

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

(b)(6)

DATE: **JAN 03 2014**

OFFICE: NEBRASKA SERVICE CENTER

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DISCUSSION: The approval of the employment-based visa petition was revoked by the Director, Nebraska Service Center.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 motion to reconsider. The motion will be dismissed. The petition will remain revoked.

The petitioner describes itself as a restaurant. It seeks to employ the beneficiary permanently in the United States as a 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 possessed the minimum experience required by the labor certification. Accordingly, the director revoked the approval of the petition. The AAO affirmed the director's decision and added that the petitioner had failed to establish the ability to pay the proffered wage in 2003.

The labor certification states that the offered position has the minimum requirement of two years of experience in the job offered as a cook. The labor certification also states that the beneficiary qualifies for the offered position based on experience as a cook for [REDACTED] Pakistan, from April 1997 through the date the beneficiary signed the ETA Form 750 on August 28, 2003. No other experience is listed.

In an attempt to verify the beneficiary's claimed work experience, USCIS contacted the claimed employer through the U.S. Consulate in Islamabad, Pakistan. The Consular Officer spoke with the owner of the [REDACTED] who stated that the beneficiary was a seasonal employee and worked there just three months out of the year. Based on this information, the director concluded that the petitioner had not established that the beneficiary possessed two years of work experience as of the priority date and revoked the approval of the petition.

On appeal, counsel stated that the Consular Officer contacted the hotel when the business was "operationally closed" and concludes that the information gathered by the Consular Officer's investigation was not sufficient to discredit the beneficiary's claimed employment experience. Counsel submitted an employment letter dated February 10, 2013, from [REDACTED] who identified himself as the "[REDACTED]" stated that he had not been contacted by a Consular Officer and affirmed that the beneficiary worked there as a full-time cook from April 1, 1997, until March 31, 2006.

Counsel concluded on appeal that the letter from [REDACTED] cast doubt on the "relevance and competence" of the Consular Officer's investigation. However, the AAO found that the letter from [REDACTED], itself, bore little evidentiary weight. Specifically, the AAO detailed that while the letter is on what purports to be company letterhead, the letterhead lacked credibility in that the letterhead refers to the company as "[REDACTED]" Further, the letter is inconsistent with counsel's claim that the hotel was closed since January 2008 and has since been converted to an educational institution. No explanation is made as to how letterhead for a closed organization was available in February 2013.

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).

On motion, counsel concedes that the letterhead on the February 10, 2013, letterhead did misspell the company's name, but points out that a different part of the same letterhead did "boldly [spell] the word correctly." Counsel states on motion that the misspelling in the letterhead "cannot be the basis for questioning the credibility of a statement's contents." However, counsel's assertion is not supported by any authority or precedent decision that releases USCIS from its requirement to judge the quality of evidence submitted.¹ 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). Further, counsel fails to address at all the inconsistency in his claim that the hotel was closed since January 2008, yet provided letterhead in February 2013.

Counsel also asserts that the AAO failed to consider a February 9, 2013 statement from the hotel's manager, [REDACTED] statement also asserts that the hotel was closed in January 2008, but fails to explain how letterhead was available in February 2013.

Counsel further asserts that the beneficiary's schooling in 2002 did not interfere with his full-time employment as a cook, as the hotel catered to guests late at night. Counsel submits no documentary evidence to support this 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).

Finally, counsel also challenged the AAO's finding that the petitioner had failed to establish the ability to pay the proffered wage. Specifically, counsel stated that the petitioner could pay the proffered wage in 2003 through a combination of its net income and net current assets. However, counsel's assertion is not supported by any authority or precedent decision that would allow such a combination of funds to be used in determining a petitioner's ability to pay the proffered wage.²

¹ The evidence in each case is judged by its probative value and credibility. Each piece of relevant evidence is examined and determinations are made as to whether such evidence, either by itself or when viewed within the totality of the evidence, establishes that something to be proved is probably true. Truth is to be determined not by the quantity of evidence alone, but by its quality. *Matter of E-M-*, 20 I&N Dec. 77 (Comm'r 1989).

² This approach is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all

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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.

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 reconsider is dismissed. The approval of the petition remains revoked.

expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.