



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **FEB 21 2014**

OFFICE: TEXAS SERVICE CENTER

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:

INSTRUCTIONS:

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 preference visa petition was denied by the Director, Texas Service Center (the director) on May 12, 2010. The petitioner filed a motion to reopen on June 15, 2010. The director granted the motion to reopen and reaffirmed the decision to deny the petition on September 28, 2010. The petitioner appealed the decision to the Administrative Appeals Office (AAO), which was dismissed by the AAO on February 28, 2013. The petitioner filed a subsequent motion with the AAO. On June 27, 2013, the AAO granted the motion, withdrew in part and affirmed in part its prior decision, and denied the petition. The petitioner filed a second motion with the AAO, which was granted, and the AAO affirmed its prior decision and denied the petition. The matter is now before the AAO on a third 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, an experience affidavit, partial information on other Form I-140 immigrant beneficiaries, information and financial documents on the sole proprietor and copies of documentation submitted in previous proceedings. 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 petitioner submits documentation to clarify the inconsistencies in the record regarding the beneficiary's experience and to establish the petitioner's ability to pay the proffered wages of all immigrant petition beneficiaries through the sole proprietor's adjusted gross income. On motion, the AAO notes that the documentation which purports to clarify the inconsistencies in the beneficiary's experience is not independent and objective and does not clarify the inconsistencies.² See *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

On March 17, 2010, the director issued a request for evidence (RFE), instructing the petitioner to submit evidence that the beneficiary met the minimum requirements of the labor certification and of the petitioner's ability to pay the proffered wage, including information on household expenses. In response, counsel submitted some financial records for the petitioner, but failed to submit the requested household expenses and sufficient evidence that the beneficiary met the minimum

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).

² The affidavit fails to specify the beneficiary's dates or hours of employment or provide a detailed description of the beneficiary's duties and it is inconsistent with the Form ETA 750B, which states that the beneficiary began employment in August 1997, because it implies that the beneficiary was employed prior to this date. The discrepancies between all of the affidavits and the Form ETA 750B casts doubt on the authenticity of the affidavits. Doubt cast on any aspect of the applicant's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the application or visa petition. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

requirements of the labor certification. On motion before the director, the petitioner again failed to provide the requested information on household expenses and evidence that the beneficiary met the minimum requirements of the labor certification. The AAO's following decisions all stated that the petitioner failed to submit the required household expenses, evidence that the beneficiary met the minimum requirements of the labor certification and evidence of wages paid to beneficiaries of other Form I-140 immigrant petitions.

The purpose of an 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) 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 or motion. *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.³

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. While counsel 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 based on the evidence of record at the time of the initial decision. Accordingly, the petitioner's motion to reconsider will be dismissed.

³ Even if the AAO were to consider the evidence submitted on motion, the evidence does not resolve the inconsistencies regarding the beneficiary's experience or establish that he was licensed or eligible to be licensed as a groom in California as of the priority date on November 14, 1997. Further, the petitioner fails to submit the required household expenses and all information regarding the other beneficiaries of Form I-140 immigrant petitions and does not provide evidence which establishes the petitioner's ability to pay the proffered wage.

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 motion is dismissed.