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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: **MAY 02 2012** Office: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), 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 \$630. 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,

*Elizabeth McCormack*

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the preference visa petition. The petitioner appealed the director's decision to the Administrative Appeals Office (AAO), and the AAO dismissed the appeal. Following the AAO's dismissal, the petitioner filed a motion to reconsider. The motion was approved and the appeal reconsidered. Upon reconsideration, the AAO dismissed the appeal. Following the dismissal, the petitioner filed a motion to reopen and a motion to reconsider. The motion will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook pursuant to section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii). 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 AAO dismissed the appeal, finding that the petitioner did not have sufficient net income or net current assets to pay the proffered wage from the priority date, specifically from 2001 to 2004. Additionally, the appeal was dismissed because the petition was filed under a wrong category or classification.<sup>1</sup>

On motion to reopen/reconsider, counsel for the petitioner, among other things, asserts that the petitioner probably would not have been able to survive without the beneficiary. The beneficiary, according to counsel, is key to the success and growth of the petitioning business. No evidence is submitted to support the assertions, however. 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)).

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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 USCIS 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. 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).

Here, the motion is not accompanied by documentary evidence. Nor it is supported by any precedent decisions to establish that the AAO's decision was based on an incorrect application of law. Without documentary evidence and precedent decisions to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not

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<sup>1</sup> The petitioner indicated on the labor certification that the applicant must have a master's degree in business administration (MBA), three years of on-the-job training at a Thai restaurant, and three years prior work experience in the job offered. The petition filed along with the approved Form ETA 750, however, was for any other worker (requiring less than two years of training or experience). There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) or the AAO to accept a petition under a different visa classification.



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). For these reasons, the motion must be dismissed.

**ORDER:** The motion is dismissed.