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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: MAR 12 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the director, Texas Service Center. The Administrative Appeals Office (AAO) dismissed the subsequently filed appeal. The matter is now before the AAO on a motion to reopen and/or motion to reconsider. The motion will be dismissed and the director's and the AAO's decision will be undisturbed.

The petitioner is a Delaware limited liability company engaged in Information Technology services, and seeks to employ the beneficiary as its chief executive officer (CEO). Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition based on the following two grounds: (1) the petitioner failed to establish that the beneficiary had at least one continuous year of full time employment abroad with a qualifying organization within the three years immediately preceding the filing of the petition; and, (2) the petitioner failed to establish that the beneficiary was employed by the foreign company in a qualifying managerial or executive capacity.

On June 7, 2010, the petitioner filed a Form I-290B and stated that it is filing an appeal. In a decision dated June 13, 2012, the AAO dismissed the appeal and affirmed the director's decision. On July 16, 2012, counsel for the petitioner filed a Form I-290B and identified it as a Motion to Reconsider and a Motion to Reopen. On motion, counsel submits a brief and supporting documentation.

Counsel's assertions do not satisfy the requirements of a motion to reopen. The regulations at 8 C.F.R. 103.5(a)(2) states, in pertinent part: "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.[1]

A review of the evidence that the petitioner submits on motion reveals no fact that could be considered *new* under 8 C.F.R. 103.5(a)(2). The evidence submitted was either previously available and could have been discovered or presented in the previous proceeding, or it post-dates the petition.

Counsel for the petitioner also states that it is filing a motion to reconsider. 8 C.F.R. § 103.5(a)(2) states, in pertinent part:

> 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.

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[1] The 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).

On motion, counsel does not submit any document that would meet the requirements of a motion to reconsider. A review of the record and the adverse decision indicates that the director and the AAO properly applied the statute and regulations to the petitioner's case.

On motion, counsel for the petitioner disputes the AAO's decision, arguing that the AAO used the incorrect three-year time period as the point of reference. Specifically, counsel asserts that the AAO should have considered the beneficiary's employment abroad in light of the fact that it took place within three years of the beneficiary's lawful admission into the United States in a TN nonimmigrant visa category.

On motion, counsel contends that the beneficiary "possesses at least one year of qualifying experience, from January 2005 through March 2006, outside the United States as CEO and President of the Canadian entity, a managerial position of considerable responsibility, within 3 years before his entry into the United States as TN nonimmigrant." Counsel also states that the AAO erred by counting the one year experience abroad preceding the change of status to an L-1 nonimmigrant classification, rather than when the beneficiary entered into the United States on a TN nonimmigrant classification. Counsel further states that when the beneficiary entered the U.S. as a TN nonimmigrant on March 3, 2006, the beneficiary was to provide services as a Computer Analyst "under a corporation-to-corporation contract between the Canadian company and various US clients." In addition, counsel states that during the beneficiary's stay in TN nonimmigrant classification, he continued to serve the foreign company as CEO and President.

On motion, the petitioner submits addendums to letters previously submitted by the companies that utilized the beneficiary's services when he was in the United States in TN nonimmigrant classification. The new letters state that the beneficiary worked at the companies pursuant to a contract between the U.S. client and the beneficiary's foreign company. Counsel claims that the beneficiary was still employed by the foreign company when he was working in the U.S. in TN nonimmigrant classification.

However, the AAO noted that the beneficiary did not enter the United States in TN nonimmigrant classification to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive. The petitioner did not provide sufficient evidence to establish that at the time the beneficiary entered the United States to work in TN nonimmigrant classification for various U.S. companies, those employers had a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary"). In this case, the petitioner did not establish that the beneficiary's employer when he first entered into the United States has a qualifying relationship with the beneficiary's foreign employer.

Counsel also claimed that when the beneficiary was in the United States in TN nonimmigrant classification he was still in the role of CEO and President for the foreign company. However, the petitioner failed to provide any corroborating evidence for this claim and failed to explain how the

beneficiary could have a full-time job in the United States as a Computer Systems Analyst while also filling the position of CEO and President for the Canadian parent company. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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. Comm'r 1972)).

Furthermore, even if the petitioner can prove that the beneficiary entered the United States as a TN nonimmigrant to work with the beneficiary's foreign employer, or a company that has a qualifying relationship with the foreign company, it still cannot establish that the beneficiary was working in a managerial or executive capacity when he entered the United States in TN nonimmigrant classification.

The Service does not feel that Congress intended that *nonimmigrant managers or executives* who have already been transferred to the United States should be excluded from this classification. Therefore, the regulation provides that an alien who has been a manager or executive for one year overseas, *during the three years preceding admission as a nonimmigrant manager or executive for a qualifying entity*, would qualify." *See* 56 Fed. Reg. 30703, 30705 (July 5, 1991) (emphasis added).

The beneficiary was employed as a Computer Systems Analyst when he was employed in the U.S. in TN nonimmigrant classification. The petitioner did not provide a job description for this position and did not establish that the beneficiary was in a managerial or executive capacity.

In examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law clearly supports the pivotal role of a clearly defined job description, as the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *see also* 8 C.F.R. § 204.5(j)(5). That being said, however, USCIS reviews the totality of the record, which includes not only the beneficiary's job description, but also takes into account the nature of the petitioner's business, the employment and remuneration of employees, as well as the job descriptions of the beneficiary's subordinates, if any, and any other facts contributing to a complete understanding of a beneficiary's actual role within a given entity.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Upon review of the petition and evidence, the petitioner has not established that the beneficiary was employed in a managerial or executive capacity when he entered the United States in TN nonimmigrant classification.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See* sec. 291 of the Act, 8 U.S.C. 1361; *see also Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. at 376 (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Here, the submitted evidence does not meet the preponderance of the evidence standard. As noted in the director's decision and the AAO's decisions, the petitioner did not provide sufficient relevant, probative, and credible evidence to establish the petitioner meets the regulatory requirements to establish eligibility for the I-140 immigrant visa petition.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *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 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. 8 CFR 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, the proceedings will not be reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion will be dismissed. The director's and AAO's decision will be undisturbed. The petitioner is denied.