



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **MAY 31 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,


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 petitioner filed a motion to reopen the AAO's decision, which was granted. The AAO dismissed the appeal on the merits. The matter is now before the AAO on another motion to reconsider. The motion will be dismissed, the previous decision of the AAO will be affirmed, and the petition will remain denied.

In the director's March 7, 2008 denial, the director determined that the petitioner failed to establish its ability to pay the proffered wage for the beneficiary from 2001 through 2004. The petitioner appealed the director's denial to the AAO. On July 27, 2010, the AAO dismissed the appeal under its authority for *de novo* review. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In its decision, the AAO found that the petitioner did not have the ability to pay the proffered wage in 2001 through 2004, and dismissed the appeal. The AAO did conclude that the petitioner demonstrated its ability to pay the proffered wage in 2005 and 2006.

The petitioner filed a motion to reopen the AAO's dismissal of the appeal. The AAO granted the motion and again reviewed the record to analyze the petitioner's ability to pay the proffered wage in 2001 through 2004. In the motion to reopen, the AAO analyzed the officer's compensation paid to its shareholder. The AAO determined that the petitioner failed to provide accurate and sufficient information regarding the shareholder's household expenses and tax returns for all relevant years. The AAO again dismissed the appeal.

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.

The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3). On motion, counsel asserts the director "erred by determining that the employer failed to demonstrate his ability to pay the wages at the time of filing." Counsel contends that for 2004, the petitioner had enough current assets combined with the officer's compensation to pay the proffered wage. Counsel submits the petitioner's shareholder's tax returns for 2004 through 2009, the shareholder's monthly expenses for 2001 through 2009, and a letter from [REDACTED] stating his willingness to forego officer compensation to cover the proffered wage of the beneficiary. Counsel also submits the beneficiary's Form W-2 for 2007 through 2009 and the petitioner's tax returns for 2007 through 2009.

Counsel also asserts that the petitioner omitted important evidence that in 2003, 50% shareholder [REDACTED] purchased the other 50% of the company from [REDACTED] thus leaving him 100% of the company. Counsel contends that this evidence establishes the petitioner and shareholder had sufficient funds to pay the proffered wage. Counsel submits numerous corporate documents reflecting the transfer of stock shares from [REDACTED] to [REDACTED] in 2003. Counsel asserts that "Mr. [REDACTED] paid \$250,000 on or before October 31, 2003, and that this is evidence that Mr. [REDACTED] and the business had sufficient funds to pay the proffered wage."

In its decision, the AAO analyzed the petitioner's ability to pay the proffered wage from 2001 through 2006. The AAO determined that the petitioner failed to establish its ability to the proffered wage in the years 2001, 2002, 2003 and 2004. Even if the petitioner's ability to pay the proffered wage could be established in 2004, the petitioner has failed to establish its ability to pay the proffered wage from 2001 through 2003. Counsel states that "the petitioner cannot provide a letter or the personal income taxes of the second officer for 2001 through 2003 because he is no longer a part of the business and does not maintain a relationship with Mr. [REDACTED]" The evidence presented on motion establishing that Mr. [REDACTED] purchased stock from Mr. [REDACTED] in 2003 does not demonstrate that the petitioner had the ability to pay the proffered wage from the priority date in 2001 through 2003 based on the wages paid to the beneficiary, the petitioner's net income, or the petitioner's net current assets. Nor does the evidence submitted on motion support the consideration of officer's compensation from 2001 to 2003 to pay the proffered wage.

The AAO also noted in its decision that the list of household expenses provided for Mr. [REDACTED] did not appear to be complete upon review of Mr. [REDACTED]'s IRS Forms 1040. The petitioner failed to address this issue on motion.

Further, in its decision, the AAO noted a recurring inconsistency in the record concerning the beneficiary's social security number as listed in the Forms W-2 and the petitioner's failure to identify the beneficiary's social security number in the Form I-140. The petitioner also failed to address this issue on motion.

As stated in the AAO's decision, the petitioner has failed to establish it had the continuing ability to pay the proffered wage from the priority date onwards an examination of wages paid to the beneficiary, and its net income or net current assets.

Furthermore, United States Citizenship and Immigration Services (USCIS) regulations require that motions 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). No new precedent decisions were submitted in support of counsel's assertions. 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 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.

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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 motion is dismissed. The petition remains denied.