



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: MAY 08 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:

[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,

RR for
Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition on June 5, 2007. The petitioner filed an appeal on July 5, 2007, which the Administrative Appeals Office (AAO) dismissed on September 15, 2009. The petitioner filed a motion to reopen and a motion to reconsider the AAO's decision on October 16, 2009, which is now before the AAO. The motions will be dismissed, the previous September 15, 2009 decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is an insurance business seeking to employ the beneficiary as a sales manager 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 June 5, 2007, the director denied the petition, finding that the petitioner had failed 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, April 30, 2001, until the present. On September 15, 2009, the AAO dismissed the petitioner's appeal on the same ground, its failure to establish the continuing ability to pay the beneficiary the proffered wage from the priority date onwards. The AAO specifically noted that the petitioner had failed to establish its ability to pay the beneficiary the difference between wages paid and the proffered wage of \$60,902.40 from 2002 through 2004.

On October 16, 2009, the petitioner filed a timely motion to reopen and motion to reconsider the AAO's September 15, 2009 decision. In order to file a motion properly, the regulation at 8 C.F.R. § 103.5(a)(1)(iii) requires that the motion must 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 and, if so, the court, nature, date, and status or result of the proceeding." Furthermore, the regulation at 8 C.F.R. § 103.5(a)(4) requires that "[a] motion that does not meet applicable requirements shall be dismissed." In this case, counsel states on the Form I-290B that the validity of the unfavorable decision has not been the subject of any judicial proceedings.

On motion, counsel asserts that the AAO's decision disregarded evidence of the petitioner's owner's assets. The petitioner submits a letter from its president, [REDACTED] dated October 12, 2009, which states that his business has the ability to pay the beneficiary, whom he finds to be irreplaceable with regard to the level of customer service that she provides. Counsel claims that the AAO committed legal error by failing to consider the assets of [REDACTED] as an individual. Accordingly, the petitioner submits additional financial information from [REDACTED], including car titles, leased office equipment receipts, and personal tax statements for 2002 and 2003.

The USCIS regulation at 8 C.F.R. § 103.5(a)(3) states that:

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.

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. Accordingly, the AAO will dismiss the motion to reopen.

In the present motion to reconsider, the AAO finds that counsel did not cite any pertinent precedent decisions to establish that the AAO’s decision was based on an incorrect application of law or USCIS policy. Counsel has failed to demonstrate a reasonable basis for the motion to reconsider. Counsel asserts that the AAO misunderstands the nature of an S corporation in failing to consider the petitioner’s sole shareholder’s personal assets as available to pay the proffered wage. As already noted by the AAO in its September 15, 2009 decision, 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.”

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 motions will be dismissed in accordance with 8 C.F.R. § 103.5(a)(4).

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

ORDER: The motions are dismissed, the decision of the AAO dated September 15, 2009 is affirmed, and the petition remains denied.

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).