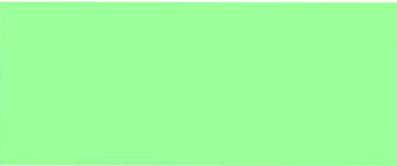


(b)(6)

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



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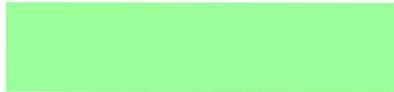
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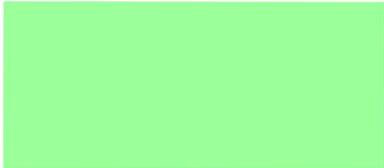
IN RE:

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), and the Administrative Appeals Office (AAO) dismissed the subsequent appeal. The matter is now before the AAO on a motion to reopen and motion to reconsider. The motions will be dismissed, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner<sup>1</sup> describes itself as a restaurant. It seeks to permanently employ the beneficiary in the United States as an Indian cook. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).<sup>2</sup> The petition is accompanied by an ETA Form 9089, Application for Permanent 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 October 30, 2005. *See* 8 C.F.R. § 204.5(d). The director's decision denying the petition concluded that the petitioner failed to establish its ability to pay the proffered wage.

On appeal, counsel filed the Form I-290B, Notice of Appeal or Motion on behalf of the petitioner.<sup>3</sup> On August 21, 2014, we found that [REDACTED] failed to establish that it is a valid successor-in-interest to the petitioner and the petitioner had failed to establish its ability to pay the proffered wage. Beyond the decision of the director,<sup>4</sup> we found that the beneficiary did not possess the required education or experience for the offered position and that the beneficiary willfully misrepresented his qualifications to obtain an immigration benefit. We invalidated the labor certification pursuant to 20 C.F.R. § 656.30(d).

The regulations at 8 C.F.R. § 103.5(a)(2) state, 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." 8 C.F.R. § 103.5(a) provides, 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 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."

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<sup>1</sup> The petitioner is [REDACTED] Federal Employer Identification Number (FEIN) [REDACTED] [REDACTED] also filed the ETA Form 9089, Application for Permanent Employment Certification. The appeal was filed by [REDACTED]

<sup>2</sup> Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

<sup>3</sup> We note that the attorney who signed the Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, accompanying the instant motions represents the beneficiary on motion and not the petitioner. As such, the instant motion is not filed on behalf of an affected party and the motion is improperly filed pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(I).

<sup>4</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

On motion, counsel submits the Form I-290B, a “motion to reconsider” from the beneficiary, a declaration from the beneficiary attesting to experience as a personal cook, an experience letter from a prior employer attesting to the beneficiary’s experience as a personal vegetarian cook for the Hindiya family and copies of identity documents for the beneficiary. We find that counsel has not filed a proper motion to reopen or motion to reconsider. The purpose of a request for evidence (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). On October 31, 2013, we issued an RFE for documentation clarifying the beneficiary’s name and establishing his possession of the required education and experience. On June 12, 2014, we issued a notice of derogatory information and notice of intent to dismiss (NDI/NOID) informing the petitioner that the documentation submitted to establish the beneficiary’s education and experience had been confirmed to be fraudulent and still seeking clarification of the beneficiary’s name and establishment of the beneficiary’s possession of the required education and experience.

While counsel submits documentation regarding the beneficiary’s experience as a personal cook, the experience referred to on motion is not the experience listed on the labor certification or the experience which we found to be misrepresented by and fraudulently claimed by the beneficiary. The documentation regarding the beneficiary’s experience as a personal cook could also have been submitted in response to either the RFE or NOID/NDI. 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, we 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).

We note that two of the identity documents submitted by counsel on motion are not accompanied by certified translations of the documents. *See* 8 C.F.R. § 103.2(b)(3). Further, the documentation which purports to clarify the inconsistencies in the beneficiary’s name either does not clarify the inconsistencies or contradicts the claimed explanation for the various spellings of the beneficiary’s name.<sup>5</sup> *See Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

The beneficiary states in his “motion to reconsider” that he did not make a fraudulent declaration. However, he does not submit any affidavits or other independent, objective evidence to support this statement or his previously claimed experience.<sup>6</sup> Further, the stated reason for the motion to reconsider is not supported by any pertinent precedent decisions 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.

Counsel does not address our affirmation of the director’s finding that [REDACTED] failed to establish

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<sup>5</sup> On appeal counsel claimed that [REDACTED] are the same person, submitting affidavits from the beneficiary and two other individuals stating that the beneficiary’s passport was accidentally issued under the name [REDACTED] when it was renewed. On motion counsel submits the beneficiary’s previously issued passport which reflects that it was also issued under the name [REDACTED]

<sup>6</sup> The beneficiary not only signed the labor certification but also submitted affidavits attesting to the fraudulent qualifying experience.

that it is a valid successor-in-interest to the petitioner and the petitioner had failed to establish its ability to pay the proffered wage.

Counsel fails to provide any affidavits or documentary evidence to establish any new facts, states no reason for the motion to reconsider and has not established 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 motion to reopen and 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.

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. 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. The previous decision of the AAO is affirmed. The petition remains denied and the labor certification remains invalidated.