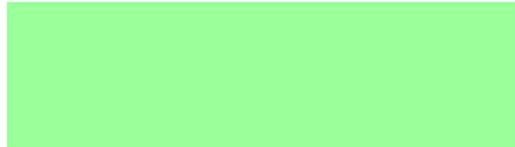


(b)(6)

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



DATE: **AUG 22 2013**

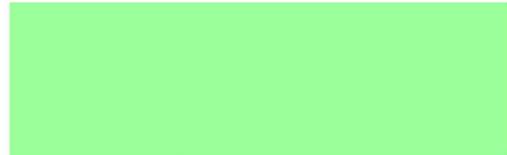
OFFICE: NEBRASKA SERVICE CENTER

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 (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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The AAO dismissed a subsequent appeal on June 4, 2012. The petitioner filed a motion to reconsider the AAO's decision dismissing the appeal on July 5, 2012. On May 2, 2013, the AAO rejected the petitioner's motion to reconsider. The matter is again before the AAO again on a motion to "Reconsider/Reopen" filed by the petitioner. The AAO's decision dated May 2, 2013 rejecting the filing of the petitioner's July 5, 2012 motion to reconsider the AAO's June 4, 2012 decision dismissing the petitioner's appeal is withdrawn. The AAO will fully consider and substantively adjudicate the petitioner's July 5, 2012 motion to reconsider. The motion to reconsider will be dismissed pursuant to 8 C.F.R. §§ 103.5(a)(1)(i), 103.5(a)(1)(iii)(C), 103.5(a)(3), and 103.5(a)(4). The AAO's prior decision of June 4, 2012 will be affirmed.

The petitioner is a dental laboratory. It seeks to employ the beneficiary permanently in the United States as a dental technician. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly. As noted above, the AAO dismissed a subsequent appeal on the same basis.

The record shows that the 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.

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).

The motion to reconsider shall be denied as the motion does not state reasons for reconsideration which are supported by pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [USCIS] policy, nor does the motion 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). The petitioner asserts in support of its motion that the petitioner has established the ability to pay the proffered wage from the priority date onward. The AAO does not agree. The AAO noted in its decision dismissing the petitioner's appeal that the petitioner had not established the ability to pay the proffered wage in either 2005, 2006, or 2007. As stated in the AAO's June 4, 2012 decision, sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds.<sup>1</sup> In addition, sole

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<sup>1</sup> The request for the sole proprietor's recurring household expenses relate to years 2005 and 2006 as the petitioner became a C Corporation in 2007.

proprietors must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983). In a Request for Evidence (RFE) from the petitioner dated January 7, 2009, the director requested that the sole proprietor provide a list of his recurring household expenses so that a determination of the petitioner's ability to pay the proffered wage could properly be made. The petitioner failed to provide those expenses at that time, and has not provided the sole proprietor's expenses on appeal or in support of its motion to reconsider stating that any request for such information was overreaching. The AAO does not agree with the petitioner's assertion as such information is material to the petitioner's eligibility for the benefit sought. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983). The refusal to provide that information alone, justifies the director's original decision denying the petition and the AAO's subsequent dismissal of the appeal. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Even if the sole proprietor's household expenses were not considered, the petitioner failed to establish the ability to pay the proffered wage in 2005. The proffered wage is \$29,619. In 2005, the petitioner submitted a W-2 Form showing wages paid to the beneficiary of \$28,000, which is less than the proffered wage. The petitioner submitted no evidence of other liquefiable personal assets which could have been used to pay the wage. This is especially pertinent since the sole proprietor reported an adjusted gross income in 2005 of only \$7,159 while the proprietor's tax returns indicate he supported a family of four. In 2006 the sole proprietor's tax return would appear to state sufficient adjusted gross income to pay the proffered wage, but again, it cannot be determined whether the reported adjusted gross income is sufficient to pay the wage plus the unknown recurring living expenses of the proprietor and his dependents. As noted by the director, the petitioner did not submit any evidence of wages paid to the beneficiary in 2006 or 2007. Further, the petitioner's 2007 tax return shows insufficient net income or net current assets to pay the proffered wage. Counsel asserts that the end of year cash noted on Schedule L of the petitioner's 2007 tax return should be considered as an additional asset with which to pay the proffered wage. Again, the AAO does not agree as that cash sum has already been considered when determining the petitioner's net current assets and may not be counted twice in an ability to pay analysis as set forth in the AAO's June 4, 2012 decision.

As an additional basis for denying the petitioner's appeal, the AAO noted in its June 4, 2012 decision that the petitioner had filed two Form I-129 petitions and five Form I-140 petitions since the June 30, 2005 priority date. The AAO stated that the petitioner would need to establish the ability to pay these workers their respective wages from their respective priority dates in addition to the wages of the present beneficiary. The petitioner did not address this issue in its motion to reconsider.

Finally, 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. Therefore, because the instant motion did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

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 reconsider is denied. The AAO's decision of June 4, 2012 is affirmed. The petition remains denied.