

(b)(6)

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



U.S. Citizenship
and Immigration
Services

DATE: **MAY 28 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 employment-based visa petition was denied by the Director, Nebraska Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). Following the appeal, the petitioner filed an untimely motion to reopen the decision. The AAO dismissed the motion. The matter is now before the AAO again on motion to reopen and motion to reconsider. The motions will be dismissed.

The petitioner describes itself as a machine shop. It seeks to employ the beneficiary permanently in the United States as a machine set-up operator. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent 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 on November 28, 2007. The petitioner appealed the director's decision. The AAO also found that the petitioner had failed to establish the ability to pay the proffered wage. In a decision dated April 19, 2010, the AAO affirmed the director's decision and dismissed the appeal.

The petitioner filed a motion to reopen the AAO's decision on May 25, 2010. The AAO determined that the motion was untimely filed and dismissed the motion on April 9, 2012. The case is again before the AAO as the petitioner has filed a motion to reopen and motion to reconsider the AAO's latest decision.

The regulations at 8 C.F.R. § 103.5(a)(2) state, 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, the petitioner has not contested the lateness of the previous motion to reopen and has presented no facts or evidence on motion that relate to the lateness of the previous motion to reopen 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. The evidence submitted on motion will not be considered "new" and will not be considered a proper basis for a motion to reopen.

A motion to reconsider must establish that the director and the AAO made an erroneous decision through misapplication of law or policy. 8 C.F.R. § 103.5(a)(3). In this case, the petitioner has not made any allegation of misapplication of law or policy by the AAO in determining the previous motion to reopen to have been untimely filed. Therefore, it will not be considered a proper basis for a motion to reconsider.

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).

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 met that burden.

ORDER: The motion to reopen and motion to reconsider are dismissed.