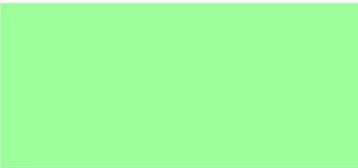


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

(b)(6)

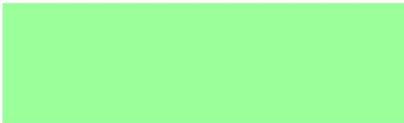


DATE: **MAY 08 2013** Office: TEXAS SERVICE CENTER FILE: 

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 AAO 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 preference visa petition was denied by the Director, Texas Service Center. The petitioner appealed the director's decision which was dismissed by the Administrative Appeals Office (AAO). The petitioner filed both a motion to reopen and an appeal of the AAO's decision. The matter is again before the AAO. The appeal is rejected, and the motion to reopen is dismissed. The petition remains denied.

The petitioner is a furniture design and production company. It seeks to employ the beneficiary permanently in the United States as an international furniture production engineer. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly. On April 27, 2009, the petitioner filed an appeal of the director's decision to the AAO. On August 6, 2012, the AAO dismissed the petitioner's appeal. The petitioner filed an appeal and a motion to reopen the AAO's decision on September 7, 2012. The matter is again before the AAO.

On the Form I-290B, Notice of Appeal or Motion, the petitioner checked Box B, which states, "I am filing an appeal. My brief and/or additional evidence will be submitted to the AAO within 30 days." In Part 3 of the I-290B, the petitioner states that it is filing both a motion to reopen and an appeal. The AAO does not exercise appellate jurisdiction over its own decisions. The AAO exercises appellate jurisdiction over only the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(effective March 1, 2003). Therefore, an appeal of an AAO appeal is not properly within the AAO's jurisdiction and must be rejected. However, because the petitioner characterized its filing as a motion to reopen on the Form I-290B, it will be accepted as one despite the incorrect box being checked on the form.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "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 the instant case, the motion to reopen does not qualify for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner does not provide any new facts with supporting documentation. A motion must meet the regulatory requirements of a motion to reopen or reconsider at the time it is filed; no provision exists for USCIS to grant an extension to the petitioner to file evidence or arguments in the future. The fact that the petitioner on the Form I-290B incorrectly checked box B ("I am filing an appeal. My brief and/or additional evidence will be submitted to the AAO within 30 days"), does not

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).

allow it to submit evidence beyond the 30 day period allowed for motions to reopen. 8 C.F.R. § 103.5(a)(1)(i).²

With counsel's brief submitted on October 10, 2012, counsel submits unaudited profit and loss statements for [REDACTED] for 2011 and 2012. A letter supplementing the brief was also received on November 14, 2012. The letter, from [REDACTED] asserts that the petitioner was restructured in 2008 and its name is now [REDACTED]. Although the profit and loss statements were not available at the time of the appeal, those documents are not relevant to demonstrate the petitioner's ability to pay the proffered wage in 2006 and 2007, the years which the AAO notes as deficient in its decision. Further, evidence that the petitioner was restructured in 2008 cannot be considered "new," as this evidence could have been provided with the appeal.

It is also noted that the petitioner has failed to address all of the issues noted in the AAO's decision. Although counsel's brief asserts that the beneficiary possesses the minimum experience required for the offered position as stated on the labor certification, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, the petitioner fails to address at all the AAO's notation that a *bona fide* job offer may not exist based on a familial relationship between the beneficiary and a co-owner of the petitioner.

As the petitioner did not present any new facts with supporting documentation, it has not established a proper basis for a motion to reopen.

² The fact that the petitioner's owner claims that a new entity now exists in place of the petitioner raises the issue of whether there is a valid successor-in-interest to the petitioner. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If [REDACTED] is a different entity than the petitioner/labor certification employer and appellant, it must establish that it is a successor-in-interest to that entity. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A valid successor relationship may be established for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The evidence in the record does not satisfy all three conditions described above because it does not fully describe and document the transaction transferring ownership of the predecessor, and it does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods. This issue must be addressed fully with any further filings.

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. 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. Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion to reopen and reconsider is dismissed. The appeal is rejected. The AAO's previous decision is affirmed. The petition remains denied.