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)

[redacted]

Date: JUN 1 2 2013 Office: NEBRASKA SERVICE CENTER [redacted]

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]

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.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter was before the Administrative Appeals Office (AAO) on appeal, and the appeal was dismissed. A motion to reopen and reconsider was filed on May 31, 2012. The motion will be rejected pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(*1*).

The petitioner describes itself as a Chinese restauraunt. It seeks to permanently employ the beneficiary in the United States as a Chinese specialty cook. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).

The director's decision denying the petition concludes that the petitioner did not establish it possessed the continued ability to pay the proffered wage. The AAO's decision dismissing the appeal concluded that: the petitioner failed to establish its ability to pay the proffered wage; the beneficiary did not possess the required minimum experience; and, that counsel's assertions regarding American Competitiveness in the Twenty-First Century Act (AC21) were misplaced.

The record indicates that the petitioner no longer intends to employ and pay the beneficiary. Counsel for the beneficiary states that a new entity plans to employ the beneficiary, utilizing the provisions of AC21.

The record of proceeding contains a properly executed Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, for the beneficiary's representative. However, the copy of the Form G-28 submitted with the instant motion was signed by the original petitioner, and dated June 7, 2006. The record shows the petitioner no longer has an interest in the instant petition. Although counsel states the new employer will utilize the provisions of AC21, there is no evidence to show that a new employer has attempted to supplant the original petitioner in visa petition procedings. 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). The regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B) specifically prohibits a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing a motion. There is no evidence in the record that the petitioner or subsequent employer consented to the filing of the motion.

As the motion was not properly filed, and it is unclear whether or not the petitioner consented to having a motion filed on its behalf, it will be rejected. 8 C.F.R. § 103.3(a)(2)(v)(A)(*1*).

We note that even if the record contained a properly executed Form G-28, the motion would be dismissed.

The regulations at 8 C.F.R. § 103.5(a)(2) state, 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." Based on the plain meaning of "new," a new fact is found to be evidence that

was *not available and could not have been discovered or presented in the previous proceeding.*[1] Emphasis added.

The regulations at 8 C.F.R. § 103.5(a)(3) state that "[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. 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."

Counsel's sole argument on the motion is that the provisions of AC21 require approval of the instant petition. This issue was addressed at length in the AAO's dismissal. The petitioner has provided no new evidence or controlling law on the subject.

ORDER: The motion is rejected.

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[1] The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <*new* evidence> . . . ." *Webster's II New Riverside University Dictionary* 792 (1984)(emphasis in original).