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: MAY 0 3 2013 Office: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

Petition: Immigrant Petition for Alien Worker as Skilled Worker or Professional pursuant to § 203(b)(3)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i)

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, Texas Service Center denied the immigrant visa petition and the Administrative Appeals Office (AAO) rejected a subsequent appeal. The matter is again before the AAO on motion to reconsider. The motion to reconsider the petition will be dismissed. The AAO's decision of November 25, 2011 is affirmed.

The petitioner is an Italian restaurant. It seeks to employ the beneficiary permanently in the United States as a head chef. 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 rejected the appeal and stated in its decision:

> The record of proceeding contains an improperly executed Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative. Specifically, both G-28s in the record of proceeding contain the petitioner's name as the name of the person consenting, but are signed by the beneficiary and not the petitioner. Additionally, the Form I-290B, Notice of Appeal or Motion, was not signed by the petitioner but rather the beneficiary's representative. United States Citizenship and Immigration Services' (USCIS) regulations specifically prohibit a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing an appeal. 8 C.F.R. § 103.3(a)(1)(iii)(B). No evidence suggests that the petitioner authorized the filing of the appeal.

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).

Counsel states that the Form I-290B may be signed by the attorney of record; the Form I-290B was properly signed by the attorney; the Form I-290B indicated that the appeal was being filed on behalf of the restaurant and not on behalf of the beneficiary; the Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, was signed on behalf of the beneficiary; and the filing fee check was drawn on the petitioner's name and signed by the petitioner's manager. With the motion, the petitioner has submitted additional evidence of the petitioner's claimed ability to pay the beneficiary the proffered wage including paycheck stubs and federal tax returns for the beneficiary. The motion to reconsider will be dismissed as the motion is not supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A review of the record shows that the Form I-290B in the prior appeal submitted was signed by counsel, and submitted with a Form G-28 signed by the beneficiary. A prior Form G-28 submitted with Form I-140 was also signed by the beneficiary and not the petitioner's representative.

Furthermore, the motion shall be dismissed for failing to meet an applicable requirement. The regulation at 8 C.F.R. §§ 103.5(a)(1)(iii) lists the filing requirements for motions to reconsider. Section 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." In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C) it must also be dismissed for this reason.

The AAO notes that the appeal was properly rejected as the Form G-28 was signed by the beneficiary. In the event that the motion was granted, which it is not, the AAO would note that while the new G-28 with the motion to reconsider is properly filed, the evidence in the record is not sufficient to establish that the petitioner had the continuing ability to pay the beneficiary the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2) beginning on the priority date of the visa petition continuing onward based on a review of wages paid to the beneficiary, the petitioner's net income and the petitioner's net current assets. The record does not include sufficient evidence to establish that the petitioner could pay the proffered wage in 2006 or 2008.

The AAO also notes that the position offered requires four years of experience. The petitioner is required to provide employer/trainer letter(s) reflecting that the beneficiary has the required experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). In this case, no evidence was submitted to document the beneficiary's claimed employment experience. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). The record does not establish that the beneficiary possessed the minimum experience required to perform the offered position by the priority date.

The petition would be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motion to reconsider is dismissed. The previous decision of the AAO dated November 25, 2011 is affirmed.