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

[redacted]

DATE: DEC 2 4 2012 OFFICE: NEBRASKA SERVICE CENTER [redacted]

IN RE: Petitioner:
Beneficiary: [redacted]

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference via 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 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 limited liability company that was formed in the State of Washington. The petitioner seeks to employ the beneficiary as its executive director. 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 May 18, 2009, 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, affirming the director's original findings.

On November 30, 2011, the petitioner filed Form I-290B and states that it is filing a motion to reconsider, and a brief and/or additional evidence 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 part feels may overcome the grounds for the underlying adverse decision. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO's review of a motion to reopen or a motion to reconsider is limited to evidence that fits the specific criteria discussed at 8 C.F.R. §§ 103.5(a)(2) and 103.5(a)(3), respectively. Submitting evidence that does not meet the regulatory criteria specified at 8 C.F.R. §§ 103.5(a)(2) or 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.

The petitioner'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, the petitioner submits a brief that "explains the circumstances and timeline that has brought us to our current situation." The petitioner explained that the beneficiary's foreign

employer was in the business of trading newsprint and wood products and it decided to operate a subsidiary in the U.S. to "import American newsprints and recycled papers to China." The petitioner also explained that the U.S. company had to shut down and the petitioner purchased a glass vase and ceramic wholesale company in January 2006. The petitioner also provided a brief description of an expansion plan it has for the future. The petitioner also provided a discussion of the "prediction of the effect of a denial decision," such as loss of jobs, loss of investments and loss of inventory.

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 decisions 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.

On motion, the petitioner does not establish that the AAO's decision was based on an incorrect application of law or Service policy. Instead, the petitioner provided a history of its business operations; an explanation of investments made by the beneficiary in the United States; and the petitioner's opinion of the negative impacts the visa denial would have on the petitioner and the beneficiary. The brief does not provide information or evidence that would establish a basis for a favorable decision on the motion to reconsider. 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)).

The Form I-140 and the supporting evidence stated that the petitioner was engaged in the purchase and export of paper commodities. On motion, the petitioner explained that its initial business operation of trading newsprint and wood products did not succeed, and that the petitioner subsequently purchased a new company in January 2006. The new company was engaged in the wholesale of glass vases and ceramics. The Form I-140 was filed in January 2007, a year after the petitioner purchased a new company and began a whole new business operation. The I-140 petition does not mention the new company at all. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Furthermore, 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).

On motion, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). A petitioner may not make

material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

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 decision, the petitioner did not provide sufficient evidence to establish that the petitioner meets the regulatory requirements to establish eligibility for the I-140 immigrant visa.

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, the proceedings will not be reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed. The petition is denied.