



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: OFFICE: NEBRASKA SERVICE CENTER  
**AUG 29 2013**

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.

Thank you,

*Rachel Ni Jorio*  
for

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. On May 30, 2013, the AAO affirmed its decision in response to a motion to reopen filed by the petitioner. The matter is again before the AAO as an appeal. The appeal will be rejected as improperly filed.

In its May 30, 2013 decision, the AAO informed the petitioner that if it believed the law to have been inappropriately applied or had additional information it wished to have considered, it could file a motion to reconsider or a motion to reopen, in accordance with the instructions on the Form I-290B, Notice of Appeal or Motion.

The petitioner, however, has filed an appeal of the May 30, 2013 decision, checking Box A. in Part 2. of the Form I-290B, which states "I am filing an appeal. My brief and/or additional evidence is attached." The brief, submitted with the Form I-290B, carries the heading, "Appeal from Denial of I-140 Petition."

The AAO does not exercise appellate jurisdiction over its own decisions. It has appellate jurisdiction only over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). See DHS Delegation Number 01 50.1 (effective March 1, 2003). Therefore, as the petitioner's appeal of its May 30, 2013 decision is not within the AAO's jurisdiction, it will be rejected as improperly filed.<sup>1</sup>

Moreover, the AAO finds that the Form I-290B and the supporting evidence submitted by the petitioner, even if considered in this proceeding, would not overcome the AAO's prior findings regarding the petitioner's ability to pay the beneficiary the proffered wage or the beneficiary's qualifications for the offered position.

The AAO's decisions of May 13, 2010 and May 30, 2013 provided a detailed discussion of the reasons that the petitioner had failed to demonstrate that it had paid the beneficiary at or above the proffered wage from the April 23, 2001 priority date onward. These same decisions also included an explanation of why the petitioner's net income and net current assets during this same period did not satisfy the regulatory requirements of 8 C.F.R. § 204.5(g)(2). Further, the AAO outlined its reasoning in concluding that the petitioner's financial history and circumstances did not establish its ability to pay the proffered wage, pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The AAO's decisions also discussed the basis for its finding that the record did not establish the beneficiary's qualifications for the offered employment.

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<sup>1</sup> The AAO notes that the petitioner in response to the AAO's May 13, 2010 dismissal of its appeal of the director's July 21, 2007 denial of the Form I-140 petition correctly filed the Form I-290B as a motion to reopen.

In filing the instant Form I-290B, the petitioner has resubmitted evidence the AAO has previously considered, while supplementing the record with a brief from its counsel and additional evidence in the form of Employer's Contribution and Wage Reports, tax returns for itself and the beneficiary, and Internal Revenue Service (IRS) W-2 Wage and Tax Statements (Forms W-2) for the beneficiary. The petitioner has also submitted printouts of its webpage and online menus; a copy of the beneficiary's resume; a copy of "[REDACTED]" and copies of emails relating to the beneficiary's training in Indian cuisine.

As discussed in its May 13, 2010 and May 30, 2013 decisions, the AAO found that the record did not establish that the petitioner had paid the beneficiary at or above the proffered wage since the April 23, 2001 priority date and the petitioner's submission of a new brief and additional financial documentation does not alter this finding. Although counsel continues to assert that the wages paid to the petitioner's other cooks should be considered in determining the wages paid to the beneficiary, the AAO has previously indicated to the petitioner that only the wages paid to the beneficiary will be considered as *prima facie* evidence of its ability to pay. The newly submitted evidence also fails to overcome the AAO's finding that the petitioner had not established that its net income and net current assets, as calculated in the May 30, 2013 decision, were sufficient to establish its ability to pay during the period 2001 through 2005 or to provide basis for a reassessment of the petitioner's ability to pay based on the totality of its circumstances. While counsel contends that the petitioner's balance sheets show a "sufficient ratio of total current assets to total current liabilities" to establish its ability to pay, the AAO has previously informed the petitioner that ability to pay in an employment-based immigrant visa proceeding is calculated based on a petitioner's net rather than total assets. Moreover, although counsel again states that the totality of the petitioner's circumstances establish its ability to pay, the record does not reflect the sustained financial growth she asserts, nor document the excellent reputation that she indicates the petitioner enjoys in Chicago.

Additionally, the AAO finds that the documentation submitted to establish the beneficiary's qualifications, like that previously provided by the petitioner, fails to establish that he had any experience in preparing Indian-style cuisine prior to the April 23, 2001 priority date. The submitted syllabus, which states it relates to training programs offered by "[REDACTED]" is not established as the training program under which the beneficiary received a diploma in hotel management and catering technology, and the subjects covered in the "[REDACTED]" training syllabus do not correspond to those listed in the training transcripts previously submitted by the petitioner to establish the beneficiary's qualifications. The AAO also notes that the beneficiary's claim on his resume to have been an executive sous chef in India in 1998-1999 is not supported with a letter from his former employer, as required by the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A).

The petitioner has filed an appeal of the AAO's May 30, 2013 decision, a matter over which the AAO does not have appellate jurisdiction. Accordingly, the appeal will be rejected as improperly filed. 8 C.F.R. §103.3(a)(2)(v)(A)(1).

(b)(6)

*NON-PRECEDENT DECISION*

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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). Here, that burden has not been met.

**ORDER:** The appeal is rejected.