



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUN 27 2013

OFFICE: NEBRASKA SERVICE CENTER

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and the subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The petitioner filed a motion to reconsider and the matter is again before the AAO.¹ The motion will be dismissed.

The petitioner is a residential care facility for the elderly. It seeks to employ the beneficiary permanently in the United States as a caregiver. As required by statute, ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. 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. The AAO dismissed the subsequent appeal and also found that the petitioner did not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date.

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 Service policy. A motion to reconsider a decision on an application or petition must, when filed, also 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).

On motion, the petitioner asserts that the AAO erred in concluding that the petitioner did not establish its ability to pay the proffered wage as of the priority date of June 12, 2008 and continuing to the present. The petitioner asserts in its motion that its ability to pay the proffered wage was already established for 2009 and 2010, but that the AAO failed to consider the totality of the circumstances affecting the petitioner's business in 2008. Specifically, the petitioner asserts that the costs of improvements made to its facility in 2007 were deducted from its gross income in 2008, and although that year was an uncharacteristically unprofitable year, the totality of the circumstances demonstrates that the petitioner still maintained its ability to pay the proffered wage.

¹ Effective March 4, 2010, the regulation at 8 C.F.R. § 292.4(a) requires that a new Form G-28 "must be filed with an appeal filed with the [AAO]." 8 C.F.R. § 292.4(a) further requires that the Form G-28 "must be properly completed and signed by the petitioner, applicant or respondent to authorize representation in order for the appearance to be recognized by DHS." The record, however, does not contain a properly executed Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, signed by the petitioner's representative and by an authorized official of the petitioning entity dated subsequent to the director's decision and submitted to authorize representation of the petitioner on appeal. On March 29, 2013, a notice was faxed to the petitioner's previous attorney of record and the individual who signed the instant Form I-290B, Notice of Appeal or Motion. To date, no new Form G-28 has been received. Therefore, we cannot consider the petitioner to be represented by any attorney or accredited representative in the instant proceedings.

The petitioner's assertion that its ability to pay the proffered wage in 2009 and 2010 was established is incorrect. In its decision dismissing the appeal, the AAO noted that, although the petitioner's ordinary income in 2009 and 2010 was greater than the proffered wage, USCIS records reflect that the petitioner filed an I-140 petition on behalf of another beneficiary. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). On motion, the petitioner does not submit any evidence of the priority date, wages paid to the other beneficiary, or status of the other petition.

Thus, it is concluded that the petitioner has not established its continuing ability to pay the proffered wage to the instant beneficiary and the proffered wage to the beneficiary of its other petition in any of the relevant years.

In its decision dismissing the appeal, the AAO also addressed the petitioner's claims that it made \$185,413.00 in improvements to its facility in 2007, which resulted in an uncharacteristically unprofitable year for the petitioner in 2008. The AAO noted that the petitioner did submit a list detailing these expenses, which indicates that the petitioner completed the renovations on June 14, 2007, but that the document was unsupported by receipts, contracts, building permits, or other supporting evidence to demonstrate that the renovations were made and how this impacted the petitioner. The AAO also noted that the petitioner submitted photos of its purported renovations, but these photos are not labeled, indicating the address at which they were taken or the date(s) on which they were taken. Although both the director and the AAO informed the petitioner that it had not submitted sufficient evidence to demonstrate that the renovations were an uncharacteristic business expense in 2008, the petitioner submits no new evidence with its motion.

In its motion, the petitioner again urges the AAO to consider the \$69,886.00 that the petitioner deducted on its 2008 tax return for the cost of improvements, which counsel asserts that the petitioner could have instead declared as its net income. As noted in both the AAO's dismissal of the appeal and the director's denial, USCIS does not add depreciation back into net income when analyzing ability to pay. The court in *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009), noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Texas 1989) (emphasis added).

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the AAO noted that the petitioner failed to establish that the beneficiary is qualified for the proffered position. Specifically, the AAO noted that the letter from [REDACTED] fails to explain how this individual knows of the beneficiary's experience, and that it therefore does not constitute persuasive evidence of the beneficiary's prior experience. On motion, the petitioner provides no new evidence to demonstrate that the beneficiary possessed the required experience. The petitioner merely states that, [REDACTED]

[REDACTED] Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

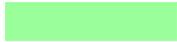
The evidence in the record therefore does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has failed to establish that the beneficiary is qualified for the offered position.

As noted previously, a motion to reconsider must establish that the decision is 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 not done so.

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. The petitioner has not met that burden.

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ORDER: The motion to reconsider is dismissed.