(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: MAY 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 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. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reconsider. The motion will be dismissed, the previous decision of the AAO will be affirmed, and the petition will remain denied.

In the director's March 4, 2009 denial, the director determined that the petitioner failed to establish its ability to pay the proffered wage for the beneficiary since 2007. The petitioner appealed the director's denial to the AAO. On June 22, 2012, the AAO dismissed the appeal, finding that the petitioner failed to establish its ability to pay the beneficiary's proffered wage, as well as the proffered wage of another pending petition.

In this matter, counsel asserts that the petitioner has the funds available to pay the beneficiary the prevailing wage from the time of filing to the present based on the totality of the circumstances. Counsel asserts that the petitioner has the ability to pay the proffered wage and 2007 was an uncharacteristic year. Counsel submits copies of a Form W-2 for 2011 issued by the petitioner to the beneficiary; the beneficiary's 2011 federal tax return; pay stubs dated January 2012 through June 2012 issued by the petitioner to the beneficiary; the petitioner's corporate documents; the petitioner's 2011 federal tax return; a letter from the petitioner's owner; and a previously submitted copy of the petitioner's 2007 federal tax return.

The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

> 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.

The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3). On motion, counsel asserts the petitioner "has the funds available to pay the beneficiary the prevailing wage from the time of filing to the present based on the totality of the circumstances argument outlined in *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm'r 1967)." The petitioner asserts that the petitioner has existed for over 12 years (since 1999) and is financially sound, has the ability to pay the proffered wage, and is well known in the surrounding community and continues to grow having expanded to two additional sister restaurants. On motion, counsel submits a document reviewing the restaurant and indicating three new locations; however, the document fails to reflect the date of the article or when the new restaurants opened or the current status of the new restaurants. Further, although counsel asserts that 2007 was an uncharacteristically unprofitable year for the petitioner, no evidence was submitted to explain why this was so. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In the AAO decision, it was noted that the petitioner has filed another petition and that the petitioner is responsible for demonstrating its ability to pay both of the proffered wages to both beneficiaries. As stated in the AAO's decision, the petitioner failed to establish it had the continuing ability to pay

all the proffered wages, including the instant beneficiary, from the priority date to the present through an examination of wages paid to the beneficiary, and its net income or net current assets.

On motion, counsel submits a letter from the petitioner's owner stating that there is no other Form I-140 petition for an alien worker pending at this time. In his letter, the petitioner's owner states that they have filed two Form I-140 petitions in the past
He states that both beneficiaries have adjusted to legal permanent residents. However, U.S. Citizenship and Immigration Services (USCIS) records reflect that the petitioner has filed other Form I-140 petitions not mentioned in the letter. The record reflects that the petitioner filed three Forms I-140 as well as the instant 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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). No evidence was provided in support of the letter from the petitioner's owner. 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)).

Given the above discrepancies, the AAO cannot properly analyze the petitioner's ability to pay the proffered wage. Therefore, the petitioner has failed to establish its continuing ability to pay the beneficiary the proffered wage from the priority date onwards.

In the AAO decision, it was noted that two different Forms 1120 were submitted for the 2007. On motion, counsel acknowledges the discrepancy was limited to lines 12 and 13 of the tax returns, but asserts that there is no substantive difference between the tax returns. Counsel explains that the two returns are substantially the same and that the one filed with the IRS separated the officer's compensation from wages and salaries, and contends that the discrepancy should not cast doubt on the petitioner's submission. No evidence was submitted in support of counsel's assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 motions 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 sustained that burden. Accordingly, the motions will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed. The petition remains denied.