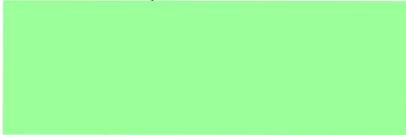


(b)(6)



U.S. Citizenship
and Immigration
Services



DATE:

OFFICE: TEXAS SERVICE CENTER

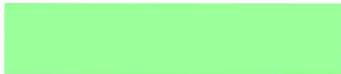
FILE:



MAR 07 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 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 on July 8, 2009. The petitioner appealed to the Administrative Appeals Office (AAO), who summarily denied the appeal because the petitioner failed to articulate a specific claim of error. On June 28, 2010, the petitioner filed a motion to reconsider the AAO's decision. The motion will be dismissed and the director's decision will be affirmed.

The director determined that the petitioner failed to establish the petitioner had the continued ability to pay the proffered wage, and that the beneficiary did not have the requisite qualifications at the priority date.

The regulations at 8 C.F.R. § 103.5(a)(3) state 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 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."

With the motion to reopen or reconsider, the petitioner submitted two documents from [REDACTED], CPA. The first document stated [REDACTED] opinion, based upon the petitioner's statement of cash flows, that the petitioner had the ability to pay the proffered wage. The second document stated, without any particularity, that the petitioner was located in an area that was entitled to more aggressive depreciation expenses following the September 11, 2001, attack, and that when this depreciation is considered, the petitioner had the ability to pay the proffered wage.

We first note that [REDACTED] statements discuss financial data which was available when both the appeal and the petition were filed. Consequently, the statements cannot be considered "new." Additionally, the statements are not audited financial statements, but vague assertions lacking any specificity. [REDACTED] does not establish which assets, if any, the petitioner utilized for this accelerated depreciation calculation. Furthermore, with respect to depreciation, 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). Thus, even if this evidence were previously unavailable, it would not assist the petitioner in establishing its continued ability to pay the proffered wage.

The director’s decision noted that the application for labor certification stated a high school diploma was required for the proffered position. A beneficiary must possess the minimum experience and educational qualifications at the priority date, which in this case is September 24, 2002. The petitioner provided evidence that the beneficiary completed the requirements for a high school equivalency in 2007. Nothing in the petitioner’s motion to reconsider establishes that the beneficiary attained a high school diploma or equivalency prior to the priority date. Consequently, the petitioner failed to provide “new” evidence.

The petitioner takes issue with USCIS evaluating the beneficiary’s qualifications, stating that it is not appropriate for USCIS to make a *de novo* determination on this issue. However, we note that DOL’s certification of the Form ETA 750 does not supersede USCIS’ review and evaluation of the criteria the petitioner must prove in order to establish that the petition is approvable, and that includes a review of whether or not the beneficiary is qualified for the proffered position, which in this case, is governed by section 203(b)(3)(A)(i) of the Act and 8 C.F.R. § 204.5(1)(3).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motion to reconsider the petition is dismissed. The petition remains denied.