

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



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DATE: DEC 17 2012

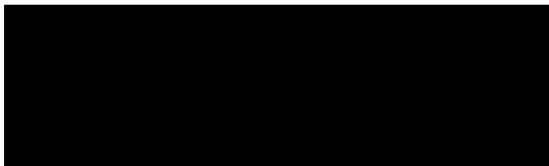
OFFICE: NEBRASKA SERVICE CENTER

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.

Thank you,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska 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 motions will be dismissed, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner describes itself as a supermarket. It seeks to permanently employ the beneficiary in the United States as an assistant store manager. 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 AAO's decision dismissing the appeal concludes that the petitioner failed to establish the petitioner's ability to pay the proffered wage from the priority date onwards.

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, counsel submitted copies of checks, a dictionary of accounting terms definition, New Brunswick Farmer's Market website pages and the decision of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The beneficiary's bank checks were previously submitted, may not be considered "new" under 8 C.F.R. § 103.5(a)(2) and cannot be considered a proper basis for a motion to reopen. The other documents are not new facts, in that they were available and could have been discovered or presented in the previous proceedings. The evidence submitted on motion will not be considered a proper basis for a motion to reopen.

The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that the AAO made an erroneous decision through misapplication of law or policy. Counsel for the petitioner maintains that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date and continuing until the beneficiary obtains lawful permanent residence.

The petitioner is structured as a C corporation. Upon review, the petitioner's net current assets were properly analyzed in the AAO's May 10, 2010 decision.

On motion, counsel asserts that the beneficiary's cancelled bank checks were not analyzed properly. In its decision, the AAO stated that there was no evidence the checks were processed by a bank in order to establish that the beneficiary was paid those amounts by the petitioner and deposited into an account. Upon review, the AAO acknowledges that the cancelled bank checks were provided by the bank and on bank letterhead. Therefore, for 2007, the record reflects that the beneficiary was paid \$756.76 on August 3, 2007, August 17, 2007, August 31, 2007, September 28, 2007 and October 12,

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).

2007 by the petitioner, a total of \$3,783.80. This amount is insufficient to establish the petitioner's ability to pay the proffered wage of \$19,110 per year. In addition, the record fails to contain the petitioner's tax return for 2007 for use in determining the petitioner's ability to pay that year. Regardless of the petitioner's ability to pay the proffered wage in 2007, the petitioner has failed to demonstrate its ability to pay the beneficiary the proffered wage for 2001, 2002 and 2004, the additional years in question.

Counsel also asserts that the AAO should add back the depreciation expense charged for the year to the petitioner's net income. Counsel's assertion is without basis. The law is clear concerning depreciation. With respect to depreciation, the court in *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009), noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Texas 1989) (emphasis added).

Counsel asserts that the petitioner's gross sales grew each year in 2003, 2004 and 2005. As stated in our decision, counsel's reliance on showing that the petitioner's gross sales grew from 2003 through 2005 is misplaced. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Counsel further contends that under a totality of the circumstances analysis, the petitioner has the continuing ability to pay the proffered wage beginning on the priority date onwards. Counsel asserts that the petitioner has been in business for 17 years and its gross sales have been consistently growing and expected to grow. Counsel argues that food, which is a basic human need, has a wider market than the petitioner in *Sonegawa* and is "guaranteed" to exist.

The AAO acknowledges that the petitioner was incorporated in 1993 and has had growing gross receipts or sales from 2001 through 2005. Nevertheless, the petitioner's gross sales decreased in 2006. The evidence in the record does not reflect a pattern of significant growth or the occurrence of an uncharacteristic business expenditure or loss that would explain its inability to pay the proffered wage in 2001, 2002, 2004 and 2007. As stated in the AAO's decision, the petitioner's tax returns reflect that payments for salaries and wages have been inconsistent. Counsel failed to address this issue.

In addition, the record fails to contain evidence to demonstrate that the petitioner has a sound and outstanding business reputation as in *Sonegawa*.² Unlike *Sonegawa*, the petitioner has not established the company's reputation or historical growth since its inception in 1993. Nor does it include any evidence or detailed explanation of the corporations' milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the company's accomplishments. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

Furthermore, United States Citizenship and Immigration Services (USCIS) regulations require that motions 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 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.

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, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the motions will be dismissed, the proceedings will not be reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

² On motion, counsel submits internet articles about the petitioner as additional evidence for reconsideration. Pursuant to 8 C.F.R. § 103.5(a)(3), a motion to reconsider a decision on a petition must establish that the decision was incorrect based on the evidence of record at the time of the initial decision. Given this, the evidence shall not be considered.



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ORDER: The motions are dismissed. The petition remains denied.