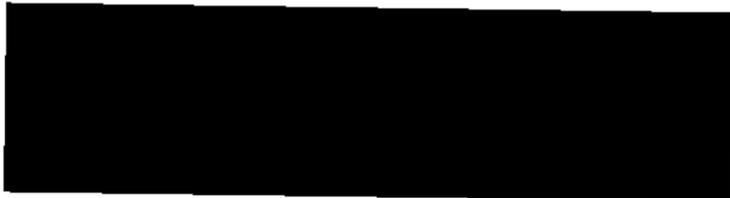


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



B6

Date: **DEC 26 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:

SELF-REPRESENTED

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 immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen and motion to reconsider. The motion to reopen will be denied. The motion to reconsider will be denied. The petition remains denied.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a 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.

Beyond the decision of the director, the AAO further denied the petition on appeal on the ground that the petitioner failed to sufficiently establish that the beneficiary had two years of experience in the proffered position as of the priority date as required by the Form ETA 750.

The record shows that the motion to reopen and motion to reconsider is properly filed. 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.

The regulation at 8 C.F.R. § 103.5 provides 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.” “New” facts are those that were not available and could not reasonably have been discovered or presented in the previous proceeding. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

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).

As noted above, 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.” “New” facts are those that were not available and could not reasonably have been discovered or presented in the previous proceeding. A motion that does not meet applicable requirements shall be dismissed. The petitioner did not state new facts to be considered in the reopened proceeding that were not available and could not reasonably have been discovered or presented in the previous proceeding. As such the motion to reopen is denied.

The motion to reconsider shall be denied as the motion does not state reasons for reconsideration which are supported by pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [USCIS] policy, nor does the motion 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). The petitioner merely states what was previously stated and is of record, that the beneficiary was not paid wages equal to the wages required by the Form ETA 750 because the beneficiary suffered health conditions which prevented him from working on a full-time basis.¹ The petitioner states that she is unable to locate another full-time chef to take the beneficiary's place and that she is able to support herself and dependent with the assistance of her husband who is in China. These statements were made and previously considered by the AAO in its October 20, 2010 decision dismissing the petitioner's appeal. The petitioner has offered no new evidence or statement that would establish that the AAO's prior decision (October 20, 2010) was incorrect based on evidence of record at the time of the initial decision. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). The AAO clearly set forth that the petitioner had not established its ability to pay the proffered wage and that the sole proprietor failed to confirm recurring personal expenses as previously requested by the director and noted in the AAO's decision. The petitioner failed to address this issue in its Motion to Reopen.

The AAO also stated in its October 20, 2010 decision that the petitioner had not established the beneficiary had two years of experience in the proffered position as of the priority date and denied the petition for that reason also. The AAO specifically noted that 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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO reviews appeals on a de novo basis).

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The petition is for a skilled worker and the job requires two years of experience in the proffered position. The AAO specifically noted in its decision denying the petitioner's appeal that the experience letter submitted by the petitioner did not contain a full English translation that complied with the requirements of 8 C.F.R. § 103.2(b)(3). It was further noted by the AAO that it was unclear who signed the experience letter on behalf of the beneficiary's prior employer and the letter did not,

¹ The petition must be for full-time employment. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). The petitioner states at several parts in the record that the restaurant "has been [operating] irregular hours." The petition, therefore, may not support a full-time job offer.

therefore, establish that the beneficiary had the required experience. This basis of denial was not addressed by the petitioner in its motion to reopen or motion to reconsider.

In visa petition proceedings, the burden of proving eligibility remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion to reopen is denied. The motion to reconsider is denied. The petition remains denied. The AAO affirms its decision of October 20, 2010.