

(b)(6)



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**

DATE: **NOV 26 2013**

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

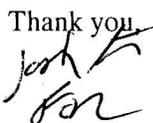
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker OR Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal on September 5, 2012. The petitioner filed an appeal of the AAO's September 5, 2012, decision dismissing the petitioner's appeal. As an appeal may not be filed on a decision of the AAO, the AAO treated the appeal as a motion to reopen and a motion to reconsider. The AAO dismissed the motion to reopen and the motion to reconsider by decision dated June 6, 2013.¹ The matter is again before the AAO on a motion to reopen and a motion to reconsider. The motion to reopen and motion to reconsider will be dismissed. The petition will remain denied. The AAO decisions of September 5, 2012, and June 6, 2013, will not be disturbed.

The petitioner is a trainer of thoroughbred racehorses. It seeks to employ the beneficiary permanently in the United States as a thoroughbred racehorse groom. As required by statute, the petition is accompanied by a Form ETA 750 (labor certification), Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is April 24, 2001. See 8 C.F.R. § 204.5(d). The proffered wage is \$19,118.32 per year,² and the position requires two years of experience as a thoroughbred racehorse groom or two years of experience in the related occupation of "Grooming Quarter Horse Race Horses."

The record shows that this motion is properly filed. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The director's decisions, and the AAO's September 5, 2012, decision, found that the petitioner had not established its ability to pay the beneficiary's proffered wage from the priority date onward. Beyond the decision of the director, the AAO also found that the petitioner had not established that it

¹ The AAO dismissed the motion to reopen as the petitioner did not submit new evidence to be considered in a reopened proceeding. 8 C.F.R. § 103.5. The AAO dismissed the motion to reconsider as the petitioner did not state the reasons for reconsideration supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [USCIS] policy; and did not establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

² The labor certification indicates that the position offered is for 42 hours per week, including a 40 hour work week at a salary of \$342 per week (\$8.55 per hour), and 2 hours of overtime per week at a rate of "1 1/2 reg."(\$12.83 per hour). Therefore, the position offered includes a basic salary of \$17,784 and a required overtime salary of \$1,334.32 for a total proffered wage of \$19,118.32. The amount of overtime required for the position was calculated as 104 hours of overtime annually (two hours a week for 52 week) at a rate of \$12.83 per hour (one-and-a-half times the basic rate of \$8.55 per hour). The AAO's September 5, 2012, decision incorrectly stated rounded wages, listing the weekly proffered wage as \$368 and the annual proffered salary as \$19,136. That portion of the AAO's decision is withdrawn; however, the decision would not change based on the correct proffered wage of \$19,118.32 per year (\$367.66 per week).

was a successor-in-interest to the labor certification employer, or that the beneficiary possessed the minimum qualifications for the position offered as of the priority date.

It would appear that although the petitioner is presenting evidence with this motion, the submission of the evidence could not overcome the basis of the last dismissal and this one should be dismissed accordingly.

The regulation at 8 C.F.R. § 103.5 provides 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.” “New” facts are those that were not available and could not reasonably have been discovered or presented in the previous proceeding. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

A motion to reconsider must: (1) 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 [USCIS] policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The motion to reconsider must be dismissed because the motion does not state reasons for reconsideration supported by any pertinent precedent decisions. The petitioner’s motion fails to establish that the AAO’s September 5, 2012, or June 6, 2013, decisions were based on an incorrect application of law or policy, or establish that the AAO’s decisions were incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

The motion to reopen must be dismissed, as the motion does not state new facts to be provided in the reopened proceeding that were not available and could not reasonably have been discovered or presented in the previous proceeding. 8 C.F.R. § 103.5(a)(4). The AAO notes that its previous decision was dated June 6, 2013, and that the petitioner’s motion was received on July 5, 2013. A motion must be complete upon filing. See 8 C.F.R. §§ 103.5(a)(1)(iii), (iv). On September 16, 2013, counsel for the petitioner submitted additional tax returns for the petitioner, and a letter from counsel dated September 9, 2013. Even if the AAO were able to accept and consider this late filed evidence, the petitioner has not established that the evidence constitutes new facts. Counsel indicates that the petitioner had been attempting to obtain these tax returns from the Internal Revenue Service and had not received them until September 6, 2013. However, neither counsel nor the petitioner indicated the reason for the delay in obtaining these documents. As noted in the director’s September 23, 2009, decision in response to the petitioner’s second motion to reopen, “[the] Service strongly emphasizes that ... the petitioner is able to obtain copies of [its] 2004 and 2005 tax return information by written request from the Internal Revenue Service.”

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.

Were this second motion to be granted, and all the evidence now in the record were able to be accepted and considered, the petition would remain denied and the original decision of the AAO, dated September 5, 2012, would be affirmed. The record now contains the following evidence, filed with the petitioner’s motion and filed untimely, in support of the present motion:

- Copies of W-2 Forms for another employee which shows the Federal Employer Identification Number of the petitioner as a sole proprietor [REDACTED] and then as an S Corporation [REDACTED]. The W-2 Forms presented show that the California State Taxpayer Identification Number [REDACTED] did not change from when the petitioner operated as a sole proprietor through its transition to an S Corporation, to date. The petitioner submitted this information to address the concerns of the AAO in its September 5, 2012 as to whether the present petitioner (a corporation) is the successor-in-interest to the petitioner’s business operation as a sole proprietor.
- Documentation showing that it requested copies of tax forms from the Internal Revenue Service (IRS) for 2004, 2005 and 2006, as requested by the AAO, to establish its ability to pay the proffered wage. The documentation shows that the petitioner’s request was returned to it no reason was given for the petitioner’s failure to provide the tax returns, except for the petitioner’s statement that it could not obtain them. No reason was given for the petitioner not providing copies of the tax returns from another source, such as the petitioner’s accountant or the petitioner’s personal copies, if any.
- An experience letter signed by Sr. [REDACTED] dated December 17, 2003 (previously presented but now containing an interpreter’s certification) which states that the author certifies that the beneficiary, who lives on a farm in Mexico, has had a responsibility in the area of keeping and maintain horses from January 1992 to December 2001.
- The beneficiary’s 2006 through 2011 W-2 Forms which show the beneficiary was paid wages exceeding the proffered wage from 2007 through 2011, but less than the proffered wage in 2006 (\$18,003.12).
- A statement of the sole proprietor’s household expenses in 2001 and 2002.

- The petitioner's 2004, 2005 and 2006 tax returns, which were not filed until after the petitioner's second motion. Those tax returns show:
 - 2004 - Net Income of \$124,908; Net Current Assets of \$0 (the petitioner's Schedule L was left blank and net current assets, therefore, cannot be determined).
 - 2005 - Net Income of \$62,855; Net Current Assets may not be determined as the petitioner did not provide a copy of Schedule L.
 - 2006 - Net Income of 155,566; Net Current Assets of \$0 (the petitioner's Schedule L was left blank and net current assets, therefore, cannot be determined).

Even if all the evidence were accepted and considered in a light most favorable to the petitioner, the original decision of the AAO would be affirmed and the petition would remain denied. The petitioner did not address the issue that the petitioner has sponsored multiple beneficiaries for nonimmigrant and immigrant petitions, and has not provided evidence to establish its ability to pay those beneficiaries' proffered wages in addition to the instant beneficiary's proffered wage. The wage obligations of the other sponsored worker(s) are unknown. Thus, it cannot be determined that the petitioner had sufficient adjusted gross income as a sole proprietor or net income or net current assets as an S Corporation to pay all required wages in any year. Further, the petitioner did not present tax returns or audited financial statements to establish its ability to pay proffered wages in 2008 or any subsequent year.

In addition, the petitioner has not established that the beneficiary had two years of required experience in the proffered position or two years of experience in the related occupation as required by the labor certification. As noted by the AAO in its September 5, 2012 decision, the experience letter provided by the petitioner does not state the specific duties performed by the beneficiary so that it may be determined that the beneficiary had qualifying experience as required by the labor certification. The letter provided by the petitioner, dated December 17, 2003, states only that the beneficiary "has played a responsibility for this area of keeping and maintaining horses." Any letter provided to document a beneficiary's experience must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. See 8 C.F.R. § 204.5(g)(1) and (1)(3)(ii)(A). The letter provided is vague and does not provide a specific description of the beneficiary's duties. In addition, there is no indication that the beneficiary's experience included the care of thoroughbred or race horses, as required by the labor certification.

Further, the dates of employment noted on the experience letter conflict with employment dates provided by the beneficiary, and attested to on the labor certification. These inconsistent dates cast doubt on the beneficiary's claimed experience. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Id.* at 591-92. The petitioner failed to address the conflicting employment dates in its instant motion.

Therefore, the evidence in the record would be insufficient to overcome the AAO's previous decision regarding whether the petitioner has the ability to pay the proffered wage, or whether the petitioner demonstrated the beneficiary's qualification for the position offered.

Having carefully considered the petitioner's motion in its entirety, the motion shall be denied. The AAO's decisions of September 5, 2012, and June 6, 2013, will not be disturbed. The petition shall remain denied.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The motions to reopen and reconsider are dismissed. The petition remains denied.