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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: APR 30 2013 OFFICE: TEXAS 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 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, Texas Service Center, denied the immigrant visa petition on June 18, 2008. The matter was then appealed to the Administrative Appeals Office (AAO) who dismissed the appeal on June 14, 2012 for failure to respond to the AAO's Request for Evidence (RFE). The matter is again before the AAO on a motion to reopen and a motion to reconsider in accordance with 8 C.F.R. § 103.5. The motion to reopen will be denied. The motion to reconsider will be denied. The petition remains denied and the AAO's decision of June 14, 2012 will be affirmed.

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

On appeal, the AAO issued an RFE, which sought additional evidence of the petitioner's ability to pay the proffered wage, to include complete copies of the petitioner's 2007, 2008, 2009 and 2010 federal tax returns, resolution of issues related to the beneficiary's pay records, evidence related to wage payment of other sponsored workers, and evidence that the job offer was for full-time year-round employment. The petitioner failed to respond to the RFE and the appeal was dismissed.

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. Counsel states that he received the AAO's March 28, 2012 RFE but that it was inadvertently shredded in his office before it could be reviewed. Counsel acknowledges that the petitioner received the RFE, but states that he was unable to obtain a copy from the petitioner until a month after the AAO issued its decision. Counsel states on the Form I-290B (Notice of Appeal or Motion, signed by counsel on July 14, 2012)) that he ultimately received a copy of the RFE on July 13, 2012 and he was, at that

time, in the process of obtaining tax returns in response to the RFE. The petitioner submitted with its motion to reopen the following documents:

- Payroll summary sheets for the beneficiary covering years 2002 through 2011;
- W-2 Forms for 2001, 2003 and 2004 issued by the petitioner in the beneficiary's name;
- A statement from the petitioner's president stating that another employee, A.J., was employed by the petitioner from March 1997 to October 2010;
- A copy of a Form ETA 750 showing a priority date for A.J. of April 30, 2001, and a proffered wage of $11.48 per hour ($23,878.40 per year);
- Payroll summary sheets and W-2 Forms for A.J.;

The petitioner has not, however, stated 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. All of this documentation would have been available at the time the AAO's RFE was issued on March 28, 2012 and at the time the AAO dismissed the appeal on June 14, 2012. Further, the petitioner did not submit the missing tax returns which were requested by the AAO in its RFE with its motion or at any time thereafter. Even if this information were provided, there is no reason to believe, based on the record, that the requested tax returns were not previously available. As such the motion to reopen is denied.

The motion to reconsider shall be dismissed as the petitioner has not stated reasons for reconsideration that are supported by pertinent precedent decisions which establish that the decision was based on an incorrect application of law or [USCIS] policy; and the petitioner has not established 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).

On the Form I-290B, the petitioner states, in part, (in support of its motion to reopen/reconsider) that it was in the process of obtaining copies of tax returns in response to the AAO's RFE. The Form I-290B was signed by counsel on July 14, 2012. To date, neither the tax returns nor any additional documentation has been filed in support of the petitioner's motion to reconsider.[1] The petitioner did not provide the following information in support of its motion to reconsider, in addition to the aforementioned tax returns, which was requested by the AAO in its RFE:

- A statement as to the petitioner's total number of employees;

- An explanation as to why the petitioner did not indicate on the Form ETA 750 that the beneficiary was employed by the petitioner when W-2 Forms were submitted showing the beneficiary was so employed;

[1] The Form I-290B requires that the petitioner submit its brief and/or additional evidence at the time of filing.

- The petitioner did not attempt to resolve by independent objective evidence the conflict in the tax identification number and the social security number used by the beneficiary showing that the petitioner paid the beneficiary claimed wages;

- Evidence to establish that the job offer was for full-time year-round employment.

As the petitioner has not provided the requested information it cannot be determined that the petitioner has established its continuing ability to pay the proffered wage from the priority date onward.

As noted above, the petitioner has not established that the petition was denied based on an incorrect application of law or USCIS policy and that the previous AAO decision was incorrect based on the evidence of record at the time of the initial decision.

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's decision of June 14, 2012 will be affirmed.