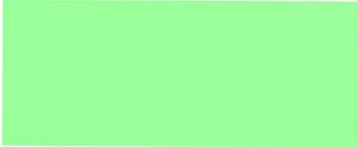
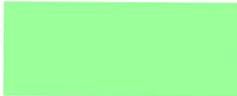




U.S. Citizenship
and Immigration
Services

(b)(6)



Date: Office: NEBRASKA SERVICE CENTER FILE: 
MAR 14 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: On May 26, 2010 the Administrative Appeals Office (AAO) summarily dismissed the appeal and affirmed the decision of the Director, Nebraska Service Center (the director). The petitioner has now filed a motion to reopen and a motion to reconsider the AAO's decision. The motions will be granted, and the appeal will be reconsidered. Upon reconsideration, the appeal will be dismissed, and the AAO's previous decision will remain undisturbed.

The petitioner is a retail donut and bakery shop. It seeks to employ the beneficiary permanently in the United States as a baker, pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).¹ 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 denied the petition, and the AAO subsequently summarily dismissed the appeal, because the petitioner failed to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

On motion to reopen/reconsider, counsel for the petitioner argues that the AAO erroneously discounted the probative value of the petitioner's affidavit confirming the attainment of the beneficiary's work experience prior to the priority date.² Citing Federal Rules of Evidence (FRE) 902(8), counsel urges the AAO to accept the petitioner's affidavit and consider it as proof of the beneficiary's qualifications for the job offered.

The record shows that the motions are properly filed, timely and supported by new evidence. The AAO conducts this appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted in this proceeding.³

¹ Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

² In an affidavit dated June 21, 2010, [REDACTED] the former owner of the petitioner, stated that he called and talked to the owners of three [REDACTED] shops, where the beneficiary claimed he had worked from 1998 to 2000, to confirm the beneficiary's prior employment and experience. [REDACTED] indicated that all of them confirmed the beneficiary's employment.

Additionally, [REDACTED] stated in his affidavit that upon hiring the beneficiary, "it became instantly obvious that he [the beneficiary] indeed had the experience and expertise gained through those prior employment positions, and therefore that he was fully qualified to meet the requirements that I had for that hire."

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1).

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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 U.S. Citizenship and Immigration Services (USCIS) 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). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Here, the motion is not accompanied by new facts and supported by any corroborating documentary evidence. However, it states the reasons for reconsideration, and counsel argues that the AAO erroneously apply the FRE 902(8) to this case. The motion to reconsider is granted, and the appeal will be reconsidered.

Upon *de novo* review, we do not find the application of FRE 902(8) is relevant to this case, and therefore, we conclude that the decision to dismiss the appeal was based on correct application of law. FRE 902 states:

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(8) Acknowledged Documents. A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

Counsel contends on motion that under FRE 902(8), the affidavit submitted by the petitioner is an admissible document when accompanied by a Certificate of Acknowledgment executed in the manner provided by law by a notary public. Counsel essentially argues that the petitioner's affidavit should be accepted as evidence of the beneficiary's qualifications.

Counsel's interpretation of FRE 902(8) is misplaced, because FRE 902(8) does not state that a signed affidavit, such as the one in this case, is admissible or inadmissible in this proceeding. FRE 902(8) only provides the definition of acknowledged document, and a signed affidavit is an example of an acknowledged document. Therefore, we conclude that FRE 902(8) is irrelevant and does not apply in this case.

The AAO in its earlier decision has acknowledged the submission of the petitioner's affidavit outlining the efforts of the petitioner to confirm the beneficiary's past experience and employment. Upon review of the affidavit, the AAO agreed with the director that the affidavit

The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

from the petitioner alone was not sufficient to demonstrate that the beneficiary had the requisite work experience in the job offered before the priority date.

The regulations at 8 C.F.R. §§ 204.5(g)(1) and (l)(3)(ii)(A) specifically require the petitioner to submit letters from former employers or trainers containing the name, address, and title of the writer and a specific description of the duties performed by the beneficiary or of the training received. Further, if the petition is for a skilled worker, as is the case here, the petition must be accompanied by evidence, i.e. the letters from former employers or trainers as specified above, that the beneficiary meets the educational, training, or experience, and any other requirements of the individual labor certification. 8 C.F.R. § 204.5(l)(3)(ii)(B). The affidavit of the petitioner alone is, therefore, not sufficient to demonstrate the beneficiary's qualifications in this case.

Moreover, even if we consider the petitioner's affidavit and conclude that the beneficiary possessed the requisite work experience in the job offered prior to the priority date, the petition would not and could not have been approved, as the petitioner has failed to submit any evidence demonstrating the petitioner's ability to pay from the priority date and continuously until the beneficiary receives lawful permanent residence.

The petition is dismissed for the reasons stated above, with each considered as an independent and alternative basis for the decision. 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. For the reasons stated above, the appeal must be dismissed.

ORDER: The motions to reopen/reconsider are granted; upon reconsideration, the appeal is dismissed.