

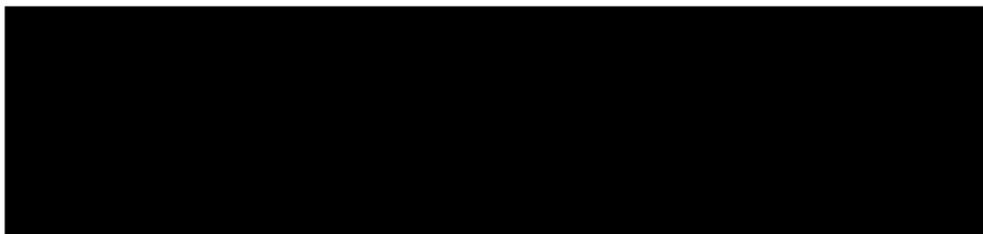
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



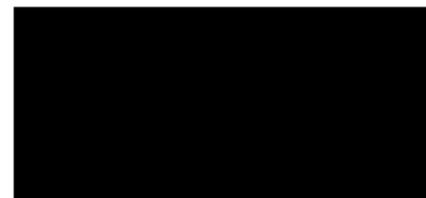
U.S. Citizenship
and Immigration
Services



B4

DATE: AUG 16 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:

SELF-REPRESENTED

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director, Nebraska Service Center. The petitioner appealed the matter to the Administrative Appeals Office (AAO), where the appeal was dismissed. The petitioner subsequently filed a motion to reopen with AAO, which was dismissed. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be dismissed.

The petitioner is a Florida corporation that offers language-based education programs. It seeks to employ the beneficiary as its Language Director/Owner. 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 concluding that: (1) the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity, and (2) the petitioner failed to establish that it has a qualifying relationship with the foreign entity that employed the beneficiary abroad.

The AAO dismissed the appeal, noting that in responding to the director's RFE, the petitioner failed to provide crucial documents that are necessary to gauge the availability of a support staff and whether the beneficiary would be relieved from having to primarily perform the non-qualifying, daily operational tasks of the business. The AAO concluded that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The AAO also found that the petitioner failed to submit sufficient evidence to demonstrate that the petitioner and the beneficiary's employer abroad have the required common ownership and control. Beyond the decision of the director, the AAO also found that, insofar as the regulation at 8 C.F.R. § 204.5(j)(5) required the petitioner to establish that the beneficiary will be "employed" as an "employee of the United States operation, the petitioner has failed to do so. *See, e.g., Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 449-450 (2003). Additionally, the AAO found that the petitioner failed to show that the beneficiary was employed abroad in a qualifying managerial or executive capacity per 8 C.F.R. § 204.5(j)(3)(i)(B), or that the petitioner is a "multinational" entity, as defined at 8 C.F.R. § 204.5(j)(2).

On November 2, 2010, the AAO dismissed the motion to reopen pursuant to 8 CFR 103.5(a)(4), which states, in pertinent part, that a motion that does not meet applicable requirements shall be dismissed.

On December 2, 2010, the petitioner filed Form I-290B and states that it is filing a motion to reopen and a motion to reconsider, and a brief and/or additional evidence is attached.

On motion, the petitioner states that "I consider the laws were inappropriately applied in my case. After talking to experienced people in this field I assume to have presented the necessary proof of my direct and tight relation with Tradfax in Argentina and the United States."

The petitioner submitted a printout from the website of Fidescu and University of Salamanca, "explaining DIE (proving the exclusivity in the USA)." The petitioner also submitted a letter from the United States Information Service, dated October 27, 1997, written to the beneficiary thanking him for his help as a bus driver during the visit of Bill Clinton to Argentina. The petitioner also submitted a Business Tax Receipt for the petitioner for 2010 – 2011. The petitioner also submitted certificates of recognition granted to the

petitioner and the beneficiary. The petitioner also submitted a letter detailing the job duties performed by the beneficiary when he was employed by the foreign entity. The petitioner's assertions do not satisfy the requirements of either a motion to reopen or a motion to reconsider.

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.

In addition, the motion does not satisfy the requirements of 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.

On motion, the petitioner 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. The petitioner's primary complaint is that the director denied the petition. The petitioner insists that it provided sufficient documentation and that the petitioner's business is extremely important. However, both the director and the AAO's decisions have clearly outlined the missing information and documentation that the petitioner failed to submit, and that the record has insufficient evidence to establish eligibility for the benefit sought. As previously discussed, the petitioner has not met its burden of proof and the denial was the proper result under the regulations. Accordingly, the petitioner's claim is without merit.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See 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 (AAO 2010); *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

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

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).

of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also stated that "[t]ruth 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.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

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 evidence to establish that the petitioner meets the regulatory requirements to establish eligibility for approval of the 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 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.