

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**



(b)(6)

Date: **JUL 25 2013**

Office: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner:
Beneficiary: [REDACTED]

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center denied the immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal on July 13, 2012. On August 14, 2012, the petitioner filed a motion to reopen and a motion to reconsider the AAO's decision of July 13, 2012. On April 24, 2013, the AAO denied the petitioner's motion to reopen and motion to reconsider and affirmed its decision of July 13, 2012. The matter is again before the AAO on a motion to reopen and motion to reconsider the AAO's April 24, 2013 decision. The motion to reopen will be denied. The motion to reconsider will be denied. The petition remains denied. The AAO affirms its decisions of June 13, 2012 and April 24, 2013.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a "Specialty Cook/Japanese." 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 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. The director denied the petition accordingly. The AAO affirmed the director's decision finding that the petitioner had not established the petitioner's ability to pay the beneficiary's proffered wage and further that the record failed to establish that the petitioner was the valid successor to the initial entity that filed the labor certification. The AAO then issued a decision (April 24, 2013) denying the petitioner's motion to reopen and motion to reconsider and reaffirming its prior decision dismissing the petitioner's appeal (July 13, 2012).

The record shows that the motion to reopen and motion to reconsider is properly filed. 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 regulation at 8 C.F.R. § 103.5 provides in pertinent part that "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." "New" facts are those that were not available and could not reasonably have been discovered or presented in the previous proceeding. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

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 [USCIS] 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). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

As noted above, 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." "New" facts are those that were not available and could not reasonably have been discovered or presented in the previous proceeding. A motion that does not meet applicable requirements shall be dismissed. The petitioner did not state new facts to be considered in the reopened proceeding that were not available and could not reasonably have been discovered or presented in the previous proceeding. Counsel repeats what he stated on the prior motion to reopen. As such the motion to reopen is denied.

The motion to reconsider shall be denied as the motion does not state reasons for reconsideration which are supported by pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [USCIS] policy, nor does the motion 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). Similar to the prior motion filed, the petitioner states that the AAO raised new issues (not identified by the petitioner) which the petitioner had not had an opportunity to address and that additional documentation would be provided within 45 days to address those unidentified issues.¹ All new issues were addressed in the AAO's July 13, 2012 decision, which the petitioner failed to address in its prior motion. To date, more than 45 days after filing the motion to reconsider, the petitioner has submitted no additional information.² The petitioner states that the AAO did not adequately address documents submitted in support of the petition. The petitioner, however, did not identify these documents or otherwise state how the documents established the ability to pay the proffered wage and were misconstrued by the AAO. The petitioner has offered no evidence (new or otherwise) or statement that would establish that the AAO's prior decision (April 24, 2013) was incorrect based on evidence of record at the time of the initial decision. 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 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 to reopen is denied. The motion to reconsider is denied. The AAO's decision of April 24, 2013 is affirmed. The petition remains denied.

¹ The Form I-290B requires that any brief or additional evidence be submitted at the time of filing the petitioner's motion to reopen. See 8 C.F.R. § 103.5(a)(1)(i).

² Similarly, in the petitioner's prior motion the petitioner failed to submit any documentation with the Form I-290B and requested additional time to send documentation.