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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: MAR 29 2013 Office: NEBRASKA SERVICE CENTER FILE: [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.

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: On August 22, 2011 the Administrative Appeals Office (AAO) dismissed the appeal and affirmed the decision of the Director, Nebraska Service Center (the director). The petitioner has now filed a motion to reconsider the AAO's decision.[1] The motion will be granted, and the appeal will be reconsidered. Upon reconsideration, the appeal will be dismissed, and the petition will be denied.

The petitioner is a gas station and convenience store.[2] It seeks to employ the beneficiary permanently in the United States as a night manager, pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).[3] 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 denied the petition, finding that the petitioner did not have sufficient net income or net current assets to pay the proffered wage from the priority date. The petitioner subsequently appealed the director's decision.

Upon review, the AAO agreed with the director and dismissed the appeal in its August 2011 decision. Beyond the decision of the director, the AAO found that the petitioner failed to establish that the beneficiary possessed the requisite work experience in the job offered before the priority date. The AAO noted inconsistencies in the record between where the beneficiary lived and worked from 1996 to 1999. According to the beneficiary's Form G-325 (Biographic Form) – which she filed in connection with her Application to Register Permanent Residence Status or Adjustment Status – the beneficiary lived in Karachi, Pakistan, from 1974 to 2000. The AAO observed the location of the business where the beneficiary claimed to have worked as

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[1] The AAO notes that the petitioner checked Box B on the Form I-290B, which states "I am filing an appeal." However, the accompanying narrative states that "[t]his Motion to Reconsider is written in response to the dismissal of our Appeal dated August 22, 2011." It is noted that the AAO does not exercise appellate jurisdiction over its own decisions. The AAO exercises appellate jurisdiction over only the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). See DHS Delegation Number 0150.1(effective March 1, 2003). An appeal of an AAO appeal is not properly within the AAO's jurisdiction. However, because the petitioner characterized its filing as a motion to reconsider on the Form I-290B, it will be accepted as one, despite the incorrect box being checked on the form.

[2] The petitioner is a franchisee of 7-Eleven.

[3] Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

manager in Pakistan is in Lahore. We found that it is unlikely that the beneficiary could have lived in Karachi and worked in Lahore between 1996 and 1999.[4]

On motion to reconsider, counsel for the petitioner maintains that the petitioner has the continuing ability to pay based on the expectations of continued increase in the business and the profits. The petitioner submits a copy of its most current federal tax return and indicates that the net currents assets for the years 2001 through 2003 and from 2006 onward (until 2010) have exceeded the beneficiary's proffered wage of $23.59 per hour or $49,067.20 per year. Based on the petitioner's net current assets, counsel argues that the petitioner is a viable business entity that can reasonably expect to pay the beneficiary's proffered wage.

The record shows that the motion is properly filed, timely and supported by new evidence. The AAO conducts this appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted in this proceeding.[5]

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 USCIS 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. 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).

Here, the motion states the reasons for reconsideration, and counsel argues that the AAO erroneously applied the law to this case. The motion to reconsider is granted, and the appeal will be reconsidered. Upon reconsideration, we find that the previous AAO decision is based on the correct application of law and regulations. On motion, counsel essentially requests the AAO to consider the totality of the petitioner's circumstances based on the *Sonegawa* holding. *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967).

However, we have considered the *Sonegawa* holding in our August 2011 decision. We specifically acknowledged the viability of the petitioner's business since 1997, but stated that unlike *Sonegawa*, the petitioner in this case had not shown any evidence reflecting the business' reputation, nor had it included any proof showing the business' milestone achievements. Further, we indicated that the petitioner had not shown any unusual circumstances that paralleled those in *Sonegawa*. The petitioner has not submitted any additional evidence to establish its

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[4] The distance between Karachi and Lahore, according to world distance calculator (http://www.distancecalculator.globefeed.com) is about 1,274 km (roughly 792 miles).

[5] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

ability to pay the proffered wage from the priority date onwards. Thus, the AAO is not persuaded that the petitioner has established the ability to pay the proffered wage from the priority date and continuously until the beneficiary receives lawful permanent residence.

With respect to the beneficiary's qualifications, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). To resolve the inconsistencies in the record relating to where the beneficiary lived and worked between 1996 and 1999, counsel submits the following evidence:

- An affidavit dated September 20, 2011 from the beneficiary stating that for about three years from June 1996 to April 1999, she cared for her uncle in the evening and worked during the day as a manager in Lahore, Pakistan;
- An affidavit dated September 16, 2011 from stating that the beneficiary resided in Lahore with her uncle and aunt from June 1996 to April 1999 and that she looked after her ailing uncle and aunt; and
- A letter of employment verification dated September 12, 2011 from , Chief Executive, stating that the beneficiary was employed as a manager at from September 1996 to April 1999.

The AAO is not persuaded that the beneficiary possessed the minimum experience required on the Form ETA 750 as of the priority date. The petitioner has not submitted any independent objective evidence, i.e. the pay stubs, payroll records, the beneficiary's identification card showing where she lived and worked from 1996 to 1999. None of the evidence submitted above resolves the inconsistencies in the record. As noted above, the petitioner must resolve the inconsistencies in the record by submitting independent objective evidence. *Matter of Ho*, 19 I&N at 591-92.

The appeal will be dismissed, and the petition denied for the reason stated above, with each considered as an independent and alternative basis for the decision. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion is granted; upon reconsideration the appeal is dismissed, and the petition is denied.