



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **SEP 06 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,

Rachel NiJunio
for

Ron Rosenberg
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 reopen and a motion to reconsider.¹ The motions will be dismissed, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner describes itself as a retail business. It seeks to permanently employ the beneficiary in the United States as a night manager. 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.

In a decision dated October 23, 2012, the AAO affirmed the director's prior decision and determined that the petitioner failed to establish the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

On motion, counsel asserts that the petitioner owns two [REDACTED] franchise stores, and if the second store is considered in the ability to pay analysis, the petitioner will establish the continuing ability to pay the proffered wage as of the priority date and until the beneficiary obtains lawful permanent residence. Counsel further states that a brief and additional documentation will be submitted within 30 days, but as of this date the record contains no additional evidence or brief. Unlike appeals, the regulation pertaining to motions to reopen and reconsider does not permit briefs and/or evidence to be filed subsequently. *See* 8 C.F.R. §§ 103.5(a)(2) and 103.5(a)(3).

A motion to reopen must state new facts. *See* 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that the decision was based on an incorrect application of law or Service policy. *See* 8 C.F.R. § 103.5(a)(3).

A motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) where the petitioner is providing new facts with supporting documentation. The petitioner has not submitted documentation in support of counsel's ability to pay claim. 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).

¹ On the Form I-290B submitted on November 26, 2012, the petitioner checked Box B, which states "I am filing an appeal. My brief and/or additional evidence will be submitted to the AAO within 30 days." 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 appeal is not properly within the AAO's jurisdiction. Notwithstanding, the AAO will consider the current filing as a motion to reopen and a motion to reconsider.

The AAO finds that the motion to reconsider does not qualify for consideration under 8 C.F.R. § 103.5(a)(3) because counsel has not established that the AAO's decision was based on an incorrect application of law or Service policy – counsel instead states that the existence of the second franchise store was revealed after the AAO's decision.

The motions to reopen and reconsider will be dismissed for the reasons stated above. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The motion to reopen and the motion to reconsider are dismissed and the decision of the AAO dated October 23, 2012 is affirmed. The petition is denied.