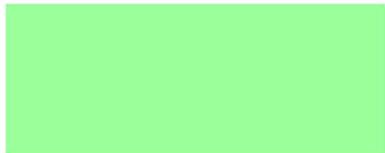
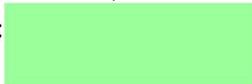


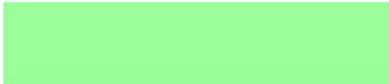
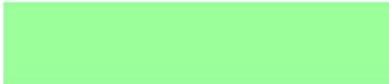


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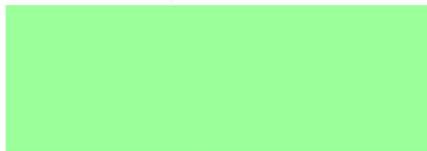


DATE: **MAR 28 2013** OFFICE: NEBRASKA SERVICE CENTER FILE: 

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, which was then appealed to Administrative Appeals Office (AAO). The appeal was dismissed. This motion to reopen and reconsider that dismissal was then filed with the AAO. The motion will be dismissed.

The petitioner is a delicatessen. The director found that the petitioner did not have the continued ability to pay the proffered wage of \$17.65 per hour (\$36,712 per year based on a forty hour work week). The petitioner appealed that decision to the AAO. The AAO decision agreed with the director that the petitioner failed to establish that it possessed the continued ability to pay the proffered wage.

The AAO decision found that the petitioner failed to establish it had paid the beneficiary the full proffered wage at any time from the priority date onward. The AAO then examined the petitioner's net income, and net current assets to determine if the petitioner could establish its continued ability to pay the proffered wage from those sources. The analysis showed the petitioner did not have the ability to pay the proffered wage at any time except 2003.

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."

In this matter, the petitioner presented no facts or evidence on motion that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen. As the petitioner was previously put on notice and provided with a reasonable opportunity to provide the required evidence, the evidence submitted on motion will not be considered "new" and will not be considered a proper basis for a motion to reopen.

With its motion the petitioner provided printouts from its website, printouts from restaurant review website [REDACTED] affidavits from the petitioner's two owners, and a statement from [REDACTED]. The petitioner's website does not provide any information relevant to its ability to pay the proffered wage.

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).

The pages from [REDACTED] likewise fail to shed light on the petitioner's ability to pay the proffered wage. The review shows that diners have rated the petitioner's food anywhere from one to four stars on a five star scale. Additionally, the earliest review included was from 2007. This is not compelling evidence of the petitioner's reputation as was established in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967), nor does it show how the petitioner was able to pay the proffered wage from the priority date in 2001. The affidavits from the petitioner's owners are not new evidence, as they could have been provided with the petition or prior appeal. Notwithstanding that, the AAO in its prior decision analyzed the owner's compensation, and determined it was not realistic for the owners to forgo an amount so great to cover the proffered wage. Finally, the letter from [REDACTED] contains a summary of the petitioner's tax returns, which were already submitted. The letter does not include [REDACTED] title. According to [REDACTED] letterhead he is a "professional accountant and income tax preparer," and not a Certified Public Accountant. The letter purports to show that the petitioner had the ability to pay the proffered wage when depreciation expenses were considered. The court in *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009), noted that the AAO's refusal to consider depreciation when determining the continued ability to pay is acceptable. In short, everything provided with the motion was available when the petitioner filed the instant petition, and the subsequent appeal.

In the motion to reopen or reconsider, the petitioner alleges the AAO erred by not considering [REDACTED] letter. However, as noted above, the letter does not contain evidence which can be relied upon to show the petitioner had the continued ability to pay the proffered wage. As the petitioner failed to establish error pursuant to 8 C.F.R. § 103.5(a)(3), the motion cannot be granted.

The regulations governing motions to reopen and reconsider require the petitioner to provide a statement with the motion addressing whether or not the decision has been the subject of judicial proceedings. See 8 C.F.R. § 103.5(c). The petitioner failed to provide this assurance and thus has not complied with the regulations.

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." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. The motion will be dismissed.

As the motion does not surmount the high burden, it must be denied.

ORDER: The motion to reopen and reconsider is rejected. The petition remains denied.