

² Given the petitioner's fiscal year, the priority date of February 22, 2001 falls in the petitioner's 2000 fiscal year.

³ The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date

The petitioner was previously advised that the evidence in the record does not document the priority date, proffered wage or wages paid to each of the other beneficiaries, or whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence.

On motion, counsel submits the petitioner's payroll records for 2000 through 2007. The payroll records are not new evidence under 8 C.F.R. § 103.5(a)(2), as the records were previously available and could have been discovered or presented earlier in the proceeding.

The petitioner also submits on motion IRS Forms W-2 for 2007 and 2008 for several of the petitioner's employees. The AAO's decision determined that the petitioner did not establish that it had the ability to pay the proffered wage of all workers sponsored by the petitioner for fiscal years 2000 and 2001. Therefore, IRS Forms W-2 for 2007 and 2008 do not relate to fiscal years 2000 and 2001 and do not provide new facts under 8 C.F.R. § 103.5(a)(2) regarding the petitioner's ability to pay the proffered wage in fiscal years 2000 and 2001.

and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on February 22, 2001. The proffered wage as stated on the Form ETA 750 is \$8.41 an hour, or \$17,492.80 per year. According to USCIS records, the petitioner has filed six other I-140 petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

⁴ In the AAO's January 22, 2009 decision, it was noted that the record contains three different sets of names for the beneficiary's parents, and that an attempt to clarify the record on motion only further confused the issue. However, these discrepancies did not form the basis of the AAO's decision.

The petitioner submitted two additional Forms W-2 issued to the beneficiary in 2000. They reflect that the petitioner paid the beneficiary \$4,590.00, and an entity named [REDACTED] with a distinct federal employer identification number (EIN), paid the beneficiary \$4,960.75. The beneficiary's Forms W-2 for the year 2000 are not new evidence under 8 C.F.R. § 103.5(a)(2), as the records were previously available and could have been discovered or presented earlier in the proceeding.

On motion, counsel also submits copies of the petitioner's checking account statements for certain months in 2000, 2001, 2002, 2003, 2004 and 2005. The beneficiary's bank statements for these years are not new evidence under 8 C.F.R. § 103.5(a)(2), as the records were previously available and could have been discovered or presented earlier in the proceeding.⁵

The petitioner also submits a statement⁶ from [REDACTED] indicating that if necessary, he "can use [his] personal fund to support [the petitioner]." However, [REDACTED] assertion that he can use his personal assets to currently support the petitioner, or to support the petitioner in the future, does not provide new facts under 8 C.F.R. § 103.5(a)(2) regarding the petitioner's ability to pay the proffered wage of all workers sponsored by the petitioner in fiscal years 2000 and 2001.⁸ Further, the information provided by [REDACTED] could have been presented earlier in the proceeding.

The AAO's decision dated January 22, 2009 further determined that the beneficiary attempted or conspired to enter into a marriage for the purpose of obtaining an immigration benefit.⁹ In the instant

⁵ The petitioner previously submitted bank statements for certain months in 2000 and 2001, which were discussed in the AAO's dismissal of the petitioner's appeal.

⁶ A motion to reopen must provide new facts and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). The declaration of [REDACTED] is not an affidavit, as it was not sworn to by the declarant before an officer that has confirmed the declarant's identity and administered an oath. *See Black's Law Dictionary* 58 (West 1999). Statements made in support of a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

⁷ Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

⁸ A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

⁹ Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the

motion, counsel reiterates previous assertions that the beneficiary did not enter into a fraudulent marriage because the marriage never took place, and that the beneficiary was not aware that a Form

approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). Section 204 of the Act governs the procedures for granting immigrant status. Section 204(c) provides for the following:

Notwithstanding the provisions of subsection (b)⁹ no petition shall be approved if:

- (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the [director] to have been entered into for the purpose of evading the immigration laws; or
- (2) the [director] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

As a basis for denial, it is not necessary that the beneficiary have been convicted of, or even prosecuted for, the attempt or conspiracy to enter into a marriage for the purpose of evading the immigration laws. However, the evidence of such attempt or conspiracy must be documented in the alien's file and must be substantial and probative so that the director could reasonably infer the attempt or conspiracy. *See Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). *See also Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988); *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978); *Matter of La Grotta*, 14 I&N Dec. 110 (BIA 1972). In his notice of revocation, the director determined that the beneficiary had previously conspired to enter into a marriage for the purpose of evading immigration laws, and that the beneficiary's record contained substantial and probative evidence of the beneficiary's attempt to procure an immigration benefit by virtue of a fraudulent marriage. On appeal, petitioner submitted a statement from the beneficiary that he knew nothing of a marriage between himself and an individual named [REDACTED] and that he had signed blank forms when applying for a work permit through a driving school in [REDACTED]. On August 15, 2006, the AAO concurred with the director's decision to revoke the petition's approval based on marriage fraud, and also noted that a signature on blank forms represented a power of attorney that the signatory authorizes the agent to complete the forms as himself and on his behalf, and the signatory will be fully responsible for the contents of the forms as if the signatory completed the forms himself. The AAO then declared counsel's assertion that the alleged marriage certificate was obtained without the beneficiary's knowledge and that immigration forms were filed without the beneficiary's knowledge or consent to be misplaced. The AAO also stated that the beneficiary had signed both the I-485 Application to Register Permanent Residence or Adjust Status, and a Form G-325, Biographic Information, filed concurrently with the Form I-130, Petition for an Alien Relative, ostensibly signed by [REDACTED]. The AAO stated that the beneficiary's claim that he was unaware of the previously filed Form I-130 petition was not credible. In its January 22, 2009 decision, the AAO reaffirmed its previous finding that the beneficiary has engaged in seeking and procuring an immigration benefit based on the filing of fraudulent marriage documents and petitions.

I-130 was filed on his behalf. Counsel submits a February 14, 2009 affidavit from the beneficiary that reiterates his statement contained in an August 7, 2003 affidavit that was previously submitted to the AAO. The affidavit does not provide new evidence under 8 C.F.R. § 103.5(a)(2), as the affidavit reiterates statements made earlier in the proceeding.

In the February 17, 2009 statement from [REDACTED] states that the beneficiary is a good worker and that as far as he knows, the beneficiary has only been married to his wife [REDACTED] from Hong Kong. The letter from [REDACTED] is not new evidence under 8 C.F.R. § 103.5(a)(2), as the information could have been discovered or presented earlier in the proceeding.

In this matter, counsel 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 on motion was previously available and could have been discovered or presented earlier in the proceeding. 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 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 motion to reconsider does not qualify for consideration under 8 C.F.R. § 103.5(a)(3) because counsel did not establish that the AAO made an erroneous decision based on the evidence of record at the time of the initial decision, and the motion was not supported by any pertinent 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 or reconsider will be dismissed. The proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion to reopen and reconsider is dismissed. The petition’s approval remains revoked.