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

(b)(6)

DATE: APR 26 2013 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.

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 with the field office or service center that originally decided your case by filing a 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, which was then appealed to the Administrative Appeals Office (AAO). The appeal was summarily dismissed because counsel did not submit a brief. The AAO later, on its own motion, reopened the petition and allowed the petitioner the opportunity to submit new evidence in support of the petition. Subsequent to this, the AAO sent the petitioner a Request for Evidence (RFE). Upon reviewing the petitioner's response, the AAO dismissed the appeal. This motion to reopen and reconsider that dismissal was filed with the AAO on October 9, 2012. The motions will be dismissed.

The petitioner is store. It seeks to employ the beneficiary permanently in the United States as a night manager. 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 dismissal of the appeal agreed with the director that the petitioner failed to establish that it possessed the continued ability to pay the proffered wage.

The evidence submitted by the petitioner on appeal included financial data from various corporate entities which raised the possibility that the entities were part of a controlled corporate group. The AAO issued an RFE to the petitioner seeking information to establish whether the entities were part of a controlled corporate group. The AAO specifically stated:

> You are therefore directed to provide evidence which establishes whether the petitioner is part of a controlled corporate group. If the evidence supports a conclusion that the petitioner is part of a controlled corporate group, the entire group's ability to pay the proffered wage may be evaluated. You are therefore directed to provide evidence establishing: the identity of all entities owned or controlled by the sole owner of the petitioner; a description of the type of business conducted by each entity; copies of submitted tax returns for each entity, ***covering the priority date year to the present***; and, Form W-2s issued from each of these entities to the petitioner's sole owner.

(Emphasis added).

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]

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[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).

The petitioner was informed that if it wished to be evaluated as part of a larger corporate group, then it must provide evidence of the entire group's ability to pay for all years beginning with the priority date. In response, the petitioner only provided evidence of the group's ability to pay for 2004, 2007, and 2008 (years that the director determined that the petitioner's records failed to establish the continued ability to pay the proffered wage). Counsel requested that if the AAO needed evidence for additional years, to inform counsel. The petitioner and counsel were already put on notice that evidence for all years was required. Counsel's statement is clear that evidence relating to the group's ability to pay the proffered wage for 2003, 2005, 2006, 2009, and 2010 was available but not provided.[2]

Therefore, in this matter, the petitioner presented no facts or evidence on motion that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen.

The regulations at 8 C.F.R. § 103.5(a)(3) state 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 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."

Counsel argues, without citation to authority, that the AAO erred by requiring evidence for the entire group for years in which it claimed the petitioner established an ability to pay the proffered wage.

The AAO gave the petitioner the opportunity to submit the requested evidence and was under no obligation to reach out to the petitioner a second time to request evidence already requested. The AAO conducts appellate review on a *de novo* basis. The AAO's de novo authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Counsel cites no authority requiring the AAO to follow-up with the petitioner for missing requested evidence. The AAO RFE sought specific facts to aid in the adjudication of the petition. The petitioner chose not to provide responsive evidence. In so doing, the petitioner failed to meet its burden.

Here, counsel is, in essence, urging the AAO to use inconsistent analytical approaches based upon what standard is easiest for the petitioner to meet. However, the petitioner, if it is a controlled corporate group that shares profits and losses across the board, must submit its entire operations for review for all years to establish that the group as a whole has the continued ability to pay the proffered wage. In the RFE, the AAO clearly informed the petitioner what information it required, and fully informed the petitioner that failure to comply with the RFE would result in a dismissal of the appeal.

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[2] Counsel included a copy of the petitioner's Federal income tax returns for 2011, which were not available the time the RFE was issued. Although this return is "new," it is has no bearing on whether or not the petitioner had the ability to pay the proffered wage at the time of the priority date.

Counsel therefore has not identified any legal error in the AAO's dismissal. Accordingly, the motion to reconsider must be dismissed.

Through counsel's analysis found in the brief accompanying the motions, the petitioner did not have the ability to pay the proffered wage in 2007. Counsel asserts that, based on the fundamental strength of the companies, the petitioner did have the ability to pay the proffered wage in that year. Furthermore, the petitioner conceded that the controlled corporate group had filed an undetermined number of employment based immigrant petitions, but did not provide information about the various beneficiaries' priority dates, proffered wages, or dates of adjustment to permanent resident status. The petitioner asserts that each of the other alien beneficiaries hired their own lawyer to handle the other petitions. The AAO notes that none of the prior petitions could have been filed without the petitioner's knowledge, signature, and active participation in the process. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner's failure to provide the requested information prevents the AAO from analyzing the totality of the circumstances in the instant matter.

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.

As the motions do not surmount the high burden, they must be denied.

ORDER: The motions to reopen and reconsider are dismissed. The petition remains denied.