

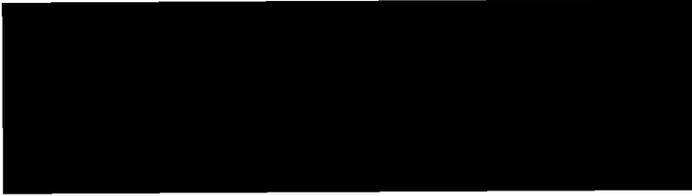
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**U.S. Department of Homeland Security**  
U. S. Citizenship and Immigration Services  
*Office of Administrative Appeals* MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**



B4

FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date:  
LIN 07 021 52238

**MAY 06 2010**

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reopen or reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner appealed the matter to the Administrative Appeals Office (AAO). The appeal was dismissed. The matter is now before the AAO on motion to reopen and reconsider. The motion will be dismissed.

The petitioner is a Florida corporation that owns and operates a restaurant. It seeks to employ the beneficiary as its president. 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 two independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and 2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, the petitioner's prior counsel disputed the director's conclusions and submitted a brief and additional documents, which were reviewed by the AAO prior to its decision. The AAO dismissed the appeal, concluding that the petitioner failed to furnish adequate job descriptions specifying the actual tasks the beneficiary performed during his employment abroad and the tasks he would perform in his proposed position with the U.S. entity. The AAO also issued one additional finding beyond the director's decision, concluding that the petitioner failed to provide sufficient evidence to show that it has established a qualifying relationship with the beneficiary's foreign employer. Specifically, the AAO observed that Schedule L of the petitioner's 2005 tax return did not show that the petitioner had been compensated for the stock it purportedly issued in 2004. The AAO further commented on the information provided by the petitioner in response to the director's request for additional evidence, noting that the petitioner's articles of incorporation, which showed that the petitioner was authorized to issue 50,000 shares of stock, was inconsistent with the petitioner's stock certificate no. 5, which indicated that a total of only 1,000 shares were authorized to be issued.

On motion, the petitioner's new counsel submits a brief dated January 13, 2009 in which he attempts to resolve the above noted inconsistency with an explanation of the petitioner's intent. Counsel refers to purchase documents, which he relies on as evidence of the foreign entity's purchase of the U.S. restaurant. Counsel clarifies that because the foreign entity's funds were purportedly used to purchase the restaurant rather than the petitioner's stock, the transaction was not reflected in the petitioner's 2005 tax return.

Counsel's statements, however, are not persuasive and do not overcome the AAO's previously stated grounds for dismissing the appeal. First, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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). In the present matter, while the petitioner provided a purchase document for Big Pete's Pizzeria, the document shows the beneficiary rather than the foreign entity as the buyer of the restaurant. While counsel asserts that the foreign entity gave the beneficiary money specifically to make the purchase at the foreign entity's request, this claim is not documented with independent objective evidence. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Second, regardless of the foreign entity's intent to allot money for the purchase of the restaurant, the fact remains that the record lacks evidence to establish that the foreign entity compensated the petitioner for the petitioner's issuance of stock. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and

foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). Ownership of the petitioning entity cannot be firmly established unless the petitioner provides evidence to show that it has been compensated for the stock it issued. Any such compensation must be documented in the petitioner's tax returns.

Notwithstanding the above considerations, the petitioner has failed to establish that it meets the requirements of either a motion to reopen or a motion to reconsider. The regulations at 8 C.F.R. § 103.5(a)(2) state, 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.<sup>1</sup>

In the present matter, counsel's motion references old documents and facts that were previously available. Therefore, the requirements of a motion to reopen have not been met.

The regulations at 8 C.F.R. § 103.5(a)(3) state, 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 USCIS 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.

Here, counsel does not cite any legal precedent or applicable law that would indicate an error on the part of the AAO in dismissing the petitioner's appeal.

Additionally, 8 C.F.R. § 103.2(b)(4) requires that application and petition forms as well as supporting documents be submitted in the original unless they were previously filed with USCIS. In the present matter, the Form I-290B that was filed with supporting evidence for the petitioner's motion to reopen and reconsider lacked counsel's original signature. Rather, the document contained a signature stamp containing counsel's name. Accordingly, USCIS returned the motion with a notice informing the petitioner that an original signature using blue or black ink was required. The petitioner resubmitted the Form I-290B with the required signature. However, the document was not received by USCIS until February 2, 2009, or 45 days after the AAO issued its decision.

Pursuant to 8 C.F.R. § 103.5(a)(1)(i), the following time restrictions apply to motions to reopen and reconsider:

Any motion to reconsider an action by the Service filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to

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<sup>1</sup> 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).

reconsider an action by the Service filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider . . . , except that failure to file before the period expires, may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner.

In the present matter, the petitioner's motion was not received in its proper form until 45 days after the AAO issued its decision dismissing the petitioner's appeal. As there is no evidence that the delay in the filing of the motion was reasonable and beyond the petitioner's control, the petitioner's motion must be dismissed based on the additional finding of the motion's untimely filing.

Therefore, in accordance with 8 C.F.R. § 103.5(a)(4), which states, in pertinent part, that a motion that does not meet applicable requirements shall be dismissed, the AAO will hereby dismiss the motion.

As a final note, the proper filing of a motion to reopen and/or reconsider does not stay the AAO's prior decision to dismiss an appeal or extend a beneficiary's previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

**ORDER:** The motion is dismissed.