

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: **NOV 30 2012**

Office: NEBRASKA SERVICE CENTER

FILE: 

IN RE:

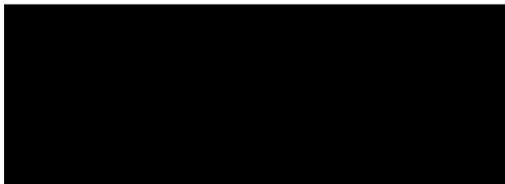
Petitioner:

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 AAO 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 petitioner appealed the director's decision which was dismissed by the Administrative Appeals Office (AAO). The petitioner filed a motion to reopen and reconsider the decision. The matter is again before the AAO. The motion to reopen and reconsider is denied. The appeal remains rejected.

The petitioner is a Chinese/Korean restaurant. It seeks to employ the beneficiary permanently in the United States as a Chinese specialty cook. 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).¹ 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. On April 28, 2008, the petitioner filed an appeal of the director's decision to the AAO. The AAO dismissed the petitioner's appeal under its authority for *de novo* review. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In its decision, the AAO determined that the petitioner did not have the ability to pay the prevailing wage.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "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.²

In the instant case, the motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner provides new facts with supporting documentation not previously submitted. In its decision, the AAO noted that USCIS records indicate that the petitioner has filed three I-140 petitions, and that the petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the respective priority date until each respective beneficiary obtains

¹ The instant petition is for a substituted beneficiary. *See* 72 Fed. REg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of aliens beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition. Memo. From Donald Neufeld, Acting Associate Director, Domestic Operations, United States Citizenship and Immigration Services (USCIS), to Regional Directors, *et. al.*, *Interim Guidance Regarding the Impact of the [DOL's] final rule, Labor Certification for Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity, on Determining Labor Certification Validity and the Prohibition of Labor Certification Substitution Requests*, <http://www.uscis.gov/USCIS/Laws%20and%20Regulations/Memoranda/June%202007/DOLPermRule060107.pdf> (accessed November 19, 2012).

² 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).

lawful permanent resident status. On motion, the petitioner submits a sworn affidavit stating that it has no knowledge of any previously filed I-140 petitions on behalf of any other beneficiary.

USCIS records reveal that multiple I-140 petitions have been filed with receipt numbers [REDACTED] and [REDACTED]. The petitions were filed with variations of the petitioner's business name, but all of the petitions contain the petitioner's correct address as well as the petitioner's correct federal employment identification number (FEIN). The new evidence provided by the petitioner contradicts USCIS records.

In its motion, the petitioner submits additional evidence which does not meet the requirements for a motion to reopen under 8 C.F.R. § 103.5(a)(2) because a review of this evidence reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2). The petitioner submits an unaudited financial statement as of June 30, 2010, the petitioner's federal tax returns for 2007, 2008, and 2009, individual federal tax returns of the owner for 2009 with Schedule E demonstrating ownership of the restaurant building, a letter from the petitioner's certified public accountant confirming petitioner's purchase of the building, individual federal income tax returns for the beneficiary for 2008 and 2009, and employee payroll information and payroll stubs for 2010. None of this evidence supports a "new" fact under 8 C.F.R. § 103.5(a)(2). The petitioner had the opportunity to address these issues on appeal.

8 C.F.R. § 103.5(a)(3) states, in pertinent part:

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 Service 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.

The petitioner does not submit any document that would meet the requirements of a motion to reconsider. The petitioner does not state any reasons for reconsideration nor cite any precedent decisions in support of a motion to reconsider. The petitioner does not argue that the previous decisions were based on an incorrect application of law or Service policy, but instead restates its previous argument that rent should be considered an actual expense. The petitioner does not state any reasons that would meet the standard for reconsideration.

Furthermore, the motion 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. Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion to reopen and reconsider is dismissed. The petition remains denied.