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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

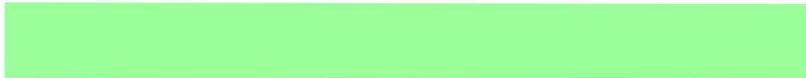


DATE: OCT 11 2013

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:

SELF-REPRESENTED

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 employment-based preference visa petition was denied by the Director, Texas Service Center (the director) and the Administrative Appeals Office (AAO) dismissed the appeal. The AAO granted a motion to reopen and reaffirmed the dismissal of the appeal on May 28, 2013. The matter is now before the AAO on a second motion to reopen and motion to reconsider. The motions will be dismissed, the previous decisions of the AAO will be affirmed, and the petition will be denied.

On motion, counsel submits a Form I-290B, Notice of Appeal or Motion, a photocopy of the certified ETA Form 9089, Application for Permanent Employment Certification (labor certification) with original signatures for the beneficiary and the petitioner, copies of financial documents and copies of documentation submitted below. The AAO finds that the petitioner has not filed a proper motion to reopen. The regulation at 8 C.F.R. § 103.5(a)(2) states, 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

On motion, counsel states that the Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, for former counsel has been withdrawn and contends that the petitioner and beneficiary should not be prejudiced by the errors of its former counsel in its failure to follow regulatory requirements regarding the signed labor certification and submission of the beneficiary's Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements. On motion, the AAO finds that the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd.*, 857 F.2d 10 (1st Cir. 1988).

On February 20, 2008, the director issued a request for evidence (RFE), instructing the petitioner to submit a certified ETA Form 9089 with original signatures for the beneficiary and petitioner and to submit evidence of the petitioner's ability to pay the proffered wage. In response, counsel submitted financial records for the petitioner, but failed to submit the requested ETA Form 9089 with original signatures. The director denied the petition on July 18, 2008. The AAO dismissed the appeal on December 16, 2011, granted a subsequent motion to reopen and affirmed the dismissal on May 28, 2013. The director's decision and the AAO's decisions all stated that the petitioner failed to submit the required ETA Form 9089 with original signatures. The AAO's decisions also stated that the submitted evidence failed to establish the petitioner's ability to pay the proffered wage.

On motion, the petitioner submits copies of payroll records for various dates to demonstrate that it employed and paid the beneficiary. Although the Form I-290B states that the beneficiary's tax returns from 2006 to the present and Forms W-2 are attached, no such evidence was submitted to the AAO. The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(8)

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).

and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on motion as it does not constitute "new" evidence.²

Motions for the reopening 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 to reopen will be dismissed.

Nor has the petitioner filed a proper motion to reconsider. The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part, 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 [USCIS] policy. A motion to reconsider ... 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 was not accompanied by arguments based on precedent decisions to establish that the decision was based on an incorrect application of law or policy, and does not establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Although counsel checked box F ("I am filing a motion to reopen and a motion to reconsider a decision") on the Form I-290B, Notice of Appeal or Motion, the motion does not meet the requirements of a motion to reconsider. While the petitioner states reasons for the motion, the petitioner does not cite any precedent decisions or other evidence not already addressed by the AAO to establish that the decision was based on an incorrect application of law or Service policy. Accordingly, the petitioner's motion to reconsider 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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not sustained that burden. 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." 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 motions are dismissed.

² Even if the AAO were to consider the evidence submitted on motion (the beneficiary's paystubs) the evidence does not cover the complete relevant time period from the priority date in 2005 to the present. Further, there is no evidence that the beneficiary actually cashed the checks.