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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: **SEP 05 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)

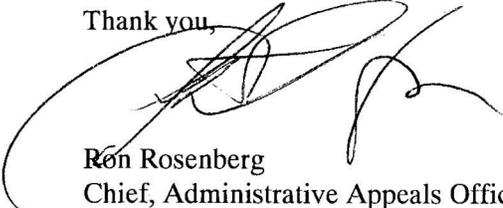
ON BEHALF OF PETITIONER:

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 and the Administrative Appeals Office (AAO) dismissed a subsequent appeal and motion to reopen and reconsider. The matter is again before the AAO on motion to reopen and reconsider. The motion to reopen and motion to reconsider will be dismissed. The AAO's prior decisions (June 6, 2012 and June 3, 2013) are affirmed. The petition remains denied.

The petitioner is an accounting firm. It seeks to employ the beneficiary permanently in the United States as an administrative assistant. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification (labor 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.

The record shows that the motion to reconsider is properly filed. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

A motion to reconsider must: (1) 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 [USCIS] policy; and (2) 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).

The petitioner has stated reasons for reconsideration, but has not cited to a precedent decision in support of its request for reconsideration. The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. The motion to reconsider will be dismissed.

The record shows that the motion to reopen is properly filed. The regulation at 8 C.F.R. § 103.5 provides 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." "New" facts are those that were not available and could not reasonably have been discovered or presented in the previous proceeding. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The petitioner has not presented facts or evidence that could not have been submitted in response to the director's Request for Evidence (RFE), or on appeal. The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. The motion to reopen will be dismissed.

In the event that the motion was not dismissed, which as addressed above is not the case, the AAO notes that the petitioner states that he has petitioned H-1B and permanent employees in the past but these employees have not worked for him in many years although he does not specify any dates of

filings or terminations;¹ he claimed \$37,884 and \$5,618 on his tax returns for mortgage payments in 2007 and 2008; he claims mortgage payments and living expenses from his previous letter should have been considered; he further claims adjusted gross income is calculated after deduction of itemized expenses such as mortgage, donations, taxes and other items; rental activity is a one year activity and has ceased; the beneficiary's 2007 and 2008 income was claimed on Schedule C of his tax returns therefore showing his asserted ability to sustain the beneficiary and his family without any deficit; and his mother gave him about \$6,800 for his expenses.

In its initial decision, the AAO found that the petitioner failed to establish that it paid the beneficiary the proffered wage in 2007; that the sole proprietor petitioner's expenses exceeded his adjusted gross income leaving a deficit to pay the proffered wage; and that it is improbable that the sole proprietor could support a family of four on a deficit. On motion, the petitioner has presented an affidavit from his mother which states that she gave him about \$6,800 in 2007. The record does not include supporting documentation of this gift. In the event that he did receive this gift, it would not establish the ability to pay the proffered wage of \$35,692.80 in 2007 as set forth in both the AAO's decisions of June 6, 2012 and June 3, 2013.

Although the petitioner states that he has petitioned H-1B and permanent employees in the past but these employees have not worked for him in many years, the evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence.

The petitioner has provided no basis for his claims that mortgage payments and living expenses from his initial letter submitted with the I-140 petition should have been considered; adjusted gross income is calculated after deduction of itemized expenses such as mortgage, donations, taxes and other items;² rental activity is a one year activity and has ceased; and the beneficiary's 2007 and 2008 income was claimed on Schedule C of his tax returns therefore showing his ability to sustain the beneficiary and his family without any deficit. The petitioner has failed to address the AAO's other findings in regard to the petitioner's living expenses from its June 6, 2012 decision. The petitioner has submitted the same letter, dated June 24, 2012, that it submitted with its previous filing and, therefore, is not new evidence.

¹ USCIS records show another I-140 petition was filed in September 2011, as well as an additional I-140 petition previously filed in October 2004.

² As noted in the AAO's prior decision, the petitioner's letter states that an individual's adjusted gross income (AGI) is calculated after deduction of itemized expenses such as mortgage, donations, taxes and other items. AGI is defined as gross income minus adjustments to income. Contrary to the petitioner's assertion, AGI is calculated before deduction of itemized (below-the-line) expenses such as mortgage interest, taxes and gifts to charity. See <http://www.irs.gov/uac/Definition-of-Adjusted-Gross-Income> (accessed September 4, 2013).

Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

If the motion was granted, the petition would remain denied for the above stated reason. 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.

The motion to reopen and motion to reconsider will be dismissed.

ORDER: The motion to reopen and motion to reconsider are dismissed. The previous decisions (June 6, 2012 and June 3, 2013) of the AAO are affirmed. The petition remains denied.