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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: **MAY 07 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:

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 denied by the Director, Nebraska Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and motion to reconsider. The motions will be dismissed, the previous decision of the AAO will be affirmed, and the petition will remain denied.

In the director's March 30, 2009 denial, the director determined that the petitioner failed to establish its ability to pay the proffered wage for the beneficiary since 2004. The petitioner appealed the director's denial to the AAO. On June 13, 2012, the AAO dismissed the appeal, finding that the petitioner failed to establish its ability to pay the beneficiary's proffered wage, as well as the proffered wage of another pending petition, and it failed to establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date.

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

In this matter, counsel asserts that the director's denial, finding that the petitioner did not demonstrate the ability to pay the proffered wage, failed to take into account the fact that the original beneficiary was replaced by the instant beneficiary. Counsel contends that the salary paid to the original beneficiary should be taken into account when calculating ability to pay for the proffered position. Counsel also asserts that the beneficiary is qualified for the position. Counsel submits a revised ETA 750B, stating that one of the beneficiary's former employers was not included in the original ETA 750B. Counsel also submits copies of a letter from the petitioner dated July 10, 2012; the first page of the petitioner's federal tax returns for 2004 through 2010; Forms W-2 for 2006 through 2010 issued by the petitioner to the beneficiary; and a May 23, 2007 letter from [REDACTED]. Counsel also submits a newly signed Form ETA 750B by the beneficiary and a June 25, 2012 letter from [REDACTED]. The submitted documents are not new facts, in that they were available and could have been discovered or presented in the previous proceedings, and cannot be considered a proper basis for a motion to reopen. Given the above, the evidence submitted on motion will not be considered a proper basis for a motion to reopen.

The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

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.

¹ 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).

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The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3). On motion, counsel asserts that the director erred in not considering the wages paid to the original beneficiary, not the instant beneficiary. Counsel contends that those wages should be taken into account when calculating ability to pay for the proffered position. It is noted the original Form ETA 750B and the instant petition contain the name of the instant beneficiary. No other beneficiary name is indicated in the record. Even if the AAO accepts counsel's statement that the beneficiary replaced the original beneficiary, the wages paid to the original beneficiary were less than the proffered wage in 2004 and 2005, and neither the petitioner's net income nor net current assets covers the difference between the wages paid to the original beneficiary and the proffered wage. Therefore, the petitioner has failed to establish it had the continuing ability to pay the proffered wages from the priority date onwards.

On motion, counsel asserts that the beneficiary is qualified for the position. Counsel submits a revised ETA 750B, stating that one of the beneficiary's former employers was not included in the original ETA 750B. The revised ETA 750B reflects that the beneficiary was employed by [REDACTED] From June 2000 through January 2003. Counsel submits two experience letters in support of the beneficiary's employment. The record contains a May 23, 2007 letter from [REDACTED] of [REDACTED], stating that the beneficiary was employed as a software engineer from June 1, 2000 through January 31, 2003. Based on this evidence, the petitioner has established that the beneficiary is qualified for the proffered position.

The motion shall also 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 motions will be dismissed.

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 motions 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 motions are dismissed. The petition remains denied.