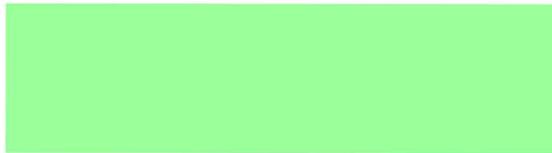


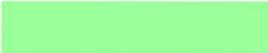
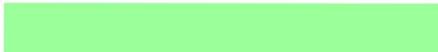
(b)(6)

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



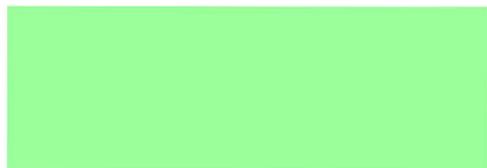
U.S. Citizenship
and Immigration
Services



Date: Office: NEBRASKA SERVICE CENTER FILE: 
IN RE: **AUG 28 2013**
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:

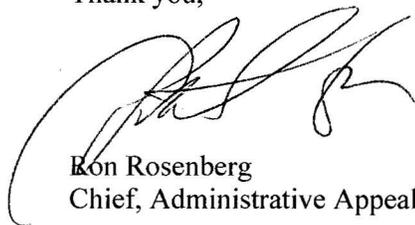


INSTRUCTIONS:

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,



Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center approved the immigrant visa petition on or about April 4, 2006. On July 25, 2011, the Director issued a Notice of Intent to Revoke (NOIR) the visa petition upon receipt of information from a consular officer with the U.S. Embassy in New Delhi, India which called into question whether the beneficiary met the two year experience requirement of the Form ETA 750 (labor certification). After considering the petitioner's response to the NOIR, the director revoked approval of the visa petition and issued a Notice of Revocation (NOR) September 16, 2011. The petitioner then filed a motion to reopen and motion to reconsider the director's NOR on October 11, 2011. The director issued a decision denying the petitioner's motion to reopen and motion to reconsider on December 6, 2011. The petitioner appealed the director's December 6, 2011 decision to the Administrative Appeals Office (AAO) on January 9, 2012. On June 4, 2013, the AAO dismissed the petitioner's appeal. The matter is again before the AAO on the petitioner's motion to reopen and motion to reconsider filed on July 8, 2013. The motion to reopen and motion to reconsider will be denied. The petition remains denied. The AAO affirms its decision of June 4, 2013.

The petitioner describes itself as an Indian restaurant. It seeks to employ the beneficiary permanently in the United States as a "North Indian Curry Cook." The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3). As required by statute, the petition is accompanied by Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is February 5, 2002. *See* 8 C.F.R. § 204.5(d).

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. The petitioner, in support of its motion to reopen, did not present any new facts in the reopened proceeding which are supported by affidavits or other documentary evidence. As such the motion

does not meet the applicable requirements for a motion to reopen and must be denied and 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 simply asserts in its brief supporting the filing of its motion to reopen and motion to reconsider that the AAO did not properly consider the evidence on appeal. Specifically, the petitioner asserts that:

- Two experience letters (one dated January 30, 2002 and one dated July 29, 2011, both signed by H.S.) establish that the beneficiary had two years of experience in the proffered profession as of the priority date.
- The results of an investigation by U.S. consular officer in India are inaccurate and inconclusive.
- That a bona fide job offer existed despite the beneficiary's familial relationship to the petitioner's owner and the fact that the beneficiary was sponsored by his uncle is not a disqualifying factor for the granting of this petition.
- That the AAO's finding that the petitioner had not established the ability to pay the proffered wage of the beneficiary plus other sponsored workers should not be considered as the petitioner's ability to pay the beneficiary's proffered wage was established when the petition was initially approved on or about April 4, 2006. The petitioner further asserts that ability to pay information is beyond the scope of the present motion as the ability to pay was not an issue on appeal from the director's decision and the AAO erred in raising the issue in its June 4, 2013 decision.¹

The petitioner did not address the AAO's concerns with the two experience letters in its motion but instead contested a distinction made between "cook" and "chef."² The petitioner did not offer additional evidence relating to the consular officer report of its investigation of the beneficiary. The

¹ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The petition should have been revoked on this basis as well.

² O*Net online has separate codes and reports for the positions of cook and chef and considers the two job titles to represent separate and distinct positions. (<http://www.onetonline.org/link/summary/35-2014.00>, for Cooks, Restaurant) and (<http://www.onetonline.org/link/summary/35-1011.00>, for Chefs and Head Cooks) (both accessed August 27, 2013).

petitioner states that its recruitment methods were approved by the Department of Labor when it certified the labor certification application, but did not provide any evidence to demonstrate that it informed the DOL of any familial relationship between the beneficiary and the petitioner's owner, or allowed the DOL to assess the bona fide nature of the relationship. The petitioner offered no additional evidence related to the AAO's concerns of the petitioner's ability to pay the proffered wage of the beneficiary and other sponsored workers.

As stated above, 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).

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

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 AAO's decision of June 4, 2013 is affirmed. The petition remains denied.