

(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



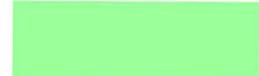
U.S. Citizenship
and Immigration
Services



DATE: NOV 01 2013

OFFICE: TEXAS SERVICE CENTER

FILE:

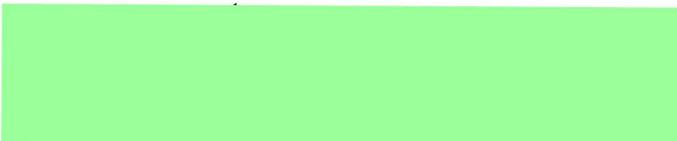


IN RE: Petitioner:
Beneficiary:



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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, Texas Service Center (director). The subsequent appeal was rejected by the Administrative Appeals Office (AAO). The petitioner filed a motion to reconsider, which was dismissed by the AAO. The matter is now before the AAO on motion to reopen and motion to reconsider. The motions will be dismissed. The petition will remain denied.

The petitioner is an Italian restaurant. It seeks to employ the beneficiary permanently in the United States as a head 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.¹

The AAO rejected the appeal from the director's denial because the appeal was signed only by the attorney and was not accompanied by a valid Form G-28, Notice of Appearance, confirming that the petitioner consented to the filing of that appeal. The AAO's November 25, 2011, decision correctly noted that the Forms G-28 contained in the record at that time had both been signed by the beneficiary, not by the petitioner. The term "affected party" means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition. 8 C.F.R. § 103.3(a)(1)(iii)(B). The party affected in visa petition cases is the petitioner, and the beneficiary does not have standing to move to reopen the proceedings. *Matter of Dabaase*, 16 I&N Dec. 720 (BIA 1979).

¹ Specifically, the director noted that while the petitioner had established the ability to pay the proffered wage in 2004, 2005, and 2007, the petitioner had failed to establish the ability to pay the proffered wage in 2006 through either its net income, net current assets, or through wages paid to the beneficiary. Though the AAO's decision was not based on the merits of the case, the AAO's May 3, 2013, decision dismissing the petitioner's motion to reconsider the AAO's previous decision affirmed the director's finding that the petitioner had failed to establish the ability to pay the proffered wage in 2006. The AAO added that the petitioner had not established the ability to pay the proffered wage in 2008. The petitioner's current motion to reopen and motion to reconsider are accompanied by copies of the petitioner's tax returns from 2010, 2011, and 2012. However, while counsel requests that the case be reviewed on its merits, the petitioner has not submitted any evidence to overcome the noted deficiencies in its ability to pay the proffered wage in 2006 or 2008.

The AAO's May 3, 2013, decision also noted that the labor certification states that the position requires four years of experience and that the record did not contain any evidence of the beneficiary's claimed work experience. Counsel states that the current motions were accompanied by "supporting evidence from prior employers." However, such evidence was not submitted. 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). Rather, the motion includes the beneficiary's resume and a letter from the beneficiary's acquaintance and customer of the petitioner. The beneficiary's resume is self-serving. The letter does not meet the requirements of 8 C.F.R. § 204.5(1)(3)(ii)(A) as it is not from the beneficiary's prior employer.

The regulations at 8 C.F.R. § 103.5(a)(2) state, 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." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.²

In this matter, the appeal was rejected because it was not filed by an "affected party." On motion, the petitioner presented no facts or evidence that relate to the decision that the petitioner seeks to have reopened. Therefore, this will not be considered a proper basis for a motion to reopen.

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).

Counsel states on motion that the petitioner submitted a properly-executed Form G-28 in 2011. The record of proceedings confirms that the petitioner signed a G-28 on December 23, 2011; however, counsel has not explained how this document establishes that the AAO's November 25, 2011, rejection of the appeal was based on an incorrect application of law or Service policy, or how this document establishes that the decision was incorrect based on the evidence of record at the time of the initial decision. As the petitioner has not alleged or identified any specific misapplication of law or policy by the AAO in rejecting the appeal, this cannot be considered a proper basis for a motion to reconsider.

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.

ORDER: The motion to reopen and motion to reconsider are dismissed. The petition remains denied.

²The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence>" *Webster's II New Riverside University Dictionary* 792 (1984)(emphasis in original).