



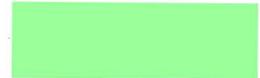
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JUN 05 2013 OFFICE: TEXAS SERVICE CENTER

FILE:

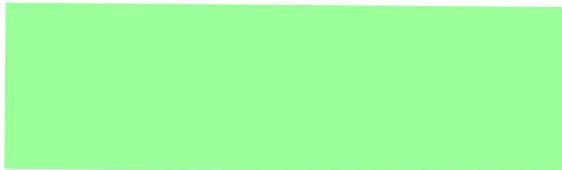


IN RE: Petitioner:
Beneficiary:



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 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen and motion to reconsider. The motion to reopen is denied. The motion to reconsider is denied. The petition remains denied. The AAO's decision of October 20, 2010 is affirmed.

The petitioner is an Indian restaurant. It seeks to employ the beneficiary permanently in the United States as an Indian specialty chef. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined 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. The director denied the petition accordingly. On appeal, the AAO determined 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 and dismissed the appeal.

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 record in the initial proceeding before the director closed on April 28, 2008 with the receipt by the director of the petitioner's response to a Request for Evidence.¹

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).

¹ As of the response time to the RFE, the most recent tax return available to the petitioner was its 2007 return. In the RFE the petitioner was informed that it was required to show the ability to pay the proffered wage from the October 12, 2004 priority date onward, and that its ability to pay the wage could be demonstrated by showing that its net income or net current assets were equal to or greater than the proffered wage or that it paid the beneficiary a salary equal to or greater than the offered wage in all years under consideration. The petitioner was instructed that ability to pay evidence was discussed in 8 C.F.R. § 204.5(g)(2) and the types of documentation mentioned in the regulation set forth. The petitioner was asked to submit evidence of wages paid to the beneficiary and all other employees. The petitioner responded to the RFE providing the requested information plus copies of some corporate bank statements.

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 submitted in support of its motion to reopen and motion to reconsider the following documents:

- A personal bank statement of the petitioner’s shareholder covering the time frame August 9, 2005 to September 19, 2005.
- A personal bank statement of the petitioner’s shareholder covering the time frame December 6, 2008 to January 7, 2009.
- The shareholder’s 2007 personal tax return.
- A copy of an \$80,000 Certificate of Deposit (CD) opened on August 29, 2006 and redeemable on October 9, 2006. The CD is in the name of [REDACTED] and [REDACTED]
- A copy of an \$80,000 Certificate of Deposit (CD) opened on June 24, 2006 and redeemable on July 25, 2006. The CD is in the name of [REDACTED].²
- The petitioner’s 2007, 2008 and 2009 tax returns.

The petitioner did not state new facts to be considered in the reopened proceeding that were not available and could not reasonably have been discovered or presented in the previous proceeding. The promissory notes for the shareholder loans in 2004 and the corporate resolutions relative thereto were all in existence and available when the petitioner responded to the director’s request for evidence, when the director’s initial decision was rendered and when the petitioner filed its appeal to the AAO, as was all other evidence submitted with the exception of the 2007, 2008 and 2009 tax returns which were prepared after the record closed as noted above. As such, the motion to reopen is denied.

Even if the petitioner’s 2007, 2008 and 2009 tax returns were considered, nothing provides evidence of the petitioner’s ability to pay the proffered wage in 2005. The later tax returns submitted similarly show relatively low gross receipts, low wages paid to all workers and no officer compensation as was noted in the AAO’s prior consideration of the petitioner’s ability to pay the proffered wage based on the totality of circumstances. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

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

² This CD and the one listed immediately above were submitted in a subsequent proceeding wherein the petitioner filed a separate Form I-140 petition for the same beneficiary.

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 has offered no new evidence or statement that would establish that the AAO's prior decision (October 20, 2010) was incorrect based on evidence of record at the time of the initial decision. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Although the petitioner cites to *Taiyang Foods, Inc. v United States Citizenship and Immigration Services*, 2010 U.S. Dist., Lexis 98748, this case is not a precedent case and was decided after the petition in the instant matter was denied. Further, the petitioner has not established that the loans to its shareholder are deemed current assets as opposed to long term assets. First, the promissory notes submitted by the petitioner showing the loans made are not dated. Second, even though the promissory notes are due on demand, the petitioner has not submitted sufficient documentation to establish that the shareholder receiving the loans was in a position to pay back the loans "on demand." For example, the petitioner submitted a [REDACTED] checking account statement in the name of the shareholder showing a balance of \$110,766.50 as of January 7, 2009 (statement period December 6, 2008 through January 7, 2009). This statement does not establish that these funds were available to repay the demand note during any other time period. The same is true for a statement from [REDACTED] which shows a checking account balance of \$34,969.78 on September 19, 2005 (statement period August 9, 2005 through September 19, 2005). The petitioner has not established that the loans to shareholder sums noted on the petitioner's tax returns are properly considered as current assets when determining the petitioner's ability to pay the proffered wage of the beneficiary during any time period.

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 October 20, 2010 is affirmed and the petition remains denied.