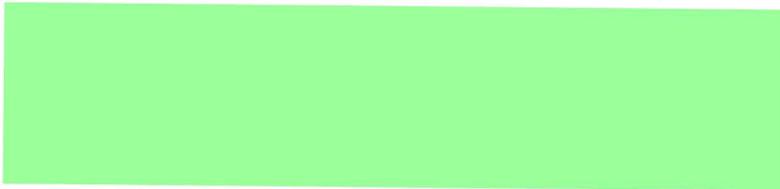


(b)(6)

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



U.S. Citizenship
and Immigration
Services



DATE:

FEB 07 2014

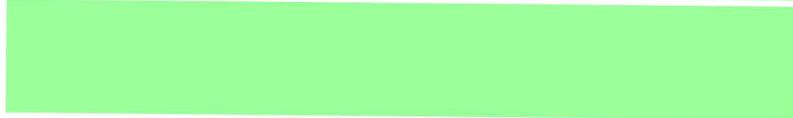
OFFICE: NEBRASKA SERVICE CENTER FILE:



IN RE:

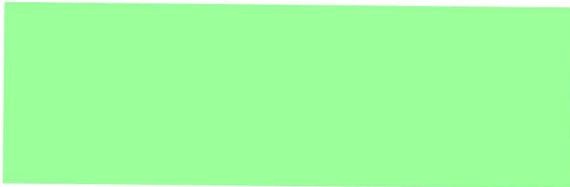
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on November 14, 2013, the AAO dismissed the appeal. The matter is now before the AAO on a motion to reopen and reconsider.¹ The motion will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as an other worker.² The director determined that the petitioner failed to demonstrate a continuing ability to pay the proffered wage beginning on the priority date. Beyond the decision of the director,³ the AAO also noted in its decision that the petitioner failed to establish the beneficiary's qualifications for the proffered position and noted that the transcripts and employment letters submitted are inconsistent with other evidence in the record of proceeding.

The AAO also notes that the petitioner has not filed a proper motion to reopen and reconsider. The motion was not accompanied by any new evidence or arguments based on precedent decisions. A motion must meet the regulatory requirements at the time it is filed; no provision exists for USCIS to grant an extension in order to await future correspondence that may or may not include evidence or arguments. The regulation at 8 C.F.R. § 103.5(a)(2) states, 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.⁴ 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. Counsel did not submit any evidence at the time of filing. On January 17, 2014, the AAO

¹ On the Form I-290B submitted on December 17, 2013, the petitioner checked Box B, which states "I am filing an appeal." 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. However, the AAO will accept the filing as a motion to reopen and reconsider despite the incorrect box being checked on the form.

² Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

³ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

⁴The 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).

received counsel's brief and evidence. All evidence submitted on motion was previously submitted by the petitioner and was already part of the record of proceeding.

Moreover, the AAO will not consider the additional evidence submitted by counsel on January 17, 2014, 64 days after the AAO's November 14, 2013 decision. The fact that the petitioner on the Form I-290B incorrectly checked box B ("I am filing an appeal. My brief and/or additional evidence will be submitted to the AAO within 30 days"), does not allow for submission of evidence beyond the 30 day period indicated for motions. The cover page of the AAO's November 14, 2013 decision indicated that the petitioner may file either a motion to reopen or a motion to reconsider the decision pursuant to the requirements found at 8 C.F.R. § 103.5, and that any motion must be filed with the office that originally decided the case within 30 days of the decision that the motion seeks to reconsider or reopen as required by 8 C.F.R. § 103.5(a)(1)(i).

On motion, counsel stated that the AAO erred in dismissing the appeal and that the evidence in the record sufficiently established the beneficiary's qualifications for the position. On motion, counsel restated that the matter should be reviewed under *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967) and that a totality of the evidence and circumstances analysis should be used to determine the petitioner's ability to pay. Counsel did not address the AAO's concerns regarding the inconsistent evidence in the record or provide any additional evidence of the beneficiary's qualification for the proffered position.

In her previous appeal, counsel stated that *Matter of Sonogawa* was applicable to the instant case. The AAO discussed *Matter of Sonogawa* in its November 14, 2013 decision. On page 8 of the AAO's decision, the AAO noted that the loss experienced by the petitioner in 2011 was not due to an uncharacteristic loss similar to *Matter of Sonogawa*. The AAO noted that the petitioner's rent had increased since 2009 and noted a downward trend in the petitioner's gross income, net income, and payroll. In the instant case, the record contains no evidence of the petitioner's reputation or its tax returns prior to 2009. Although counsel previously asserted that the petitioner has experienced growth since its establishment in 1997, the record contains no independent, objective evidence of the petitioner's finances before 2009. 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). Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

Furthermore, the motion shall be dismissed for failing to meet an applicable requirement. The regulation at 8 C.F.R. §§ 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and motions to reconsider. Section 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.



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 sustained that burden. Accordingly, the motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.