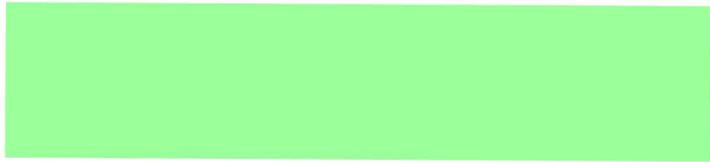


(b)(6)

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: JUL 30 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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center (the director) on June 8, 2009. The director dismissed a subsequent motion to reopen and reconsider on August 29, 2011 and the Administrative Appeals Office (AAO) dismissed the subsequent appeal on June 29, 2012. The matter is now before the AAO on a motion to reopen.<sup>1</sup> The motion will be dismissed.

The AAO finds that the petitioner has not filed a proper motion to reopen. The regulation at 8 C.F.R. § 103.5(a)(2) states, 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." The request was not accompanied by any affidavits or other documentary evidence.

Nor has the petitioner filed a proper motion to reconsider. The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part, that "[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 [USCIS] policy. A motion to reconsider ... must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision." The motion was not accompanied by arguments based on precedent decisions to establish that the decision was based on an incorrect application of law or policy, and does not establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

A request for motion must meet the regulatory requirements of a motion to reopen or reconsider at the time it is filed; no provision exists for United States Citizenship and Immigration Services (USCIS) to grant an extension in order to await future correspondence that may or may not include evidence or arguments. With the instant motion, current counsel to the petitioner stated: "The motion to reopen [sic]<sup>2</sup> was denied on the bases that the employer's ability to pay for the proffered wage was not proved and that the employee's experience required for the proffered position was not proved. A separate brief and additional evidence will be filed with AAO."

As such, the AAO will not consider the additional evidence submitted by the petitioner on August 29, 2013, 425 days after the AAO's June 29, 2012 decision. The regulations at 8 C.F.R. § 103.5(a)(1)(i) require that motions to reopen be filed within 30 days of the underlying decision, except that failure to timely file a motion to reopen may be excused in the discretion of USCIS where it is demonstrated that the delay was reasonable and was beyond the affected party's control. The petitioner has not

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<sup>1</sup> On the Form I-290B submitted on July 30, 2012, the petitioner checked Box B, which states "I am filing an appeal," however, the accompanying narrative states that additional evidence will be submitted in support of a motion to reopen and reconsider. It is noted that the AAO does not exercise appellate jurisdiction over its own decisions. The AAO exercises appellate jurisdiction over only the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). See DHS Delegation Number 0150.1(effective March 1, 2003). An appeal of an AAO appeal is not properly within the AAO's jurisdiction. However, because the petitioner characterized its filing as a motion to reopen and reconsider on the letter accompanying the Form I-290B will be accepted as one despite the incorrect box being checked on the form.

<sup>2</sup> The last decision in this matter was not a consideration of the petitioner's motion to reopen but rather was the AAO's June 29, 2012 decision dismissing the petitioner's appeal.

established that such an exception is warranted here. The fact that the petitioner on the Form I-290B incorrectly checked box B (“I am filing an appeal. My brief and/or additional evidence will be submitted to the AAO within 30 days”), does not allow it to submit evidence beyond the 30 day period allowed for motions to reopen. The cover page of the AAO’s June 29, 2012 decision clearly instructed the petitioner that it may file either a motion to reopen or a motion to reconsider the decision pursuant to the requirements found at 8 C.F.R. § 103.5, and that any motion must be filed with the office that originally decided the case within 30 days of the decision that the motion seeks to reconsider or reopen as required by 8 C.F.R. § 103.5(a)(1)(i).

The AAO notes the following deficiencies in the record.

At the outset, the Commonwealth of Virginia State Corporation Commission indicates that the petitioner’s status has been terminated. As the petitioner is no longer in business it appears that there may no longer be a *bona fide* job offer. As such, the petition would be rendered moot.<sup>3</sup>

In its decision dismissing the appeal, the AAO found that the petitioner had not established the ability to pay the beneficiary the proffered wage in 2006 because the record did not contain evidence that the petitioner had paid the beneficiary wages in 2006. Nevertheless, the petitioner failed to submit the evidence simultaneously with the current motion. The beneficiary’s 2006 Form W-2, submitted late, would establish that the petitioner had the ability to pay the proffered wage in 2006 from its net current assets,<sup>4</sup> when considered in conjunction with other evidence of record.

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.

<sup>3</sup> Should the petitioner file any further motion to reopen and/or reconsider, it must establish its active corporate status and the bona fides of the job offer.

<sup>4</sup> In its decision, the AAO noticed a discrepancy between the wages the beneficiary earned in 2007 on the Form W-2 and the year-to-date wages shown on the payroll statements as of July 29, 2007. At that time, the payroll statements reflected wages paid to the beneficiary of \$51,865.60. The wage reported on the Form W-2 was \$34,200.00. The petitioner did not address this inconsistency on motion. See *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (stating that doubt cast on any aspect of the petitioner’s proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. In any further filing, the petitioner should explain why this evidence does not cast doubt on other aspects of the petitioner’s proof.

The AAO noted in its previous decision that the petitioner, on appeal, did not submit evidence of its ability to pay in 2008, 2009 and 2010. The petitioner must demonstrate the ability to pay at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. On motion, the petitioner fails to submit evidence of its ability to pay the beneficiary the proffered wage from 2008 through 2010.<sup>5</sup>

Beyond the decision of the director and the previous AAO decision, USCIS records indicate that the petitioner has filed three (3) other Form I-140 petitions since the petitioner's establishment in 2003. The petitioner must demonstrate its ability to pay the proffered wage for each Form I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

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 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The petitioner has not established on motion that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through the present.

On motion, counsel asserts that the petition was initially denied due to insufficient assistance of former counsel and that the petitioner had established its continuing ability to pay the proffered wage based on the wages paid to the beneficiary and its net current assets. On appeal, the AAO found that the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1<sup>st</sup> Cir. 1988).

The AAO notes that the record contains some evidence of previous counsel's ill health that may have excused previous counsel's failure to submit the beneficiary's 2006 Form W-2 to the director before the June 8, 2009 decision. Nevertheless, current counsel has represented the petitioner since March 30, 2011 when it filed the first motion to reopen and reconsider before the director and thus any claim of ineffective assistance of former counsel is moot. The director notified the petitioner in its RFE dated March 16, 2009 and again in its decision dated June 8, 2009 that the record lacked any evidence of the petitioner's payment of wages to the beneficiary in 2006 such as the beneficiary's 2006 IRS Form W-2. Current counsel to the petitioner failed to submit such documentation with its motion to reopen before the director, on appeal to the AAO, or concurrently with the current motion. Moreover, as noted above, the petitioner has not established its continuing ability to pay the beneficiary from 2008 to present and the beneficiaries of other the petitions it has filed.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612

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<sup>5</sup> In any future filings, the petitioner should submit the petitioner's complete federal tax returns and IRS Forms W-2 or 1099-MISC from 2008 through the present.

(Reg'l Comm'r 1967). On motion, counsel contends that the petitioner has the ability to pay the proffered wage. However, the petitioner failed to submit the petitioner's Forms 1120S and Schedules L for 2008 through present or the beneficiary's IRS Forms W-2 for 2009 through present, precluding the AAO from making a determination as to whether it had the ability to pay the proffered wage for 2008 through the present. The record also does not contain necessary information regarding other Form I-140 petitions filed by the petitioner, and thus, the AAO cannot determine if the petitioner had the ability to pay the proffered wages from 2008 through the present. Further, the petitioner's tax returns and beneficiary's Forms W-2 reflect a recent downward trend in the beneficiary's compensation and the petitioner's gross sales.<sup>6</sup> In addition, there is no evidence in the record of the historical growth of the proprietor's business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of the petitioner's reputation within its industry. Thus, assessing the totality of the circumstances in this individual case, the petitioner has not established that it had the continuing ability to pay the proffered wage.

The AAO found in its previous decision that the record in this case failed to establish that the beneficiary meets the experience requirements of the labor certification at the time of filing. On motion, counsel submits additional documents to establish the beneficiary's qualifications. The record contains a notarial certificate entitled certificate of career, dated July 18, 2012, completed by [REDACTED] representative, indicating that the beneficiary was employed by [REDACTED] as the head of the culinary department (baking, dessert, wedding cake, etc.) on a full-time basis from November 18, 2002 until April 28, 2004. The certificate indicates that the beneficiary was a licensed baker responsible for making "all kinds of bakery" and managing "all bakerys and their assistant."<sup>7</sup> The certificate does not provide a sufficient description of the beneficiary's duties such that it establishes the beneficiary's duties were that of a bakery supervisor. Further, any such experience would only account for 17 months of experience.

A notarial certificate entitled supplement of career and certificate of career, dated July 18, 2012, completed by [REDACTED] representative, indicates that the beneficiary was employed by [REDACTED] on a full-time basis, from June 5, 1989 until February 27, 1993, as an employee of the department in charge of making beverages and food. The certificate indicates that the beneficiary made desserts, various kinds of breads and cookies, etc. The new certificate from [REDACTED] does not provide an address for the beneficiary's employment.<sup>8</sup> Additionally, the certificate does not indicate that the beneficiary's duties were those of a bakery supervisor.

A notarial certificate entitled supplement of career and certificate of career, dated July 18, 2012, completed by [REDACTED] representative, indicates that the beneficiary was employed by [REDACTED] on a full-time basis from July 2, 1980 until May 30, 1989, as an employee. The certificate states that the beneficiary designed and made pastries, cakes and bread. The certificate does not

<sup>6</sup> Public databases indicate that a large judgment has been issued by the Fairfax County Circuit Court against the petitioner, indicating that the financial stress on the petitioner is high.

<sup>7</sup> It is noted that the address for the business listed on the 2003 and 2012 certificates does not correspond to a wedding hall business, but to a Buddhist Temple.

<sup>8</sup> The address listed on the first certificate from [REDACTED] does not comport with the address listed for the business in Seoul, Korea.

indicate that the beneficiary's duties were that of a bakery supervisor. Additionally, the new certificate is inconsistent with the certificate submitted with the Form I-140 petition in that the new certificate states that the businesses address is [REDACTED] while the first certificate indicated that the business address was 1 [REDACTED]

A certificate of closed business, dated March 4, 2004, completed by the chief of [REDACTED] indicates that the beneficiary owned [REDACTED] from February 26, 1993 until September 16, 2002. The certificate indicates that the nature of the business was bread, cookies and rice bread. The certificate does not indicate and there is no independent, objective evidence that the beneficiary's duties were those of a bakery supervisor.

Additionally, while all of the certificates state that they are translations, the petitioner fails to submit certified translations for the above listed documents. The AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3).<sup>9</sup> Accordingly, the evidence is not probative and would not be accorded any weight in this proceeding.

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 does not meet the applicable filing requirements the motion must be dismissed.

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. The motion 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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not sustained that burden. Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the previous decisions of the director and the AAO will not be disturbed.

**ORDER:** The motion is dismissed.

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<sup>9</sup> The certified translations of the document do not meet the requirements of 8 C.F.R. § 103.2(b)(3).