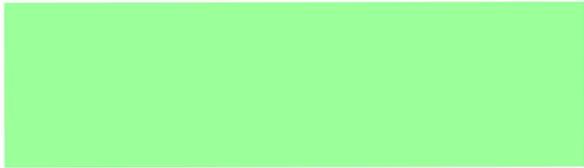


(b)(6)

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



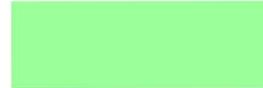
U.S. Citizenship  
and Immigration  
Services



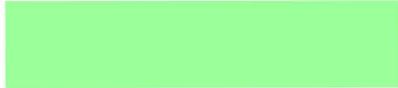
DATE: OFFICE: TEXAS SERVICE CENTER

JAN 31 2013

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:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Texas Service Center. The petitioner appealed the director's decision to the Administrative Appeals Office (AAO). On June 8, 2009, the AAO summarily dismissed the appeal. The petitioner filed a motion to reopen and reconsider the AAO's decision. On July 23, 2010, the AAO dismissed the motion for failing to meet the requirements of a motion to reopen and failing to meet the requirements of a motion to reconsider. The petitioner then filed a motion to reopen the AAO's decision. The motion will be dismissed, the previous decision of the AAO will be affirmed, and the director's denial will remain undisturbed.<sup>1</sup>

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL).

The director's decision denying the petition concluded that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. On appeal, the AAO's decision summarily dismissing the appeal found that the petitioner had not specifically identified any erroneous conclusion of law or statement of fact, and had not provided additional evidence. On motion, the AAO's decision dismissing the motion concluded the petitioner did not provide

- New evidence relating to the petitioner's ability to pay the proffered wage, as required for a motion to reopen by 8 C.F.R. § 103.5(a)(2);
- Any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or policy, as required for a motion to reconsider by 8 C.F.R. § 103.5(a)(3); or
- A statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding, as required for motions to reopen or reconsider by 8 C.F.R. 103.5(a)(1)(iii)(C).

With the instant motion, the petitioner submits a letter dated August 9, 2010 from its president and owner. The letter states that the beneficiary will replace an employee named [REDACTED] who has been employed as a cook from 2003 "to the present." The letter also states that the validity of the unfavorable decision has not been or is not the subject of any judicial proceeding.

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. 8 C.F.R. § 103.5(a)(2). Motions to reopen must also state whether the unfavorable decision has been or is the subject of any judicial proceeding. 8 C.F.R. § 103.5(a)(1)(iii)(C).

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<sup>1</sup> The record of proceeding contains a Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, signed by the petitioner. The designated attorney on the Form G-28 is listed as deceased on the website of the New Jersey Courts. Therefore, the AAO will not recognize the attorney in this proceeding. See 8 C.F.R. §§ 1.1(f), 103.2(a)(3), 292.

The petitioner's letter of August 9, 2010 does not state "new" facts.<sup>2</sup> The assertion that the beneficiary will replicate [REDACTED] was made by the petitioner in a December 17, 2007 letter responding to a request for evidence from the director, and a copy of the December 17, 2007 letter was submitted to the AAO in support of the previous motion to reopen and reconsider.

The motion does not state the "new facts" supported by affidavits or other documentary evidence. Therefore, the motion to reopen cannot be granted.

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 is dismissed.

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<sup>2</sup> Based on the plain meaning of "new," a "new fact" is evidence that was not available and could not have been discovered or presented in the previous proceeding. The word "new" is defined as "having existed or been made for only a short time" or "[j]ust discovered, found, or learned." *Webster's II New Riverside University Dictionary* (Riverside, 1984).