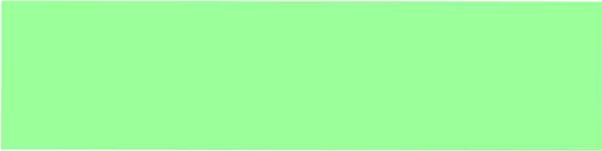




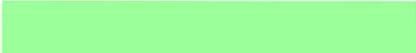
U.S. Citizenship
and Immigration
Services

(b)(6)



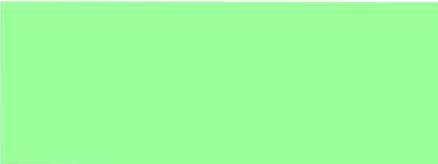
DATE **AUG 15 2013** OFFICE: NEBRASKA SERVICE CENTER

FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Rachel NiJunio
For

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal on July 1, 2010. The AAO granted a subsequent motion to reopen and reconsider the matter and reaffirmed its prior dismissal of the appeal on November 1, 2011 and May 3, 2013. The matter is again before the AAO on motions to reconsider and reopen. The motions to reconsider and reopen will be dismissed.

The petitioner is an Indian restaurant. It seeks to employ the beneficiary permanently in the United States as an Indian specialty cook. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The AAO determined that the petitioner had failed to demonstrate that the petitioner had the continuing ability to pay the proffered wage to the beneficiary since the priority date. The AAO further determined that the record did not contain sufficient credible evidence demonstrating the beneficiary had the required two years of experience in the offered job as listed on the ETA Form 9089. The AAO dismissed the appeal and affirmed the director's decision, and then subsequently reaffirmed its prior dismissal of the appeal on motion.

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.

In the current motion, counsel asserts that the AAO discredits the polygraph results without basis in polygraph procedure, as outlined in the report from the American Polygraph Association Board of Directors entitled [REDACTED] and dated September 9, 2011. Counsel states that the polygraph results and an affidavit regarding the procedures taken to ensure their accuracy were submitted and rejected by the AAO. Counsel states that a rebuttal by the polygraph examination from [REDACTED] the certified polygraphist who conducted the beneficiary's polygraph examination in support of the motion, will be submitted within 30 days. Counsel states that the AAO mistakenly refers to the beneficiary's father when referring to the beneficiary. Counsel declares that the admission of the polygraph results would prove the beneficiary's subjective state of mind through scientifically valid evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

A motion to reconsider must establish that the decision was based on an incorrect application of law or Service policy. *See* 8 C.F.R. § 103.5(a)(3). A motion to reopen must state new facts. *See* 8 C.F.R. § 103.5(a)(2).

As to reconsideration, counsel makes no new arguments in which to establish that the beneficiary qualifies for the proffered position. Counsel states that the admission of the polygraph results would prove the beneficiary's subjective state of mind through scientifically valid evidence. Counsel asserts that the AAO discredits the polygraph results without any basis in polygraph

procedure, as described in the report [REDACTED] and dated September 9, 2011. In the decision dated May 3, 2013, the AAO questioned the accuracy of the polygraph results, finding there were significant procedural deficiencies in the beneficiary's polygraph examination as it failed to comport with the standards set forth in Mr. [REDACTED] outline entitled [REDACTED] and, furthermore, that the results of the entire polygraph examination had not been provided on motion. Counsel states on motion that a rebuttal from Mr. [REDACTED] will be submitted within 30 days of receipt of the motion. We note that no additional evidence was subsequently submitted by counsel, and even this evidence were submitted, it could not have been considered on motion because evidence and briefs are required to be submitted with the motion. Unlike appeals, the regulation pertaining to motions to reopen and reconsider does not permit briefs and/or evidence to be filed subsequently. See 8 C.F.R. §§ 103.5(a)(2) and 103.5(a)(3). In sum, counsel has not established that the AAO's decision dated May 3, 2013 was erroneous and based on an incorrect application of law or Service policy.

The regulation at 8 C.F.R. § 103.5(a)(2) states, 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

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 AAO notes that the petitioner provided character references on behalf of the beneficiary and his wife, but these documents do not address the issues raised on motion or previously in these proceedings. The evidence referred to on motion on the Form I-290B – the polygraph examination and results; the report entitled [REDACTED] and dated September 9, 2011; the outline entitled [REDACTED] from [REDACTED]; and the letter dated February 18, 2010 signed by Mr. [REDACTED] regarding the beneficiary's polygraph examination, were already presented and considered in the previous motion. The evidence referred to on motion will therefore not be considered "new" and will not be considered a proper basis for a motion to reopen.

The motion will be dismissed for the reasons stated above. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The motions to reconsider and reopen are dismissed.

¹The 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).