

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

(b)(6)



U.S. Citizenship
and Immigration
Services

DATE: MAY 08 2013

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

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 Director, Texas Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on March 16, 2012, the AAO dismissed the appeal. Counsel to the petitioner filed a motion to reopen the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be dismissed pursuant to 8 C.F.R. §§ 103.5(a)(1)(iii)(C), 103.5(a)(3), and 103.5(a)(4).

The AAO finds that the motion to reopen should be dismissed and that the petition should remain denied, as the petitioner failed to meet the requirements of a motion to reopen. The petitioner is a hollow metal door and frame manufacturer seeking to employ the beneficiary as a mechanic in accordance with section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).

On December 3, 2008, the director denied the petition, finding that the petitioner had failed to demonstrate that the beneficiary possessed the requisite experience for the position as of the priority date or to establish its ability to pay the beneficiary the proffered wage listed on the Application for Alien Employment Certification, Form ETA 750, from the date the application was filed with the U.S. Department of Labor (June 17, 2003) until the present. On March 16, 2012, the AAO dismissed the petitioner's appeal on the same grounds and on the additional ground that the petitioner, [REDACTED] failed to establish that it was a successor-in-interest to [REDACTED] the entity that filed the labor certification.

On April 18, 2012, the petitioner filed a motion to reopen the AAO's March 16, 2012, decision. On motion, counsel asserts that the beneficiary possessed more than the requisite experience for the position as of the priority date. Counsel and the petitioner claim that prior counsel listed incorrect dates of employment for the beneficiary on the labor certification. The petitioner submits two new letters regarding the beneficiary's previous, respective employment with [REDACTED] and [REDACTED] Inc., which contain dates of employment different than those listed on the labor certification. Counsel fails to explain why properly executed experience letters for the beneficiary were not submitted previously. The AAO notes that the petitioner and the beneficiary set forth the beneficiary's credentials on the labor certification and signed their names under a declaration that the contents of the form were true and correct under the penalty of perjury.

Counsel asserts that the petitioner has demonstrated its ability to pay the beneficiary the proffered wage from the priority date and subsequently. On motion, the petitioner submits copies of its federal corporate tax returns (Forms 1120) from 2003 through 2010. Counsel fails to explain why the petitioner did not submit these tax returns previously.

Counsel states that there is no successor-in-interest issue in this case, as prior counsel incorrectly listed the petitioner's name as [REDACTED] on the Form I-140 instead of [REDACTED] Inc., its correct name. The AAO notes that the petitioner's vice president, [REDACTED] signed his name under a declaration that the contents of the petition were true and correct under the penalty of perjury. Furthermore, counsel and the petitioner have not provided any new facts in this instance, which are supported by affidavits or other documentary evidence according to 8 C.F.R. § 103.5(a)(2).

Although counsel and the petitioner claim that the petitioner's prior counsel was incompetent in this matter, they have not properly articulated a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1st 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. Counsel and the petitioner do not explain the facts surrounding the preparation of the petition or the engagement of the representative. Accordingly, counsel and the petitioner did not articulate a proper claim based upon ineffective assistance of counsel.

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 submitted with this motion could not have been discovered or presented in the previous proceeding. A review of the evidence that the petitioner submits on motion 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.

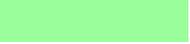
The present motion does not allege that the issues, as raised on appeal, involved the application of precedent to a novel situation or that there is a new precedent or a change in law that affects the AAO's prior decision. Instead, counsel generally makes arguments that are based on the same factual record. Accordingly, the AAO will dismiss the motion to reopen.

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 motion 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 motion will be

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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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 is dismissed.