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

DATE: MAY 2 8 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 employment-based immigrant visa petition on May 30, 2009. The petitioner filed an appeal on June 29, 2009, which the Administrative Appeals Office (AAO) dismissed on September 10, 2012. The petitioner filed a motion to reopen and a motion to reconsider the AAO's decision on October 9, 2012, which is now before the AAO.[1] The motions will be dismissed, the previous September 10, 2012 decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is a family restaurant seeking to employ the beneficiary as a specialty cook in accordance with section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).

On May 30, 2009, the director denied the petition, finding that the petitioner had failed to establish its ability to pay the beneficiary the proffered wage listed on the Application for Permanent Employment Certification, ETA Form 9089, from the date the application was filed with the U.S. Department of Labor, May 25, 2005, until the present. The director also found that the petitioner failed to demonstrate that the beneficiary possessed the requisite experience for the position as of the priority date. On September 10, 2012, the AAO dismissed the petitioner's appeal, finding that the petitioner failed to establish that the beneficiary possessed the requisite experience for the position as of the priority date. However, the AAO did find that the petitioner had established its continuing ability to pay the beneficiary the proffered wage from the priority date onwards.

On October 9, 2012, the petitioner filed a timely motion to reopen and motion to reconsider the AAO's September 10, 2012 decision. The regulation at 8 C.F.R. §§ 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and 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 motions do 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 motion which do not meet applicable requirements must be dismissed. Therefore, because the instant motions did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), they must be dismissed for this reason.

On motion, counsel concedes that the AAO accurately pointed out that the two letters submitted from [redacted] did not correctly explain when the beneficiary actually worked at [redacted] and when he left that employment. The petitioner submits five signed and notarized

[1] On the Form I-290B submitted on October 9, 2012, the petitioner checked Box A, which states "I am filing an appeal. My brief and/or additional evidence is attached." However, counsel's accompanying cover letter states that the petitioner is providing a "Statement for Grounds for Motion to Reopen/Reconsider." 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 counsel for the petitioner characterized the petitioner's filing as a motion to reopen and a motion to reconsider in the materials accompanying the Form I-290B, the filing will be accepted as a motion to reopen and a motion to reconsider despite the incorrect box being checked on the form.

affidavits to "clarify and confirm the facts in this case." The AAO notes that, in the affidavit submitted on motion from he states that he signed his previously submitted April 9, 2009 employment letter without really reviewing it or fully thinking about the dates listed regarding the beneficiary's prior employment with admits that his son drafted the letter and that this letter included mistakes.

On motion, the petitioner additionally resubmitted a copy of the labor certification that filed on behalf of the beneficiary on April 27, 2001, which lists the beneficiary as having worked for as a kitchen assistant/cook prep. from July 1998 through March 2000 and as a specialty cook from March 2000 onwards.

Counsel claims that the affidavits and the labor certification submitted demonstrate that the beneficiary worked for from July 1998 through April 2002. Counsel asserts that the beneficiary left in May 2002 and that he began working for the as a specialty chef in June 2003. Counsel concludes that the petitioner has demonstrated that the beneficiary possessed the requisite experience for the proffered position as of the May 25, 2005 priority date.

The USCIS regulation at 8 C.F.R. § 103.5(a)(3) states 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.

A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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.[2] Counsel fails to explain why any of the evidence submitted with this motion could not have been discovered or presented in the previous proceeding. A review of the evidence that the petitioner submits on motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2) and, therefore, cannot be considered a proper basis for a motion to reopen.

The present motion does not allege that the issues, as raised on appeal, involved the application of precedent to a novel situation or that there is a new precedent or a change in law that affects the AAO's prior decision. Accordingly, the AAO will dismiss the motion to reopen.

In the present motion to reconsider, the AAO finds that counsel did not cite any pertinent precedent decisions to establish that the AAO's decision was based on an incorrect application of law or USCIS policy. Counsel has failed to demonstrate a reasonable basis for the motion to reconsider. Counsel has not cited any precedent decisions on point.

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[2] 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).

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. Therefore, the motions will be dismissed in accordance with 8 C.F.R. § 103.5(a)(4).

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

ORDER: The motions are dismissed, the decision of the AAO dated September 10, 2012 is affirmed, and the petition remains denied.