



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

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

MATTER OF R-T-M-, INC.

DATE: APR. 6, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a travel agency, seeks to employ the Beneficiary as a “manager, travel & tours.” It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. *See* section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based immigrant classification allows a U.S employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The petition was initially approved by the Director, Texas Service Center (TSC). The approval was subsequently revoked by the Director, Nebraska Service Center (NSC), who found that the Petitioner committed fraud or misrepresentation of material facts with respect to its work address and the familial relationship between the Beneficiary and the Petitioner’s owner/corporate officers, and also found that the Petitioner did not establish its ability to pay the proffered wage in all relevant years.

The Petitioner appealed the revocation decision to this office. We dismissed the appeal. The Petitioner has since then filed six motions to reopen and reconsider, the last of which is currently before us. In the current motion the Petitioner asserts that it did not make fraudulent or willful misrepresentations of material fact regarding its business operation or in concealing the aforementioned family relationship, and that it has had the ability to pay the proffered wage in all pertinent years. The current motion will be denied.

The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The Petitioner filed its I-140 petition on behalf of the Beneficiary on April 7, 2006. As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which had been filed with the U.S. Department of Labor (DOL) on November 2, 2005, and certified by the DOL (labor certification) on February 17, 2006. The Director, TSC, approved the petition on May 10, 2006.

On November 30, 2009, however, the Director, NSC, issued a decision revoking the prior approval of the petition on two grounds: (1) the Petitioner had engaged in fraud or willful misrepresentation of material facts in its labor certification; and (2) the Petitioner did not establish its continuing ability to

pay the position's proffered wage of \$45,843.20 from the priority date (November 2, 2005) up to the present – in particular, from the year 2006 onward. Based on the finding of fraud or willful misrepresentation on the ETA Form 9089, the Director, NSC, also invalidated the labor certification.

The Petitioner filed an appeal, which we dismissed in a decision issued on September 28, 2010. We agreed with the NSC Director's findings and affirmed his revocation of the petition's approval as well as his invalidation of the underlying labor certification. In a further order at the close of our decision, we stated that both the Petitioner and the Beneficiary had knowingly misrepresented the Petitioner's business operation, concealed their familial relationship, and concealed the Beneficiary's ownership interest in the Petitioner's business with the intention of misleading the government on material elements of the Beneficiary's eligibility for the immigrant classification sought. In this connection, we found that the Petitioner and the Beneficiary had supplied a false address for the primary worksite¹ of the proffered position, had falsely denied that there was a familial relationship between the Petitioner's president and the Beneficiary (though they are brother and sister), and had not revealed that the Beneficiary owned 100% of the Petitioner's business.

The Petitioner has filed multiple motions to reopen and reconsider, all of which we denied. In each of our prior decisions we determined that no new evidence was provided by the Petitioner to overcome the findings of the Director, NSC, that the Petitioner committed fraud or willful misrepresentation of material facts on the labor certification and that the Petitioner did not establish its ability to pay the proffered wage in all relevant years. We also determined in each of our prior decisions that the Petitioner did not establish that findings of the Director, NSC, were based on an incorrect application of law or policy. However, in our decision dated June 16, 2014, we withdrew our own finding in our initial decision dismissing the appeal on September 28, 2010, that the Beneficiary also committed fraud or willful misrepresentation of a material fact during the labor certification process. By a preponderance of the evidence we found that the Beneficiary, in accord with his declaration in Section L of the ETA Form 9089, did not incorrectly or untruthfully answer any questions in sections J and K of the labor certification.

The Petitioner filed its sixth motion to reopen and reconsider on July 11, 2014, along with a brief from counsel and supporting documentation including copies of an affidavit from the Beneficiary about his former attorney, page 1 of the Petitioner's federal income tax returns for the years 2005-2011 and the Petitioner's California Corporation Franchise or Income Tax Returns for the years 2005-2011, along with the Beneficiary's Form W-2, Wage and Tax Statement, for 2010. The Petitioner reiterates the previous claim that it should not be penalized for relying upon the advice of a previous attorney in providing information to the DOL and U.S. Citizenship and Immigrations Services (USCIS). The Petitioner asserts that it did not intentionally deceive the DOL or USCIS on the labor certification application or elsewhere in these proceedings with regard to its business operation or the familial and ownership relationships between the Petitioner and the Beneficiary. The Petitioner also reiterates the claim that it has had the continuing ability to pay the proffered wage from the priority date onward,

¹ The false address was ascertained in a site inspection by U.S. Citizenship and Immigration Services and brought to the Petitioner's attention in the NSC Director's Notice of Intent to Revoke the approved petition, dated September 4, 2009.

(b)(6)

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asserting in particular that “[if] the employer’s balance sheet shows sufficiently *favorable ratio of total assets to total liabilities*, USCIS generally assumes that the petitioner can afford the proffered wage.” (Emphasis in the original.)

The requirements for a motion to reopen are set forth in the regulation at 8 C.F.R. § 103.5(a)(2):

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.

The requirements for a motion to reconsider are set forth at 8 C.F.R. § 103.5(a)(3):

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 United States Citizenship and Immigration Services (USCIS) 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.

As further provided in 8 C.F.R. § 103.5(a)(4):

A motion that does not meet applicable requirements shall be dismissed.

The Petitioner’s current motion does not state any new facts with regard to the incorrect information provided on the labor certification that led to the finding of fraud or willful misrepresentation of material facts by the Petitioner. These facts were extensively discussed in our decision denying the first motion to reopen and reconsider on December 21, 2011. Even if we accepted the Petitioner’s claim, *arguendo*, that the errors on the labor certification were the fault of the original attorney, not apprising oneself of the contents of an immigration document before signing it is generally not recognized as a defense to misrepresentation. *See Hanna v. Gonzalez*, 128 Fed. Appx. 478, 480 (6th Cir. 2005). Moreover, the labor certification was signed by the Petitioner’s Human Resources Specialist, [REDACTED] directly below a declaration in section N of the ETA Form 9089 which reads as follows: “**I declare** under penalty of perjury that I have read and reviewed this application and that to the best of my knowledge the information contained herein is true and accurate.” (Emphasis in the original.)

Nor have any new facts or pertinent documents been submitted on the issue of the Petitioner’s ability to pay the proffered wage, which has also been extensively discussed in our previous decisions. We have previously considered all pertinent tax documentation submitted by the Petitioner as well as the Petitioner’s overall financial situation as in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg’l Comm’r 1967).² The Petitioner has not shown that we incorrectly applied any law or USCIS policy, and

² As noted in our previous decision dated June 16, 2014, corporate income tax returns (Forms 1120) for the years 2006 and 2007 recorded gross receipts of only \$20,448 and \$4,500 for those two years – far below the proffered wage of

offers no precedent decision or other legal authority to support its claim that USCIS generally assumes a petitioner can pay the proffered wage if it has a “favorable ratio of total assets to total liabilities.” For the reasons discussed above, the Petitioner has not met the requirements for a motion to reopen or a motion to reconsider as set forth at 8 C.F.R. § 103.5(a)(2) and (3).

As stated in our prior decisions, 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. With the current motion, the Petitioner has not met that burden. Therefore, the motion will be dismissed in accordance with 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of R-T-M-, Inc.*, ID# 15874 (AAO Apr. 6, 2016)

\$45,843.20. It is unclear how the petitioner’s gross receipts, which are less than the proffered wage, could substantiate its ability to pay the proffered wage under the regulation at 8 C.F.R. § 204.5(g)(2) or the ruling in *Matter of Sonogawa*. This disparity between gross receipts and the proffered wage in 2006 and 2007 reinforces our finding in our decision dismissing the appeal on September 28, 2010, that the petitioner’s job offer was not a *bona fide* employment opportunity. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg’l Comm’r 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary’s proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa, supra*.