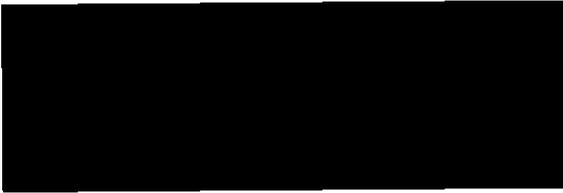




U.S. Citizenship  
and Immigration  
Services



B4

DATE: DEC 19 2012

OFFICE: NEBRASKA 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, 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 reconsider. The motion will be dismissed and the director's and the AAO's decisions will be undisturbed.

The petitioner is a Texas corporation that 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 on January 25, 2008, 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 the beneficiary was employed abroad in a qualifying managerial or executive capacity.

The petitioner subsequently filed an appeal which the AAO dismissed on December 1, 2008, affirming the director's original findings.

On July 22, 2011, the AAO dismissed the motion to reopen and reconsider pursuant to 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.

On August 24, 2011, the petitioner filed Form I-290B, Notice of Appeal or Motion, and states that he is filing a motion to reconsider, and a brief from counsel is attached.

As a preliminary matter, the AAO notes that while an appeal and a motion are both remedial actions, the legal purpose of an appeal is entirely distinct from that of a motion to reopen/reconsider. The AAO reviews appeals on a *de novo* basis, allowing the petitioner to supplement the record with any evidence or documentation that the filing party feels may overcome the grounds for the underlying adverse decision. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). However, the AAO's review of a motion to reopen or a motion to reconsider is limited to evidence that falls within the specific criteria discussed at 8 C.F.R. § 103.5(a)(2) and 8 C.F.R. § 103.5(a)(3), respectively. Submitting evidence that does not fit the regulatory criteria specified at 8 C.F.R. § 103.5(a)(2) or 8 C.F.R. § 103.5(a)(3), depending on the type of motion the petitioner has filed, will not suffice even if such evidence may have overcome the grounds for denial if it have been submitted on appeal.

Counsel's assertions do not satisfy the requirements of a motion to reconsider. 8 C.F.R. § 103.5(a)(3) 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, counsel contends that the “Petitioner and Beneficiary were not outside of legal bounds in presenting new evidence in the appeal process before the AAO.” Upon review of the AAO’s decisions, at no time did the AAO state that the petitioner or the beneficiary were “outside of legal bounds” when presenting new evidence on appeal. Instead, the AAO stated in the appeal decision that the organizational chart submitted in response to the request for evidence indicated new employees that were not employed at the time the I-140 petition was filed. As stated by the AAO, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm’r 1971).

Counsel also states that “at this time the Petitioner would like in good faith to resolve the Beneficiary’s classification with a quality decision from the Service (one that does not confuse the facts and legal explanations of the Petitioner).” Upon review of the denial and the AAO’s decisions, both the Director and AAO provided detailed statements of the grounds for denial and dismissal and cited to the specific provisions of the regulations as a basis for the decisions. 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. Both the director and the AAO’s decisions have clearly outlined the missing information or inconsistent information and documentation, and explained that the record has insufficient evidence to establish eligibility for the benefit sought.

Counsel also suggests that USCIS may have ignored the fact that an executive or manager can oversee both a function and personnel. Upon review of the AAO’s dismissal of the appeal, the AAO clearly outlined the reasons why the evidence was insufficient to establish that the beneficiary will perform in a managerial or an executive capacity or as a function manager. The AAO’s decision discusses all three issues and still found that the petitioner did not provide sufficient evidence to establish that the beneficiary was employed abroad and would be employed with the petitioner in a qualifying managerial or executive capacity. The AAO provided a detailed statement of the grounds for denial and dismissal and cited to the specific provisions of the regulations as a basis for the decisions. As previously discussed, the petitioner has not met its burden of proof and the denial was the proper result under the regulation. 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 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 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 the I-140 immigrant 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 decisions will be undisturbed. The petition is denied.