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**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**



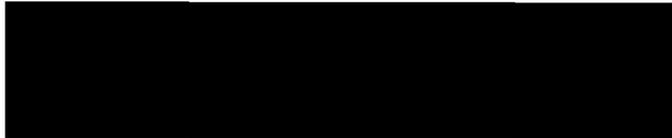
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Date: **APR 27 2012**

Office: NEBRASKA SERVICE CENTER

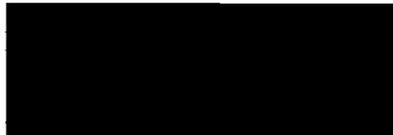


IN RE:           Petitioner:  
                    Beneficiary:



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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed

**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 AAO's adverse decision prompted the petitioner to file a motion to reopen and reconsider, which the AAO also dismissed. The matter is now before the AAO on a second motion to reopen and reconsider. This 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 the AAO considered prior to dismissing the appeal. The AAO concluded that the petitioner failed to overcome either of the two grounds cited in the director's decision and also issued an additional finding beyond the director's decision, concluding that the petitioner failed to provide sufficient evidence to show that it has a qualifying relationship with the beneficiary's foreign employer. The AAO pointed to an inconsistency between the petitioner's articles of incorporation, which showed that the petitioner was authorized to issue 50,000 shares of stock, and the petitioner's stock certificate no. 5, which indicated that a total of only 1,000 shares were authorized to be issued. The AAO also observed that Schedule L of the petitioner's 2005 tax return lacked any indication that the petitioner had been compensated for the stock it claims to have issued in 2004.

On first motion, the petitioner's new counsel submitted a brief in which he referred to purchase documents, which he offered as evidence of the foreign entity's purchase of the U.S. restaurant. Counsel claimed that the stock sale was not reflected in the petitioner's 2005 tax return because the foreign entity's funds were used to purchase the restaurant rather than the petitioner's stock.

The AAO found that counsel's statements were not persuasive as the assertions put forth were not supported by documentary evidence. The AAO pointed out that, while the petitioner provided a purchase document for Big Pete's Pizzeria, the document showed that the beneficiary rather than the foreign entity purchased the restaurant and no additional evidence was submitted to establish that the foreign entity gave the beneficiary money specifically to make the purchase at the foreign entity's request. *See Matter of Soffici*, 22 I&N Dec. 152, 155 (C.A. 9, 1999) (citing *Matter of Torres*, 14 I&N Dec. 120, 121 (C.A. 9, 1991)).

On current motion, counsel submits a statement reasserting claims previously made with regard to the petitioner's use of the foreign entity's funds for the purchase of a restaurant. In support of the claims being made, counsel offers a letter from the partners of the foreign entity as well as an affidavit from the beneficiary to further clarify the basis of the qualifying relationship claim.

Counsel also challenges the relevance of the cases cited by the AAO, claiming that there is no regulation or case law precedent that requires the petitioner to provide evidence showing that it was compensated for the issuance of stock.

The AAO again finds that counsel's assertions do not meet the requirements of a motion to reopen and reconsider.

First, with regard to a motion to reopen, the regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that the petitioner must state the new facts to be provided in the reopened proceeding and the new facts must 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, the facts put forth in counsel's statement are merely a restatement of the assertions that were previously made in the prior motion. Thus, while the petitioner submits an affidavit to support the facts that are being put forth, the facts being asserted cannot be deemed as new and thus do not meet the requirements of a motion to reopen.

Next, with regard to a motion to reconsider, 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 focuses on the cases cited in the AAO's prior decision, contending that the cited cases do not expressly require a petitioner to provide evidence showing that it had been compensated by its parent entity for the issuance of stock. However, as general evidence of a petitioner's claimed qualifying relationship,

The AAO further points out that when, as in the present matter, an inconsistency exists in the record, it is particularly crucial for the petitioner to be able to provide independent objective evidence to support the assertions being made and to overcome the inconsistency. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Moreover, USCIS has the discretion to request evidence, beyond the initial evidence required by regulation, in order to determine whether the petitioner is eligible for the immigration benefit it seeks to obtain. *See* 8 C.F.R. § 103.2(b)(8)(iii). Here, the evidence submitted in support of the petitioner's initial motion failed to address a valid issue concerning the lack of evidence showing that the foreign entity offered some form of consideration in exchange for the petitioner's issued stock.

Moreover, as with the previous motion, 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 prior motion.

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.

Lastly, the AAO notes that even if the petitioner was successful in overcoming the additional issue regarding a qualifying relationship, the record clearly shows that the director's original decision, which the AAO affirmed by dismissing the appeal, cited two other grounds for denial—the petitioner's failure to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity and that he would be employed in the United States in a qualifying managerial or executive capacity. There is no evidence showing that the petitioner has overcome or even addressed either of the director's original adverse findings in the present motion. The AAO therefore finds that the petitioner has ultimately conceded the two original adverse findings as grounds for denial.

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.