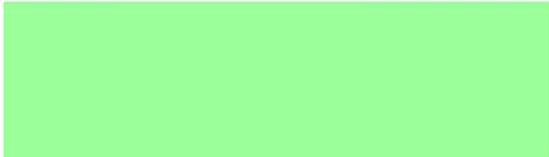




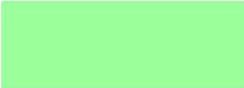
U.S. Citizenship  
and Immigration  
Services

(b)(6)

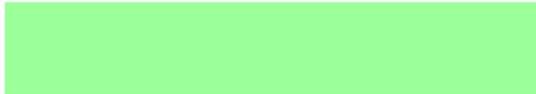


DATE: NOV 01 2013

OFFICE: NEBRASKA SERVICE CENTER

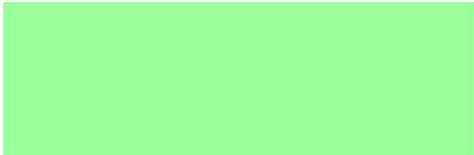
FILE: 

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:

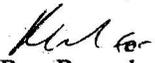


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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 Director, Texas Service Center, revoked the approval of the employment-based immigrant visa petition and certified the decision to the Administrative Appeals Office (AAO). The AAO affirmed the director's decision to revoke the previously approved petition. 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.

On the Form I-290B submitted on December 13, 2012, the petitioner checked Box B, which states "I am filing an appeal," however, it is noted that the AAO does not exercise appellate jurisdiction over its own decisions. The AAO exercises appellate jurisdiction over only the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). See DHS Delegation Number 0150.1(effective March 1, 2003). An appeal of an AAO decision is not properly within the AAO's jurisdiction. However, because the petitioner seems to be filing a motion to reopen and motion to reconsider on the Form I-290B it will be accepted as one despite the incorrect box being checked on the form.

The petitioner describes itself as a restaurant. It seeks to employ the beneficiary permanently in the United States as an Indian specialty cook. 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 the beneficiary was qualified for the offered position and that it had the continuing ability to pay the beneficiary the proffered wage beginning on the December 29, 2003, priority date of the visa petition. The director provided a detailed examination of the financial records provided by the petitioner and noted that the petitioner had filed employment-based petitions for four beneficiaries in addition to the current beneficiary. The director specifically explained that the petitioner bore the responsibility to produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). See also 8 C.F.R. § 204.5(g)(2). The director concluded that the petitioner had failed to establish the ability to pay the proffered wages to this beneficiary as well as to its other beneficiaries; accordingly, the director revoked the approval of the petition. The decision was certified to the AAO and the AAO affirmed the director's decision with respect to the petitioner's ability to pay the proffered wage. Specifically, the AAO noted that the petitioner had failed to provide any required information "to show that it has the ability to pay the proffered wages of all of the sponsored beneficiaries."

The AAO also noted that the petitioning business was dissolved on March 2, 2010, and that the petition, therefore, was subject to revocation.<sup>1</sup> Regarding counsel's assertions that the beneficiary had "ported" to another employer, the AAO noted that in *Herrera v. USCIS*, 571 F.3d 881 (9<sup>th</sup> Cir. 2009), the Ninth Circuit Court of Appeals determined that the government's authority to revoke a Form I-140 petition under section 205 of the Act survived portability under section 204(j) of the Act.

<sup>1</sup> See 8 C.F.R. § 205.1(a)(iii)(D).

Citing a 2005 AAO decision, the Ninth Circuit reasoned that in order to remain valid under section 204(j) of the Act, the I-140 petition must have been valid from the start. The Ninth Circuit stated that if the plaintiff's argument prevailed, an alien who exercised portability would be shielded from revocation, but an alien who remained with the petitioning employer would not share the same immunity. The Ninth Circuit noted that it was not the intent of Congress to grant extra benefits to those who changed jobs. Under the plaintiff's interpretation, an applicant would have a very large incentive to change jobs in order to guarantee that the approval of an I-140 petition could not be revoked. *Id.*

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.<sup>2</sup>

In this matter, the petitioner presented no facts or evidence on motion that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen. All evidence submitted on motion relates to the beneficiary's employment with a different employer since 2007 and does not address the director's or the AAO's detailed discussions of the petitioner's failure to establish the ability to pay the proffered wages to its sponsored beneficiaries since the 2003 priority date. Therefore, this filing 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 suggested on motion that the petitioner's other beneficiaries had obtained permanent residence or that the petitions had been withdrawn or revoked. However, this assertion is uncorroborated. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also stated on motion that "PORTABILITY UNDER § 204(j) OF THE ACT IS A MAJOR THIRD ISSUE." However, counsel's displeasure with the AAO's determination regarding portability is not substantiated with any allegation of misapplication of law or policy by the AAO. As the petitioner has not alleged or identified any specific misapplication of law or policy by the AAO, this cannot be considered a proper basis for a motion to reconsider.

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<sup>2</sup>The 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).

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.