U.S. Citizenship and Immigration Services

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

In Re: 18712508

Date: JUL. 25, 2022

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for a Skilled Worker

The Petitioner, a sole proprietor and operator of retail shipping stores, seeks to employ the Beneficiary as an administrative assistant. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant category (EB-3). Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(B)(3)(A)(i). The EB-3 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 Director of the Nebraska Service Center denied the petition on the ground that the Petitioner did not establish his ability to pay the proffered wage of $35,692.80 per year from the priority date of December 8, 2006, onward. We also dismissed the appeal concluding that the Petitioner did not establish its continuing ability to pay the proffered wage from the priority date onward. We dismissed 15 subsequent motions to reopen and/or reconsider, in whole or in part, on the same ground.

The case is now before us on another motion to reopen and motion to reconsider. The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon review, we will dismiss the combined motions.

## I. LAW

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). Resubmitting previously provided evidence or reasserting previously stated facts do not meet the requirements of a motion to reopen. The new facts must also be relevant to the grounds of the unfavorable decision. A motion that does not meet the applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). A motion to reconsider must state the reasons for reconsideration; be supported by any pertinent precedent decision to establish that the decision was based on an incorrect application of law or policy; and establish that the decision was incorrect based on the evidence in the record at the time of the decision. 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

By regulation, the scope of a motion is limited to "the prior decision." 8 C.F.R. § 103.5(a)(1)(i). In other words, we examine any new arguments to the extent that they pertain to our most recent

dismissal of the Petitioner's motion to reopen and reconsider. Therefore, we cannot consider new objections to motions that we dismissed prior to our most recent decision, and the Petitioner cannot use the present filing to make new allegations of error at prior stages of the proceeding.

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." *See INS v. Abudu*, 485 U.S. at 110.

## II. ANALYSIS

The Petitioner's sole proprietor, Mr. P-, owns three UPS stores in the [redacted] metropolitan area. The record indicates that he purchased his initial store in 2005, acquired two more in 2007, sold the initial store in 2008, and purchased one more store in 2012. As a sole proprietor, Mr. P- operates his three stores under a single federal employer identification number. In our most recent decision, we stated that the Petitioner had not established its ability to pay the proffered wage of $35,692.80, noting that the record shows that the Petitioner came up short in 2010, in 2011, and in 2012. Therefore, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date of December 8, 2006, onward. We incorporate our prior decision dismissing the Petitioner's combined motions here by reference.[1]

### A. Motion to Reopen

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). In the current motion the Petitioner references or provides evidence relating to his financial condition in 2010-2012 which have already been considered in decisions prior to our most recent decision. Because the motion does not meet applicable requirements, we must dismiss it. 8 C.F.R. § 103.5(a)(4).

For instance, in support of the most recent motion, the Petitioner asserted that it had "uncovered a [redacted] account in 2011 with a balance of $27,722.77," alleging that we had not previously discussed the applicability of these funds to meet its shortfall to pay the proffered wage in 2011. In the instant motion, the Petitioner contends that we inappropriately "rejected the [redacted] account as not a new fact."

Notably, the Petitioner previously provided this evidence in support of the motion that we dismissed in November 2013. In that motion the Petitioner asserted that if the [redacted] funds were used to satisfy the Petitioner's financial obligations in 2009, these same funds could also be used to address shortfalls in 2010 and 2011. We concluded in our November 2013 decision that the Petitioner's proposition that the same funds could be recurrently used to cover the shortfalls in 2010 and 2011 was unsustainable. We also determined that the [redacted] fund proceeds should be valued at $17,868 after accounting for federal and state taxes, and the 10% tax penalty for early withdrawal of funds from this traditional individual retirement account. This resubmitted (and previously discussed) evidence does not meet the requirements of a motion to reopen as set forth at 8 C.F.R. § 103.5(a)(2).

[1] Our most recent decision was ID# 13071290 (AAO APR. 15, 2021).

Similarly, in our previous decision we discussed the Petitioner's request that we consider the payment of wages to part-time workers in 2012 as evidence that these workers could have been replaced by the Beneficiary, and their wages paid to the Beneficiary in 2012. However, we noted in our most recent decision and in previous decisions, (e.g., our March 2020 and October 2017 motion decisions), that for the years 2011 and 2012 we subtracted from Mr. P-'s personal expenses the wages paid to the part-time workers. The underlying documentation, such as the resubmitted Form W-2s for the part-time workers, was addressed and accounted for in our decisions prior to our most recent decision. Thus, the wages paid to the part-time workers are not "new facts" to support the Petitioner's motion to reopen. 8 C.F.R. § 103.5(a)(2).

The Petitioner also points to its assertion that it double listed its auto insurance payments of $450 per month as both a household expense and a business expense as a new fact to be considered, indicating that a total of $5,400 was available in 2010 to offset the shortfall in the proffered wage. As discussed in our most recent decision, the Petitioner did not provide documentary evidence to support this claim. In the instant motion, the Petitioner references its 2010 Schedule C tax return and listing of household expenses in which he accounted for his auto insurance expenses. Here, the Petitioner has not provided documentary evidence of his car insurance premium costs in that year, to show that it in fact double listed this expense. Nonetheless, considering the $33,755 shortfall in the proffered wage in 2010, even if we credited the Petitioner with $5,400 in that year and concluded that the 2010 wage shortfall should actually be $28,375, this would not establish the Petitioner's ability to pay the proffered wage in 2010. Therefore, the Petitioner would still not establish eligibility for the benefit sought and we did not err in dismissing his previous motion. 8 C.F.R. § 103.5(a)(4).

B. Motion to Reconsider

The Petitioner has not demonstrated that our previous decision is based on an incorrect application of law or policy, nor has the Petitioner's motion shown that our prior decision is incorrect based on the evidence before us when we issued the decision. 8 C.F.R. § 103.5(a)(3). The Petitioner does not identify any incorrect application of law or policy in our prior decisions with regard to the Petitioner's ability to pay the proffered wage during the years 2010-2012. The Petitioner once again urges us to consider the totality of its circumstances, in accordance with *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967), but we have already done so in prior decisions.

The Petitioner also reiterates his previous objections regarding our previous references to *Ubeda v. Palmer*, 539 F.Supp. 647, 650 (N.D. Ill. 1982), *aff'd* 703 F.2d 571 (7th Cir. 1983). The Petitioner takes issue with the inclusion of his estimated household expenses in our calculations, noting that he prefers instead that we use the federal government's poverty guidelines (FPG) in our analysis. On motion, the Petitioner acknowledges that "[a]dmittedly, the Petitioner's estimate of his actual expenses may be more accurate than (FPG)." As previously discussed, a sole proprietor's household expenses are an integral part of any determination of his or her overall financial situation. The Petitioner has not demonstrated that our decision to use his own estimated household expenses instead of FPG in our ability to pay determination was based on any incorrect application of law or USCIS policy.

Based on the foregoing, we conclude that the instant motion does not meet the requirements of a motion to reconsider and must therefore be dismissed. 8 C.F.R. § 103.5(a)(3); 8 C.F.R. § 103.5(a)(4).

## III. CONCLUSION

The Petitioner has not shown proper cause for the reopening or reconsideration of our previous decision with regard to the Petitioner's continuing ability to pay the proffered wage from the priority date of the petition, onward.

**ORDER**: The motion to reopen is dismissed.

**FURTHER ORDER:** The motion to reconsider is dismissed.