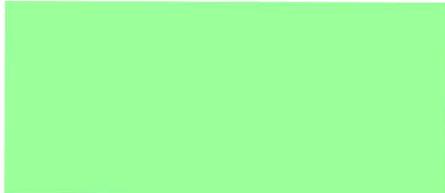


(b)(6)

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

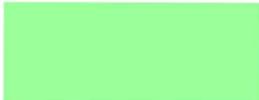


U.S. Citizenship
and Immigration
Services



DATE: **MAR 13 2014**

OFFICE: NEBRASKA 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)

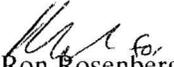
ON BEHALF OF PETITIONER:



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, Nebraska Service Center (the director) on April 13, 2009. The petitioner filed an untimely motion to reconsider on May 19, 2009, which was dismissed on October 15, 2009. The petitioner filed an appeal on November 16, 2009, which was treated as a motion by the director and dismissed. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal was dismissed by the AAO on May 31, 2013. The petitioner filed a subsequent motion with the AAO. On November 26, 2013, the AAO granted the motion, affirmed its prior decision, and denied the petition. 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 brief, 2008 through 2012 Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, for employees including the instant beneficiary, 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 additional documentation to establish the petitioner's ability to pay the proffered wage.

On February 5, 2009, the director issued a request for evidence (RFE), instructing the petitioner to submit evidence of the petitioner's ability to pay the proffered wage, including information on household expenses and personal assets of the sole proprietor and his spouse. On April 11, 2013, the AAO issued a notice of intent to deny (NOID) instructing the petitioner to submit evidence of the petitioner's ability to pay the proffered wage, including information on household expenses and personal assets of the sole proprietor and his spouse. The director's decisions and the AAO's following decisions all stated that the petitioner failed to submit sufficient evidence of the petitioner's ability to pay the proffered wage.

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

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).

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 or the AAO's NOID. *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.

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.² Accordingly, the petitioner's motion to reconsider will be dismissed.

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.

Even if the petitioner were able to meet the requirements of a motion and establish that it had the ability to pay the proffered wage, it has not established that the beneficiary meets the minimum requirements of the labor certification.

A petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification by the petition's priority date. 8 C.F.R. §§ 103.2(b)(1),(12); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, U.S. Citizenship and Immigration Services (USCIS) must examine the job offer portion of the labor certification to determine the minimum job requirements of the offered position. USCIS may not

² The AAO agrees with counsel that it erred in stating that the petitioner's shortfall in 2006 was \$1,397.73, when the shortfall was \$1,400.73 (due to a transposition of the sole proprietor's adjusted gross income (AGI) as \$7,829.00, rather than \$7,826.00). The AAO also agrees with counsel that it erred in stating that the petitioner's shortfall in 2007 was \$22,593.00, when the shortfall was \$11,971.41 (due to failure of inclusion of a maximum amount of \$10,622.39 residual in the sole proprietor's management account). However, in each relevant year there was a shortfall and counsel has not established that the AAO's decision was based on an incorrect application of law or policy or that the decision, finding that there were shortfalls in the petitioner's ability to pay in each relevant year, was incorrect based on the evidence of record at the time of the decision.

ignore a term of the labor certification, nor may it impose additional requirements. See *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires a U.S. high school diploma or the foreign equivalent, plus 24 months of experience in the job offered or as an administrator. The labor certification states that the beneficiary holds a high school diploma in Romania, conferred in 1991.³ The labor certification also states that the beneficiary qualifies for the offered position based on full-time experience as an administrator with [REDACTED] in [REDACTED] California, from March 15, 2003 until December 8, 2006, the date on which the labor certification was submitted. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The record lacks evidence that the beneficiary obtained the foreign equivalent of a U.S. high school diploma. The record also lacks an expert evaluation of the beneficiary's foreign educational credentials, showing that he obtained the equivalent of a U.S. high school degree before the petition's priority date of December 8, 2006. The record therefore does not establish that the beneficiary meets the educational requirement for the offered position.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The record contains an August 8, 2007 experience letter from [REDACTED] owner, on [REDACTED] California, letterhead stating that the company employed the beneficiary as an administrator from March 2003 until the date on which the letter was signed. However, the address and phone number on the letter is inconsistent with public information regarding [REDACTED] is located at [REDACTED] California [REDACTED] not at [REDACTED] California [REDACTED] listed on the letter. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The letter describes the beneficiary's job duties as the administrator of a nursing home. Nursing home administrators in California require state licensure. Cal. Health & Safety Code § 1416. Attached please find a copy of the applicable regulations. Online records of the California Department of Public Health do not indicate that the state ever licensed the beneficiary as a nursing home administrator. See "L & C Certification Search Page," Cal. Dep't of Pub. Health, at

³ The ETA Form 9089 does not state the name or address of the school that issued the beneficiary's high school diploma.

<http://www.apps.cdph.ca.gov/cvl/SearchPage.aspx> (accessed February 4, 2014). The beneficiary's apparent lack of required licensure casts doubt on his claimed qualifying experience as a nursing home administrator. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92.

Additionally, a labor certification remains valid only for the particular job opportunity, the alien for whom the certification was granted, and the area of intended employment stated on the ETA Form 9089. 20 C.F.R. § 656.30(c)(2); see also *Sunoco Energy Dev. Co.*, 17 I&N Dec. 283 (Reg'l Comm'r 1979) (affirming a petition's denial where the petitioner intended to employ the beneficiary outside the area of intended employment specified on the labor certification); *Matter of Izdebska*, 12 I&N Dec. 54 (Reg'l Comm'r 1966) (upholding a petition's denial where the petitioner did not intend to employ the beneficiary as a live-in domestic worker as stated on the labor certification). The term "area of intended employment" means "the area within normal commuting distance of the place (address) of intended employment." 20 C.F.R. § 656.3. Any place within the worksite's Metropolitan Statistical Area (MSA) is considered within normal commuting distance of the place of intended employment. *Id.*

As discussed in the AAO's previous decisions, the record shows that the petitioner originally offered the beneficiary the position of administrative assistant at its [REDACTED] California location. However, the record indicates that the petitioner sold that location in 2008 and has not owned or operated it since. On motion, counsel asserts that, after the sale of the [REDACTED] location, the petitioner continued to offer the beneficiary the same position at its location in [REDACTED] California, which is within the same MSA as [REDACTED]. Counsel states that the instant motion includes "Petitioner's Declaration." However, the motion of record does not contain a declaration from the petitioner.

The record does not demonstrate the petitioner's continued intention to permanently employ the beneficiary in the offered position and in the area of intended employment specified on the labor certification. Counsel's assertion does not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980); see also *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190, 193 (Reg'l Comm'r 1972)) (going on record without supporting documentary evidence is insufficient to meet the standard of proof in these proceedings).

Finally, online California records state that the beneficiary has been a licensed registered nurse since 2009. The beneficiary's licensure in an unrelated occupation casts further doubt on the petitioner's intention to permanently employ the beneficiary in the offered position. See *Matter of Ho*, 19 I&N Dec. at 591-92.

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.

(b)(6)



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NON-PRECEDENT DECISION

ORDER: The motion is dismissed.