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: OCT 10 2013 OFFICE: TEXAS 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Rachel Nitzio for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motion to reopen will be dismissed and the motion to reconsider will be granted. The previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner describes itself as an information technology, consulting and accounting business. It seeks to permanently employ the beneficiary in the United States as a programmer analyst. 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 petition is accompanied by a labor certification approved by the U.S. Department of Labor.

The AAO's decision dismissing the appeal concluded that the petitioner failed to establish its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions. The AAO also noted that the record does not establish the petitioner as the actual employer of the beneficiary.

A motion to reopen must provide new facts and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Statements made in support of a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). 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] 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. All evidence submitted on motion was previously available and could have been discovered or presented in the previous proceeding. It is further noted that the petitioner has submitted evidence with this motion that was originally requested by the AAO in a Notice of Intent to Dismiss and Derogatory Information dated September 10, 2012. 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. Thus, the motion to reopen is dismissed.

The motion to reconsider does qualify for consideration under 8 C.F.R. § 103.5(a)(3). Further, a party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. 94, 110 (1988). The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

---

[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).

On motion, counsel argues that the AAO made an erroneous decision through misapplication of law or policy. Counsel asserts on motion that the petitioner is only required to demonstrate its ability to pay the proffered wage on the priority date, counsel cites to 8 C.F.R. §204.5(d). Counsel support's his assertions with a chart prorating the wages and wages paid to its beneficiaries for the year 2003. Additionally, counsel assets that the AAO cannot seek the petitioner's information pertaining to the wages offered and paid to its temporary nonimmigrant workers. Counsel cites to a Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004). Finally, counsel asserts that the petitioner continues to be in business and provided copies of its registration renewal. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel claims that the petitioner need only provide evidence of ability to pay the proffered wage on the priority date. 8 C.F.R. §204.5(d) states:

> (d) Priority date. The priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an individual labor certification from the Department of Labor shall be the date the request for certification was accepted for processing by any office within the employment service system of the Department of Labor. The priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an application for Schedule A designation or with evidence that the alien's occupation is a shortage occupation within the Department of Labor 's Labor Market Information Pilot Program shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with the Service. The priority date of a petition filed for classification as a special immigrant under section 203(b)(4) of the Act shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with the Service. The priority date of an alien who filed for classification as a special immigrant prior to October 1, 1991, and who is the beneficiary of an approved I-360 petition after October 1, 1991, shall be the date the alien applied for an immigrant visa or adjustment of status. In the case of a special immigrant alien who applied for adjustment before October 1, 199 1, Form I-360 may be accepted and adjudicated at a Service District Office or sub-office.

While 8 C.F.R. §204.5(d) establishes how the AAO will consider the priority date of the approved labor certification, this section of law does not make any mention of a petitioner's ability to pay. Therefore, we find counsel's argument unpersuasive. Further, concerning ability to pay, the regulation at 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be

> accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

This regulation states that the petitioner must demonstrate its ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Additionally, the petitioner must produce evidence that its job offer to each additional beneficiary of an immigrant visa petition is realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending and approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). *See also* 8 C.F.R. § 204.5(g)(2) and 20 C.F.R. § 655.715. Therefore we find that the additional approved and pending immigrant visa petitions filed by the petitioner are germane, and that evidence of its ability to pay the proffered wages from the priority date onwards is necessary in establishing the petitioner's ability to pay the proffered wage. USCIS records reveal that the petitioner filed approximately ten other immigrant visa petitions since the priority date. Thus, we find counsel's claim that the AAO made an erroneous decision through misapplication of law or policy to be unpersuasive and that establishing the petitioner's ability to pay the proffered wage from the priority date onwards is required and necessary in adjudicating the instant immigration benefit.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The motion to reconsider is granted and the decision of the AAO dated June 13, 2013 is affirmed. The petition is denied.