



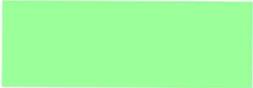
U.S. Citizenship
and Immigration
Services

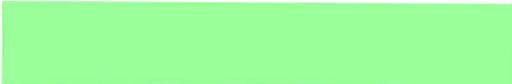
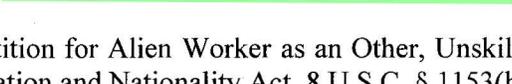
(b)(6)



DATE: JUL 11 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,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center and came before the Administrative Appeals Office (AAO) on appeal. The AAO affirmed the director's decision on February 9, 2012. The petitioner filed a motion to reconsider that decision, and the AAO dismissed the motion for being untimely filed on February 1, 2013. The petitioner filed a second motion to reconsider, and on July 26, 2013, the AAO granted the motion and affirmed the February 9, 2012 decision dismissing the appeal. The petitioner filed a third motion to reconsider that the AAO dismissed on March 28, 2014. The matter is again before the AAO as a fourth motion to reconsider its decision in accordance with 8 C.F.R. § 103.5. The motion will be dismissed pursuant to 8 C.F.R. §§ 103.5(a)(1)(i), 103.5(a)(3), and 103.5(a)(4).

United States Citizenship and Immigration Services (USCIS) regulations require that motions to reconsider be filed within 30 days of the underlying decision. 8 C.F.R. § 103.5(a)(1)(i). Similarly, USCIS regulations require that motions to reopen be filed within 30 days of the underlying decision, except that failure to timely file a motion to reopen may be excused in the discretion of USCIS where it is demonstrated that the delay was reasonable and was beyond the affected party's control. *Id.* In this matter, the motion was filed on May 1, 2014, 34 days after the AAO's March 28, 2014 decision. The record indicates that the AAO's decision was mailed to both the petitioner at its business address and to its counsel of record. The record contains a cover letter from counsel for the petitioner, dated April 30, 2014, stating that the filing fee was inadvertently omitted from the package when the Form I-290B, Notice of Appeal or Motion, was submitted. Pursuant to the regulation at 8 C.F.R. § 103.5(a)(1)(iii), a motion to reconsider must be accompanied by the filing fee in order to be properly filed. As the record does not establish that the failure to file the motion within 30 days of the decision was reasonable and beyond the affected party's control, the motion is untimely and must be dismissed for that reason.

The regulation at 8 C.F.R. § 103.5(a)(3) states 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 must also “establish that the decision was incorrect based on the evidence of record at the time of the initial decision.” In the instant matter, the petitioner has not demonstrated on motion that our March 28, 2014 decision was based on an incorrect application of law or Service policy. Therefore, the instant motion to reconsider will 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.¹

¹ Even if the petitioner had met the proper procedural requirements for the instant motion, the record reflects that the petitioner did not establish the ability to pay the proffered wage of \$39,117.00 in 2001, 2002, 2004, 2005, and 2006. In the instant case, the evidence in the record demonstrates the following:

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 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.

Year	Form W-2	Deficiency in wages paid to the beneficiary	Net Income	Net Current Assets	Year(s) in which the petitioner’s net income or net current assets exceeded the deficiency in wages paid
2001	\$12,710.78	\$26,406.22	\$14,047.00	\$(2,216.00)	
2002	\$12,000.00	\$27,117.00	\$19,535.00	\$(1,100.00)	
2003	\$12,000.00	\$27,117.00	\$24,697.00	\$49,418.00	X
2004	\$12,000.00	\$27,117.00	\$2,137.00	\$(3,017.00)	
2005	\$12,000.00	\$27,117.00	\$1,702.00	\$(6,250.00)	
2006	\$12,000.00	\$27,117.00	\$7,308.00	\$10,018.00	

Thus, from 2001 through 2006, the petitioner only had the ability to pay the proffered wage to the beneficiary in 2003. We also note that the affidavit by the petitioner’s owner, dated April 28, 2014, states that he took over the business in 2006 because “the prior owner was struggling . . . the prior owners of [redacted] did not run the business profitable from 2001 – 2006 . . . without notice, the restaurant was closed some days, the floors were dirty and the general appearance of the restaurant was poor . . . many of their sales were not recorded . . . some of the supplies purchased for this restaurant were actually being used at other restaurants . . . moneys were taken from the cash registers to make personal purchases.” These facts do not support the assertion that the predecessor to the petitioner had the ability to pay the beneficiary’s proffered wage in 2001, 2002, 2004, 2005, and 2006. Therefore, even if the instant motion had met the requirements for a motion to reconsider and if it had been timely filed, the petitioner would still not have met its burden of establishing the ability to pay the beneficiary’s proffered wage from the priority date onward.