



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF P-H-, INC.

DATE: NOV. 6, 2015

MOTION OF ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a newspaper distributor, seeks to employ the Beneficiary permanently in the United States as a circulation-sales representative. *See* section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. §11532(b)(3)(A)(i). The Director, Nebraska Service Center, denied the visa petition and this office dismissed a subsequent appeal, a decision we have reaffirmed in response to the Petitioner's subsequent motions to reopen and reconsider, and a motion to reopen. The matter is again before us on a motion to reconsider. The motion to reconsider will be denied.

We conduct appellate review on a *de novo* basis.<sup>1</sup> We consider all pertinent evidence in the record, including new evidence properly submitted on appeal.<sup>2</sup> An application or petition that fails to comply with the technical requirements of the law may be denied even if a director does not identify all of the grounds for denial in the initial decision.<sup>3</sup>

#### I. PROCEDURAL HISTORY

The Petitioner filed the visa petition on November 3, 2006. On September 13, 2007, the Director issued a request for evidence (RFE) seeking additional information regarding the Petitioner's ability to pay the proffered wage. The Petitioner responded to the RFE on October 25, 2007, submitting documentation relating to the Beneficiary's wages and its own financial circumstances. Finding that the submitted evidence did not establish that the Petitioner had a continuing ability to pay the proffered wage as of the June 19, 2003 priority date, the Director denied the visa petition on January 24, 2008.

The Petitioner appealed the Director's decision to this office on February 22, 2008. On July 27, 2009, we issued a notice of derogatory information (NDI) to the Petitioner, based on online records of the Commonwealth of Virginia State Corporation Commission that reflected the Petitioner's business had

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<sup>1</sup> *See* 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991).

<sup>2</sup> The Form I-290B, Notice of Appeal or Motion, instructions permit the submission of additional evidence on appeal. 8 C.F.R. § 103.2(a)(1) (incorporating form instructions into the regulations).

<sup>3</sup> *Supra* n. 1; *see also Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 D.3d 683 (9<sup>th</sup> Cir. 2003).

been terminated as of February 2, 2009. The Petitioner submitted evidence establishing its reinstatement.

On October 1, 2009, we dismissed the Petitioner's appeal, finding that the record did not establish that it had the continuing ability to pay the proffered wage from the priority date forward. On November 2, 2009, the Petitioner filed a motion to reopen and reconsider (MTR, motion); we granted the motion and, on June 2, 2010, affirmed our prior decision. The Petitioner filed a second MTR on July 9, 2010; on February 1, 2013, we denied the motion because the filing failed to meet the regulatory requirements for a motion. 8 C.F.R. §§ 103.5(a)(2), (3). The Petitioner filed a third MTR on March 1, 2013; on August 1, 2013, we granted the motion, but found the record did not demonstrate the Petitioner's ability to pay the proffered wage. On August 30, 2013, the Petitioner filed a fourth MTR, which we denied on March 6, 2014 for not meeting motion requirements. *Id.*

The Petitioner filed a fifth MTR on April 7, 2014, and, on July 3, 2014, we issued a notice of derogatory information and RFE to the Petitioner, informing it that our consideration of the present case had uncovered information that cast doubt on the Beneficiary's qualifying experience for the offered position. 8 C.F.R. §§ 103.2(b)(8), (16)(i). Our RFE provided the Petitioner 60 days to submit additional evidence of the claimed employment, including a letter from the Beneficiary's prior employer and supporting documentation. With regard to the Beneficiary, the RFE also indicated that while the Petitioner had submitted translations of the Beneficiary's high school degree and transcripts, it had not provided the Bahasa Indonesia language documents on which these translations were based. The Petitioner was further asked to submit copies of its federal income tax return, annual report, or audited financial statement for 2013, and documentation of any wages paid to the Beneficiary in 2013.

The Petitioner replied to the RFE on September 3, 2014, asking for additional time in which to gather the requested evidence and we extended the response period to the maximum permitted by regulation.<sup>4</sup> On October 20, 2014, the Petitioner provided evidence in support of the visa petition and again requested more time to obtain the required information. Additional response time was not granted pursuant to regulation.

In our subsequent February 10, 2015, decision, we found that the evidence submitted by the Petitioner in response to the July 3, 2014, RFE had not established its ability to pay the proffered wage. We further concluded that, as insufficient evidence had been submitted to overcome the derogatory information regarding the Beneficiary's qualifying experience, the record did not demonstrate that he was qualified for the offered position. Moreover, we found the un rebutted derogatory evidence regarding the Beneficiary's employment experience to demonstrate that, pursuant to section 212(a)(6)(C)(i) of the Act, he had willfully misrepresented a material fact to U.S. Citizenship and Immigration Services (USCIS) to obtain an immigration benefit. Our decision also noted that the Petitioner had not provided the Beneficiary's Indonesian-language high school

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<sup>4</sup> 8 C.F.R. § 103.2(b)(8)(iv) (maximum response time for an RFE shall not exceed 12 weeks; additional time to response to an RFE may not be granted).

diploma and transcripts, and, therefore, had not demonstrated that he had the high school education required by the labor certification.

Accordingly, we affirmed our March 6, 2014, decision, but additionally found the absence of evidence documenting the Beneficiary's eligibility for the offered position to provide another basis for the denial of the Form I-140. Further, based on our section 212(a)(6)(C)(i) finding, we invalidated the underlying labor certification under our authority at 20 C.F.R. § 656.30(d).

On March 13, 2015, the Petitioner filed a sixth motion.<sup>5</sup> On motion, it contends that USCIS' decision to investigate the Beneficiary's employment experience more than 15 years after the approval of its "application" has resulted in an "undue burden." The Petitioner asserts that a statute of repose or limitations should be imposed in this matter. Additionally, the Petitioner submits copies of the Beneficiary's Indonesian-language elementary school, middle school and high school diplomas.

## II. ANALYSIS

The requirements for motions to reopen and reconsider are found at 8 C.F.R. §§ 103.5(a)(2) and (3):

(2) *Requirements for motion to reopen.* A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence . . . .

(3) *Requirements for motion to reconsider.* 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.

Although the Petitioner does not indicate whether the submitted motion is a motion to reopen or a motion to reconsider, the language of its brief indicates that it is filing a motion to reconsider.

In its brief, the Petitioner contends that as the visa "application" was approved more than 15 years ago, the approval should be allowed to stand and that a denial "goes against the legislative intent for [a] statute of limitation." It specifically asserts:

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<sup>5</sup> Part 3.1.b.of the Form I-290B indicates that the petitioner is filing an appeal. However, as the Petitioner references the requirements of the regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C) in its brief supporting the Form I-290B, we will consider the Form I-290B to have been filed as a motion.

[t]he approval notice of the Form I-140 should serve as the ‘fixed date’ independent of any other claim in the future. USCIS had more than sufficient time to investigate the claims on the Petitioner’s application. The government’s decision to ‘open an investigation’ more than 15 years after its approval places an undue burden [on] the Petitioner . . . .

[T]he Statute of limitation in this case should be set at a reasonable time, in this matter 5 years.

In support of this reasoning, the Petitioner references the Supreme Court’s holding in *CTS Corp. v. Waldburger*, 134 S.Ct. 2175 (2014) that a statute of repose “puts an outer limit on the right to bring a civil action.” We note, however, that the decision in *CTS Corp. v. Waldburger* relates to whether the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERLA), which pre-empts state statutes of limitations that conflict with its terms, also pre-empts state statutes of repose. In light of its focus, *CTS Corp. v. Waldburger* does not appear relevant to the issues raised in the current proceeding and the Petitioner offers no rationale as to why its holdings should be considered here. Accordingly, we do not find the Petitioner to have established that our February 10, 2015, decision incorrectly applied the Act or USCIS policies.

Moreover, contrary to the Petitioner’s assertions on motion, the Form I-140 in this matter was not approved more than 15 years ago. The labor certification application was filed by the Petitioner on June 19, 2003 and certified by the U.S. Department of Labor (DOL) on August 24, 2006; the Form I-140 was filed with USCIS on November 3, 2006 and denied by the Director on January 24, 2008, a decision that we have affirmed in response to the Petitioner’s initial appeal and successive motions.

### III. CONCLUSION

Based on the record before us, we do not find the Petitioner’s motion to meet the requirements of the regulation at 8 C.F.R. § 103.5(a)(3). The Petitioner’s belief that a statute of limitations should apply in this matter is not a reason for reconsidering our February 10, 2015 decision, even if the Form I-140 had been originally approved. Further, the Petitioner has identified no precedent decisions that establish the decision was based on an incorrect application of law or policy. Neither has it demonstrated that our decision was incorrect based on the evidence of record at the time of the initial decision. The Petitioner has also not addressed its ability to pay the proffered wage on motion. Therefore, the Petitioner’s motion will be denied and we will not reconsider our February 10, 2015, decision.<sup>6</sup> See 8 C.F.R. § 103.5(a)(4).

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<sup>6</sup> 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.

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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). Here, that burden has not been met.

**ORDER:** The motion to reconsider is denied.

Cite as *Matter of P-H-, Inc.*, ID# 14648 (AAO Nov. 6, 2015)