

(b)(6)



U.S. Citizenship
and Immigration
Services

DATE: **JAN 23 2015**

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker Pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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 (Director). The petitioner filed an appeal, which was dismissed by the Chief, Administrative Appeals Office (AAO). Since then the petitioner has filed five motions to reopen and/or reconsider. The first was dismissed on procedural grounds, the next three were dismissed on substantive grounds, and the fifth—a motion to reconsider – is currently before the AAO. The motion will be dismissed. The petition will remain denied.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a carpenter pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). This statutory provision allows preference classification to be granted to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience) of a non-temporary nature for which qualified workers are not available in the United States.

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on August 18, 2010. The petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, that was filed with the U.S. Department of Labor (DOL) on May 31, 2009, and certified by the DOL (labor certification) on February 19, 2010.

On September 9, 2011, the Director denied the petition on the ground that the evidence of record failed to establish that the petitioner had the continuing ability to pay the proffered wage of the job offered from the priority date, May 31, 2009,¹ up to the present. In particular, the petitioner's corporate tax returns for the years 2009 and 2010 recorded net income and net current assets that were far below the proffered wage of \$45,468 per year.

In our dismissal of the appeal and the successive motions to reopen and/or reconsider, we have consistently found that the petitioner has not documented an ability to pay the proffered wage in the years 2009 and 2010. We have also consistently found that the overall magnitude of the petitioner's business as documented in the record does not establish its continuing ability to pay the proffered wage from the priority date up to the present – specifically, in the years 2009 and 2010 – applying the “Sonegawa factors” set forth in the precedent decision, *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l. Comm. 1967).

In the current motion to reconsider, the petitioner makes seven somewhat overlapping charges of error in our most recent decision, dated July 3, 2014, which dismissed the previous motion to reconsider. According to the petitioner, our decision: (1) erroneously applied the regulation at 8 C.F.R. § 204.5(g)(2); (2) failed to recognize a material fact and the ramifications of the recession of 2008; (3) erroneously interpreted and applied *Matter of Sonegawa*; (4) failed to follow the Regional Commissioner's precedent set forth in *Matter of Sonegawa*; (5) failed to recognize the

¹ The priority date of the petition is the date the underlying labor certification application was received for processing by the DOL.

petitioner's financial improvement over the qualifying period of time and to consider evidence of the totality of its circumstances; (6) applied 8 C.F.R. § 204.5(g)(2) in a prejudicial and discriminatory way against newly formed businesses created during the recession of 2008 that filed for alien workers during the recession of 2009; and (7) failed to accord judicial recognition to the economic effect of the recession of 2009.

As provided at 8 C.F.R. § 103.5(a)(3): "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 [USCIS] policy." As further provided at 8 C.F.R. § 103.5(a)(4): "A motion that does not meet applicable requirements shall be dismissed."

All of the legal arguments presented in the current motion were made by the petitioner in previous motions as well, and have already been fully considered by us in previous decisions, most recently on July 3, 2014.² The current motion does not state any new reason(s) for reconsideration. It does not present any new ground(s) for finding that our decision of July 3, 2014, or any prior decision in the course of these proceedings, was based on an incorrect application of law or USCIS policy.

In our previous decisions we have thoroughly reviewed and analyzed the evidence of record regarding the totality of the petitioner's circumstances. In each decision we have noted that the record lacks evidence of any specific impact on the petitioner's business of the economic downturn cited by counsel. Our prior decisions have also suggested certain evidence that may be helpful in demonstrating the impact of the economic downturn, including the petitioner's 2008 tax returns. With the current motion, however, the petitioner does not submit any new evidence to demonstrate that the totality of its circumstances demonstrates its ability to pay the proffered wage in 2009 and 2010.

For the reasons discussed above, we find that the current motion to reconsider does not meet the regulatory requirements of 8 C.F.R. § 103.5(a)(3). Accordingly, the motion will be denied.

² The only new wrinkle in the current motion is counsel's claim that our most recent decision on July 3, 2014, constituted discrimination against a newly-established business (the petitioner) in violation of the Civil Rights Act of 1964. This claim appears frivolous, however, since the petitioner has not cited any pertinent provision of that law or otherwise explained how the Civil Rights Act of 1964 applies to the instant petition. The assertions of counsel do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361 (2012); *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). That burden has not been met in this action.

ORDER: The motion to reconsider is dismissed. The petition remains denied.