

(b)(6)



U.S. Citizenship
and Immigration
Services

[Redacted]

DATE: **AUG 23 2013**

Office: TEXAS SERVICE CENTER

FILE: [Redacted]

IN RE:

Petitioner:

Beneficiary:

[Redacted]

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:

[Redacted]

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, Texas Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. In response to the petitioner's motion to reopen and reconsider, the AAO determined that the appeal should remain dismissed and the petition remain denied. The petitioner has filed a second motion to reopen and reconsider. The petitioner's motion will be dismissed. The AAO's decisions of May 11, 2012 and June 4, 2013 are affirmed.

The petitioner is a truck trailer repair business. It seeks to employ the beneficiary permanently in the United States as a welding supervisor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had failed to establish that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onward.¹ The director denied the petition on November 8, 2008.

¹ The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

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.

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.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

On May 11, 2012, the AAO upheld the director's decision and dismissed the appeal. In this decision, the AAO noted that there were several discrepancies relevant to the beneficiary's possession and use of a social security number compared to a tax identification number used on the tax returns and concluded that it could not accept the beneficiary's Wage and Tax Statement (W-2) forms as evidence of payment of wages. Even if they could be considered, the petitioner's federal tax returns failed to demonstrate that either its net current assets or net income shown for the relevant years could cover any deficiency between the actual wages paid by the petitioner to the beneficiary and the full proffered wage of \$54,600 per annum. The AAO additionally concluded that there was insufficient evidence to support the consideration of officer's compensation as part of the petitioner's ability to pay the proffered wage and found that approval was not warranted pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The AAO also determined that the petitioner had not established that the beneficiary possessed a valid driver's license and his own tools as required in Box 15 of the Form ETA 750.

Counsel filed a motion to reopen and reconsider the AAO's decision dismissing the appeal. On June 4, 2013, the AAO granted counsel's motion to reopen and but found that its prior decision of May 11, 2013 should be affirmed. The AAO considered the petitioner's additionally submitted evidence including documentation related to the shareholder's income and the beneficiary's W-2s. The AAO found that the explanation submitted was insufficient to overcome the inconsistencies relevant to the beneficiary's social security number, and also determined that the evidence continued to be insufficient in order to determine that officer compensation could be considered in establishing the petitioner's ability to pay the proffered wage. The AAO again concluded that the petition did not merit approval under the factors present in *Matter of Sonogawa*, 12 I&N Dec. 612. The AAO also noted that the beneficiary's explanation pertinent to the possession of a driver's license and ownership of tools overcame the AAO's concerns.

Counsel has submitted a second motion to reopen and motion to reconsider asserting that the AAO should find that the petitioner has established the continuing ability to pay the proffered wage. A motion to reopen must state the new facts to be proved in the reopened proceeding

and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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. 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).

In this case, with the exception of language stating that additional documentation would be submitted in support of the petitioner's ability to pay the proffered wage, the language Part 3 of the Form I-290B, Notice of Appeal or Motion, is *identical* to the language on the Form I-290B submitted on the first motion. No evidence or affidavits were submitted that demonstrates that the AAO's prior decision of June 4, 2013 was erroneous. No evidence was presented that indicates that the June 4, 2013 was an incorrect application of law or Service policy. The petitioner's reasons for reopening and reconsidering the decision dismissing the appeal were already presented on the first motion to reopen and reconsider and were already discussed in the AAO's decision of June 4, 2013. As such, the AAO does not accept counsel's second motion, which is a virtual verbatim repetition of the first motion, as a motion to reopen or a motion to reconsider, and does not find a sufficient basis to overturn its decision of June 4, 2013.

It is noted that on Part 2.F of the Form I-290B designating the filing as a motion to reopen and a motion to reconsider a decision, the petitioner added a typewritten statement that additional evidence will be submitted within 30 days. The petitioner cited no legal authority authorizing an extension of time in which to submit additional evidence in support of a motion. While the submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1), no analogous additional time is permitted for motions.²

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. Based on the foregoing, the petitioner's motion does not qualify as a motion to reopen or reconsider and will be dismissed.

The burden of proof in these proceedings rests solely 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 and motion to reconsider is dismissed. The AAO's decisions of May 11, 2012 and June 4, 2013 are affirmed.

² Moreover, the AAO has received nothing further to the record.