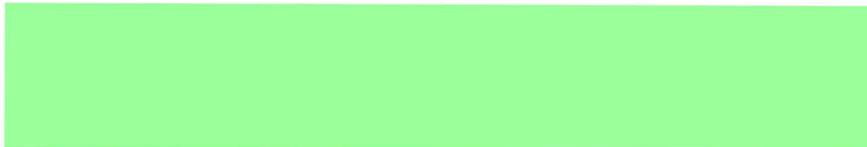


(b)(6)

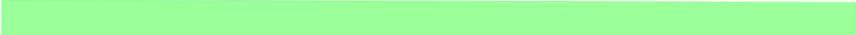
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

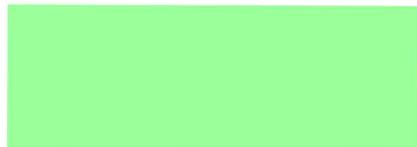


DATE: **OCT 11 2013** OFFICE: NEBRASKA SERVICE CENTER FILE: 

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, Nebraska Service Center, denied the immigrant visa petition on April 9, 2009. The petitioner appealed to the Administrative Appeals Office (AAO), which denied the appeal on March 27, 2013. The petitioner filed a motion to reopen or reconsider the AAO's dismissal. The motions will be denied.

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.¹

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."

The AAO dismissed the appeal because the petitioner failed to demonstrate that the beneficiary possessed the minimum required experience, and further found that the beneficiary provided a fraudulent experience verification letter in support of the petition.

The record contains an experience letter from [REDACTED] Manager on [REDACTED] letterhead, with the address of [REDACTED]. The letter is dated August 9, 2004, and states that an entity named [REDACTED] employed the beneficiary as a baker and pastry decorator from March 1996 until November 1998.

The director informed the petitioner that a consular investigation had taken place. The investigation stated that [REDACTED] does exist at [REDACTED] Hesana, and the sole owner's name is [REDACTED]. In a telephonic interview with an investigator, [REDACTED] stated he was the sole owner for the past 25 years. According to [REDACTED] no one named [REDACTED] has ever worked there. Furthermore, [REDACTED] Mr. [REDACTED] states that the beneficiary never worked at that establishment, nor did he provide an experience letter on the beneficiary's behalf.

In response, the petitioner submitted an affidavit purportedly signed by [REDACTED] s co-owners, [REDACTED]. The [REDACTED] affidavit states that [REDACTED] was employed at their business until November 2004, and that he was authorized to write the prior experience letter. The affidavit states that the original owner, [REDACTED] died in December 1999, and the undersigned sons took over the business at that time. This affidavit was inconsistent with the consular investigation in several places. First, the investigator was told that [REDACTED]

¹The 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).

was the sole owner of the business, and had been such for 25 years. Additionally, the experience letter in the record states the beneficiary was employed by [REDACTED]

The beneficiary also provided an affidavit, wherein he recalls a conversation with [REDACTED]. According to the affidavit, Mr. [REDACTED] told the beneficiary he had not been approached by an investigator. The beneficiary's affidavit is self-serving and does not provide independent, objective evidence of his prior work experience. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)(states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). 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)).

The petitioner now files this motion and asserts four arguments regarding the dismissal. First, the petitioner states that the letter stating the beneficiary was employed by [REDACTED] (as opposed to [REDACTED]) was a typo. The petitioner asserts on appeal that pictures of the foreign language signs in the record support this argument. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

The second issue is similarly flawed as it hinges on whether the names for the beneficiary's past employer ("Jagdish" or "Jagdish") were inconsistent. Although counsel discusses how both words are accurate romanizations of the same word, there is no evidence in the record to support 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).

The petitioner's third argument relates to the AAO's observation that the types of cakes portrayed in the pictures of the beneficiary's claimed employer do not comport with the types of cakes described in the experience letter. Counsel asserts that the pictures were taken long after the beneficiary left the employer and over time the employer changed the type of items sold. There is no evidence in the record to support this assertion.

We note that the AAO's decision and fraud determination does not solely rely on the above matters, but notes these as inconsistencies in the record which cast doubt on the evidence as a whole.

The AAO's fraud finding does rely on the consular investigation. With regard to the beneficiary's experience, counsel's final argument is that the petitioner has overcome the findings of the consular investigation by providing duplicative and repetitive affidavits relating to the prior employer. The affidavits provided with the motion present nothing in the way of new evidence that explains or reconciles such inconsistencies with competent objective evidence which could point to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The AAO also noted that the statute requires that a petition must be accompanied by a valid labor certification. In the present case, the petition was filed with a labor certification naming a different beneficiary. Consequently, the petition failed to comply with the statute. In response, the petitioner with the motion, submits an ETA 750B, naming the beneficiary. This document was dated and signed on April 22, 2013, eight years after the petition was submitted. This failing cannot be remedied.

The motion fails to meet the standard of 8 C.F.R. § 103.5(a)(2), as the petitioner did not provide new evidence relating to the previous denial. All of the evidence submitted on motion was previously available.

The motion fails to meet the standard of 8 C.F.R. § 103.5(a)(3), as the petitioner has not advanced an argument of legal error. Although counsel asserts that the beneficiary's due process rights were violated because the AAO raised the issue of the misspellings for the first time on appeal, as noted above, the AAO's decision did not rest solely on these misspellings.

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 reopen or reconsider the petition is dismissed. The petition remains denied.