(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

DATE: FEB 28 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The petitioner appealed to the Administrative Appeals Office (AAO), which dismissed the appeal. The petitioner filed a motion to reconsider. The motion will be dismissed for failure to meet applicable requirements. The AAO's prior decision will be affirmed.

The petitioner is a corporation that has owned and operated a restaurant since [1]. The petitioner seeks to employ the beneficiary permanently in the United States as a cook at an offered wage rate of $9.75 an hour (or $20,280 a year based on a 40-hour work week).

As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The petitioner seeks to classify the beneficiary pursuant to section 203(b)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), as a skilled worker capable of performing skilled labor requiring at least two years of training or experience.

The director determined that the petitioner failed to demonstrate the continuing ability to pay the offered wage rate since the the petition's April 30, 2001 priority date. *See* 8 C.F.R. § 204.5(g)(2). The director denied the petition accordingly.

In its August 25, 2010 decision, the AAO rejected the petitioner's argument that U.S. Citizenship and Immigration Services (USCIS) should consider its depreciation expenses in its annual net income amounts. Also, without evidence of the officer's annual living expenses, the AAO found the record insufficient to conclude that the petitioner's president could have supported himself and any dependents on reduced annual compensation amounts while paying the offered wages of the beneficiary and two other workers the petitioner said it had sponsored to obtain immigrant visas.

On its most recent Form I-290B, Notice of Appeal or Motion, the petitioner checked box "E," indicating that it was filing a 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." 8 C.F.R. § 103.5(a)(3). A motion to reconsider must also "establish that the decision was incorrect based on the evidence of record at the time of the initial decision." *Id.*

The petitioner's motion includes: copies of Internal Revenue Service (IRS) Forms W-2 for 2008 and 2009 regarding its payments to the beneficiary and the two other employees on whose behalf it claims to have filed immigrant visa petitions; copies of its 2008 and 2009 federal income tax returns; and a September 22, 2010 letter from its president and sole shareholder stating that he is "willing and able to forego" his officer compensation to pay the sponsored employees and that the petitioner is "no longer willing to sponsor [one of the two other employees], as [he] no longer works for [the] company."[2]

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[1] The petitioner's legal name is but it does business as according to a letter from the petitioner's president and the petitioner's federal tax returns.

[2] The petitioner's labor certification is signed by whom the labor certification identifies as the petitioner's president. also signed the Form I-140 petition and all

All of the documents listed above, however, constitute new evidence, which the AAO cannot consider. *See* 8 C.F.R. § 103.5(a)(3) (a motion to reconsider must establish that the decision was incorrect "based on the evidence of record at the time of the initial decision").

In light of the petitioner's decision to cease immigrant sponsorship of one of its employees and the willingness of its president to forego his compensation, counsel argues that the AAO should reconsider its analysis under *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967), which allows USCIS to consider the totality of the circumstances affecting a petitioner's business in determining its ability to pay the offered wage.

Again, however, the AAO cannot consider the petitioner's decision to withdraw another worker's job offer and its effect on the petitioner's ability to pay, as this argument is based on new evidence, not "the evidence of record at the time of the initial decision."[3] *See* 8 C.F.R. § 103.5(a)(3).

Also, as part of its *Sonegawa* analysis on appeal, the AAO considered the willingness of the petitioner's president to forego his compensation. The AAO acknowledged that the president stated in a May 6, 2008 letter that he "would have reduced [his] own compensation so that the proffered wage be paid from 2001 to the present.." AAO Decision, p. 6. The petitioner has not stated why the AAO's previous *Sonegawa* analysis was incorrect, nor has it supported its argument with "any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy." *See* 8 C.F.R. § 103.5(a)(3).

The petitioner's motion fails to meet an additional requirement. The regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." The petitioner's motion does not contain the statement that the regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C) requires.

Because the petitioner's motion does not meet the applicable requirements for a motion to reconsider, the AAO will dismiss the motion pursuant to the regulation at 8 C.F.R. § 103.5(a)(4)("A motion that does not meet applicable regulations shall be dismissed.").

Forms G-28, attorney authorizations, on behalf of the petitioner. Letters in response to the director's Request for Evidence and in the petitioner's appeal and motion, however, are signed by and identify the signer(s) as the petitioner's president. All of the petitioner's federal tax returns identify as the petitioner's sole shareholder. It is unclear whether all of the signatures, names and titles mentioned above belong to the same person.

[3] According to USCIS records, on September 28, 2007, the petitioner filed an immigrant visa petition for the worker for whom it has decided to withdraw its job offer. The petition was filed under the name with correspondence sent to the attention of USCIS approved the petition on April 23, 2008. The petition's approval has not been withdrawn or revoked. USCIS has no record of the beneficiary applying for or receiving lawful permanent resident status. The AAO could not find record of an immigrant visa petition by the petitioner on behalf of the third worker it claimed to sponsor.

Motions to reopen and/or reconsider immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for new trials 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." *Abudu*, 485 U.S. at 110. With the current motion, the petitioner has failed to meet that burden. The motion 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.

ORDER: The motion is dismissed. The AAO's August 25, 2010 decision is affirmed.