U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: EAC-01-147-53936 Office: VERMONT SERVICE CENTER Date: JUN 22 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
for Administrative Appeals Office

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DISCUSSION: The Director of the Vermont Service Center denied the immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal and affirmed its decision on a motion to reopen. The matter is again before the AAO on motion to reopen or reconsider. The motion will be dismissed.

The petitioner is a hotel. It seeks to employ the beneficiary permanently in the United States as an accountant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly. The AAO affirmed the director's decision and dismissed both a subsequent appeal and a motion to reopen.

On motion, counsel submits an affidavit by counsel asserting additional facts.

Counsel's submission of additional evidence does not satisfy either the requirements of a motion to reopen or a motion to reconsider. 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. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) 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 Bureau policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

On motion, counsel attaches an affidavit signed by himself that asserts the following:

> Substantial financial data was submitted by [the] [p]etitioner, along with evidence by affidavit, which does not appear to have been fully considered, and which [the] [p]etitioner believes can be buttressed and elucidated through additional documentary evidence establishing: (A) that [the] [p]etitioner has had, since 1997, access to sufficient funds to pay salary through payable-on-demand loans made by [the] [p]etitioner to corporate officers; (B) that [the] [p]etitioner has made payments to the [b]eneficiary demonstrating financial resources sufficient to pay the offered wage; and (C) that [the] [p]etitioner has incurred expenses for accounting services which would be available to meet [the] salary for the [b]eneficiary once permission to hire on the terms and conditions stated in the job offer is granted.

Counsel's statements are not persuasive. At the outset, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel does not attach supporting documentation to corroborate his assertions. There is no statement or evidence from the petitioner. The statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

If the petitioner had evidence since 1997 concerning additional funds, it should have been submitted much earlier in these proceedings. The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). The purpose of the request

for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now seeks for consideration of evidence it still does not submit but through its attorney claims it has. Even if the evidence were submitted, however, the AAO would not consider it for any purpose. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Counsel's statement concerning wages already paid to the beneficiary is redundant as evidence and argument concerning this issue was adjudicated previously. There is no new evidence or argument concerning that point and thus the submission fails to meet the requirements of a motion since these facts were previously available and discovered earlier in the proceedings.

Counsel's statement concerning the petitioner's use of accounting services as an expense to be applied towards paying the beneficiary's salary also does not meet the requirements of a motion because there is no corroborating evidence to support this assertion.

As previously stated, a motion to reopen must state the new facts that will be proven if the matter is reopened, and must be supported by affidavits or other documentary evidence. Generally, the new facts must have been previously unavailable and could not have been discovered earlier in the proceedings. *See* 8 C.F.R. § 3.2(c)(1). Here, there is no evidence being submitted along with new factual assertions testified to by counsel alone. The motion and counsel's affidavit also fail to satisfy the requirements of a motion to reconsider. Although counsel states that the decision to deny approval of the petition was an incorrect application of the law, he does not support his assertion by any pertinent precedent decisions, or establish that the director misinterpreted the evidence of record.

While counsel asserts that additional evidence will be submitted within 30 days, there is no provision allowing for the submission of supplemental materials to a motion. A motion must meet the requirements of a motion when it is filed.

A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion is dismissed.