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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B6



FILE:



Office: TEXAS SERVICE CENTER

Date:

JUL 23 2010

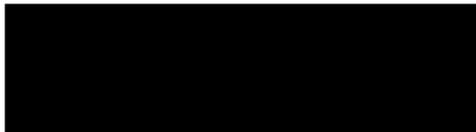
IN RE:

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:

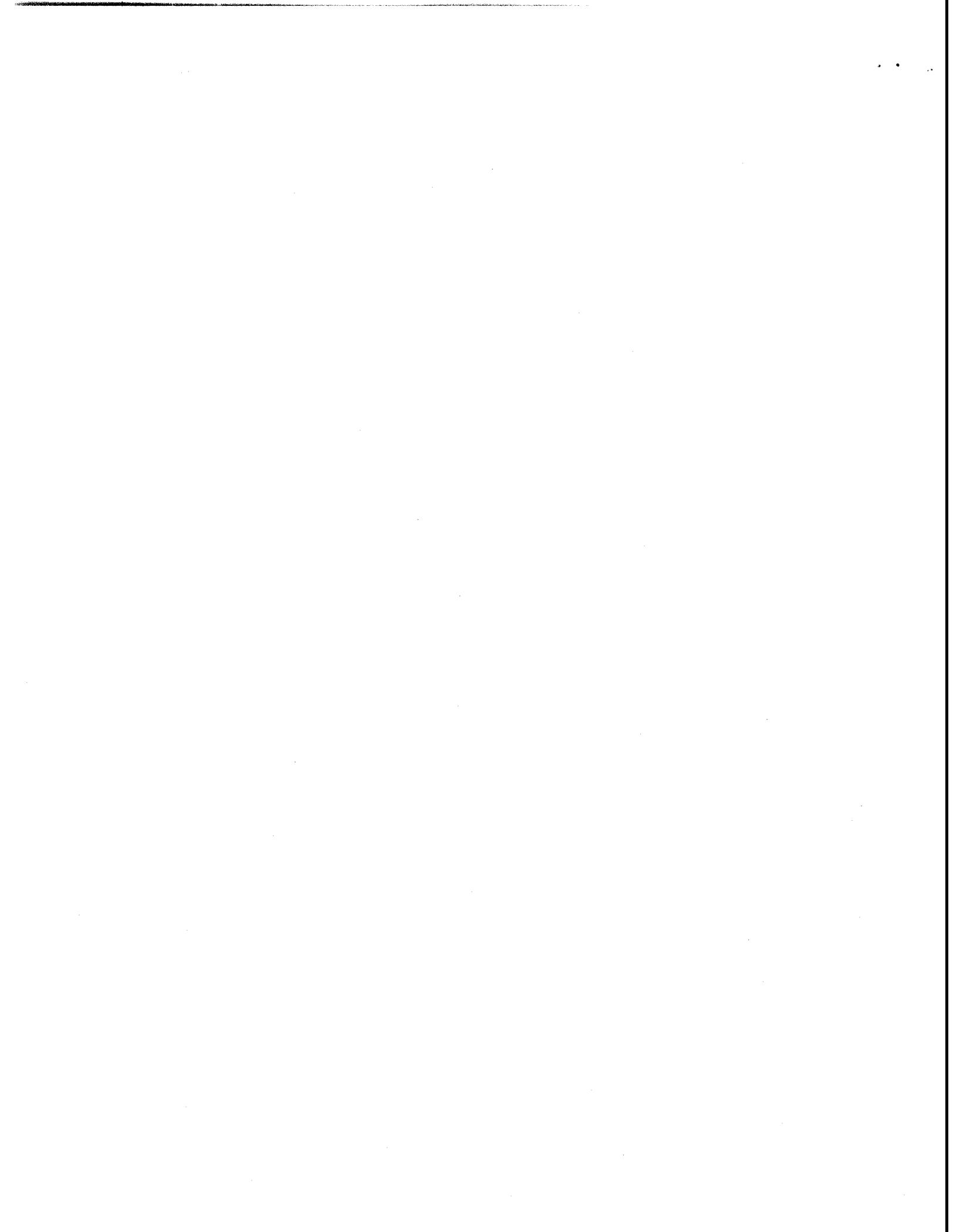
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew

Chief, Administrative Appeals Office



DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner appealed the director's decision and, on June 8, 2009, the Administrative Appeals Office (AAO) summarily dismissed the appeal. On June 29, 2009, counsel to the petitioner filed a Motion to Reopen and Reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The Motion will be dismissed pursuant to 8 C.F.R. §§ 103.5(a)(1)(iii)(C), 103.5(a)(2), 103.5(a)(3), and 103.5(a)(4).

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook (Iberian style). 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 summarily dismissed the subsequently filed appeal, finding that counsel had not specifically identified any erroneous conclusion of law or statement of fact and had not provided additional evidence. The AAO noted that counsel had indicated that a brief and/or additional evidence would be submitted to the AAO within 30 days of filing the appeal, but that no such brief or evidence had been received by the AAO.

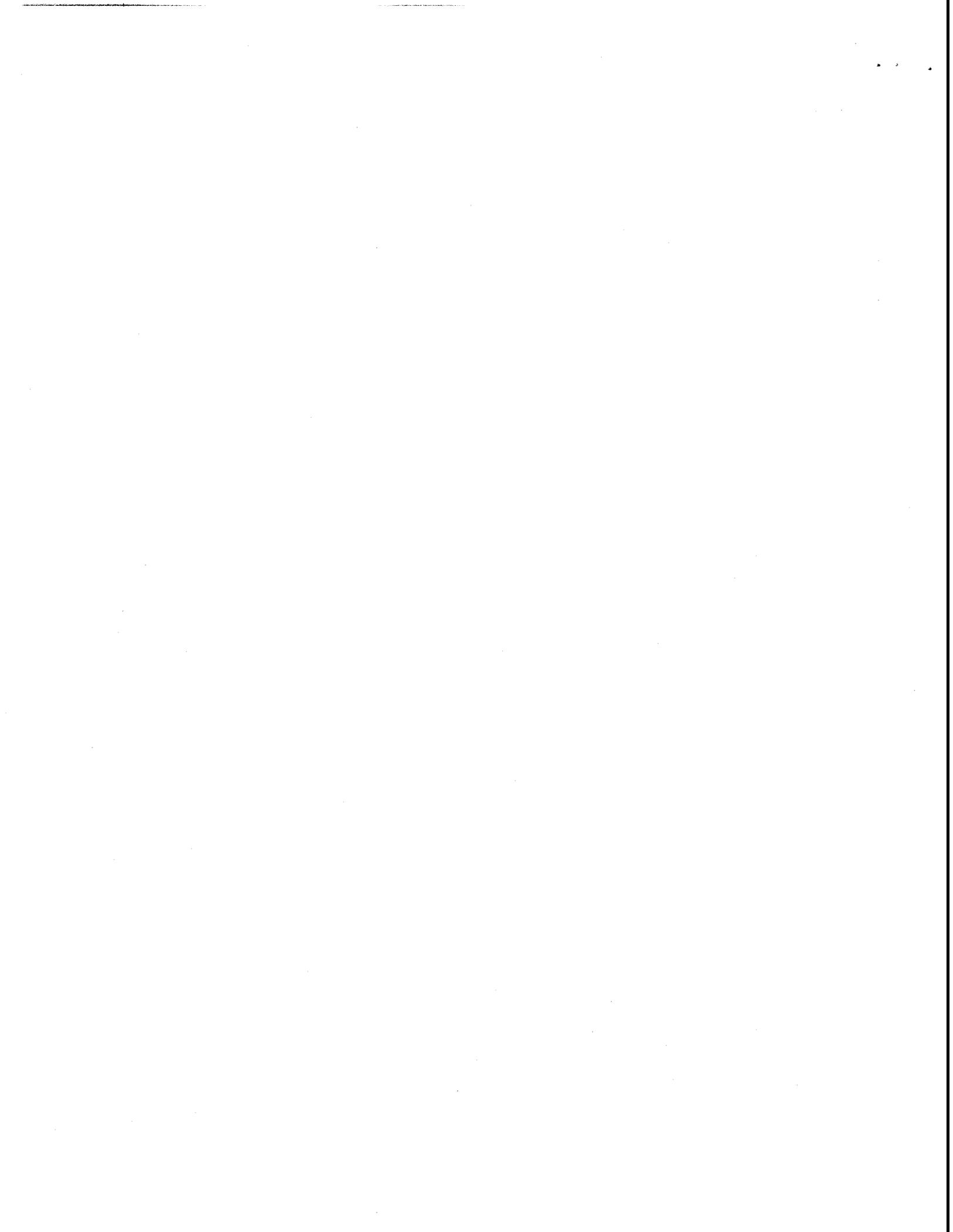
On motion, counsel states that the petitioner had the ability to pay the proffered wage. Counsel also states that additional evidence was submitted to the AAO in support of the appeal. Counsel submitted a certified mail receipt which shows that a package was mailed to the Texas Service Center on February 20, 2008. However, as noted previously by this office, the regulation at 8 CFR §§ 103.3(a)(2)(vii) and (viii) states that an affected party may make a written request to the AAO for additional time to submit a brief and that, if the AAO grants the affected additional time, it may submit the brief directly to the AAO.

In addition, in support of the motion, counsel has submitted a letter from the petitioner's president which states that the beneficiary will replace another employee upon the beneficiary's receipt of work authorization.

Upon review, the motion shall be dismissed for failing to meet applicable requirements.

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 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 be dismissed for this reason.

Furthermore, upon review, the AAO will dismiss the motion for failing to meet the applicable requirements for motions to reopen set forth in 8 C.F.R. § 103.5(a)(2). "[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." *Id.* In this matter, counsel did not offer new evidence relating to the



petitioner's ability to pay the proffered wage. As noted above, with respect to the petitioner's ability to pay, counsel has submitted a letter from the petitioner's president. The letter states that the beneficiary will replace another employee. However, no evidence has been provided to support this statement. For example, there is no evidence that the position of the other employee performs the same duties as those set forth in the Form ETA 750. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Accordingly, the motion does not meet the applicable requirements of a motion to reopen and must be dismissed for that reason.

Finally, the AAO will dismiss the motion for failing to meet the applicable requirements for motions to reconsider set forth in 8 C.F.R. § 103.5(a)(3). This regulation states, in pertinent part, 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 [U.S. Citizenship and Immigration Services (USCIS)] policy." *Id.* In this matter, counsel fails to cite to any precedent decisions that establish that the AAO's decision to summarily dismiss the appeal because the petitioner failed to establish that it had the continuing ability to pay the beneficiary the proffered wage was based on an incorrect application of law or policy. As noted above, the AAO summarily dismissed the appeal because the claimed brief and supporting evidence was not sent to the AAO.

As such, the motion does not meet the applicable requirements and must be dismissed. 8 C.F.R. § 103.5(a)(4).

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.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act. The petitioner has not sustained that burden. Accordingly, the motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.

