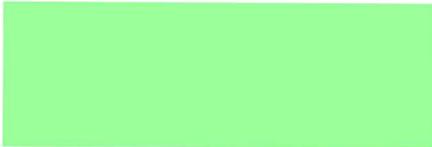


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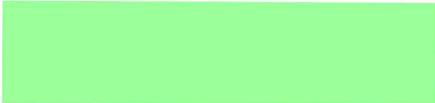
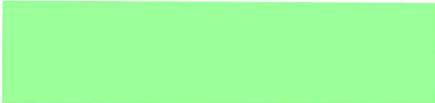
U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Service  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave. N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



DATE: **DEC 23 2013** OFFICE: TEXAS 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:

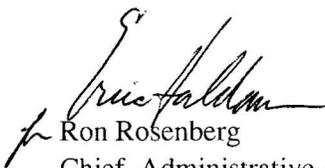


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition. 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 combined motion to reopen and reconsider. The motion will be denied.

The petitioner is a Florida corporation that 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 April 19, 2011, concluding that: (1) the petitioner failed to establish that the beneficiary's employment abroad was within a qualifying managerial or executive capacity; and, (2) the petitioner failed to establish that the beneficiary's proposed employment with the U.S. entity would be within a qualifying managerial or executive capacity.

The petitioner subsequently filed an appeal which the AAO dismissed, affirming the director's original findings. In addition, the AAO determined that the petitioner failed to establish that the petitioner has a qualifying relationship with the foreign entity.

On October 15, 2012, the petitioner filed Form I-290B, Notice of Appeal or Motion and states that it is filing a combined motion to reopen and reconsider.

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). However, 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 8 C.F.R. § 103.5(a)(3), respectively.

The regulations at 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.

The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion that does not meet applicable requirements shall be dismissed.

On motion, counsel states the petitioner provided sufficient evidence to establish that the beneficiary's employment abroad was within a qualifying managerial or executive capacity. Counsel explains that the beneficiary held the position of Sales and International Marketing

Manager with the foreign company and the duties performed by the beneficiary in that position "parallel the duties of a Marketing Manager as described by the U.S. Bureau of Labor Statistic Occupational Outlook Handbook for 2012-2013." Counsel further states that according to the Occupational Outlook Handbook, the position of Marketing Manager is a "professional occupation which requires a bachelor's degree as the minimum requirement for entry into the position."

As noted in the AAO's decision, the job description provided for the beneficiary's former overseas position consisted of an overly general and vague list of job duties. The description did not convey a meaningful understanding of how much time the beneficiary spent performing qualifying tasks versus those that would be deemed non-qualifying. Although counsel states that the beneficiary's duties are similar to the duties listed in the Occupational Outlook Handbook for a marketing manager, such claim cannot be accepted in lieu of a detailed and consistent description of the actual duties performed by the beneficiary during his period of employment with the foreign entity between 2003 and 2005. Moreover, general Occupational Outlook Handbook occupational descriptions have little probative value as they were not created within the scope of the statutory definitions of managerial or executive capacity at section 101(a)(44) of the Act.

Here, the petitioner's initial description of the beneficiary's duties included potentially non-qualifying duties such as "managing . . . administrative functions including bid requests, contract negotiations, data posting, payroll and personnel documents"; "financial functions, including accounts payable and receivable, cash reserves and financial reporting documents"; and undefined "quality control" duties, none of which clearly fall under the statutory definitions of managerial or executive capacity. These duties were notably absent from the job duty description submitted in response to the director's RFE, which focused more on marketing strategy rather than on administrative and financial and quality control-related duties. However, the description submitted in response to the RFE also included additional non-managerial duties such as "compile lists describing product or service offerings"; "participate in promotional activities and trade shows"; and "coordinate promoter visits to client outlets." Overall, the petitioner has failed to provide a detailed, consistent account of the beneficiary's job duties for the foreign entity. This deficiency cannot be cured by a comparison of the beneficiary's claimed duties to those of a generic "marketing manager" position as compiled by the U.S. Department of Labor's Occupational Outlook Handbook.

On motion, counsel also states that the petitioner submitted sufficient evidence to establish that the beneficiary's proposed employment with the U.S. entity would be within a qualifying managerial or executive capacity. The petitioner submits a description of the duties that would be performed by the beneficiary in the United States and a percentage breakdown for each duty. Counsel also states that the request for evidence instructed the petitioner to provide a definitive statement describing the beneficiary's duties in his former position with the foreign entity, but did not request comparable evidence relating to the beneficiary's proposed position.

Upon review of the request for evidence, dated March 23, 2010, the request stated, "submit evidence to establish that the beneficiary's employment at the US company and foreign company

qualifies under all four criteria stated above for either a Manager or Executive. In addition, provide a breakdown of the amount of time the beneficiary will spend on these various duties."

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The petitioner failed to submit a more detailed job description for the U.S. position and the percentage of time the beneficiary will spend on each duty, as requested by the director. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

On motion, the petitioner submits the beneficiary's job description with a percentage breakdown. However, as noted in the AAO's decision, the petitioner has not identified employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. The petitioner claimed to have four employees at the time it filed the petition in December 2009. According to the petitioner's IRS Form 941, Employer's Quarterly Federal Tax Return and state quarterly wage report for the third quarter of 2009, the petitioner employed four individuals but it appears that two individuals were working part-time. The petitioner also failed to provide an organizational chart as requested by the director. Thus, the petitioner did not establish what positions were filled at the time of filing or what duties were performed by the beneficiary's subordinates. Moreover, it appears that the petitioner operates a retail store that sells tires, provides auto mechanic services, and rents motor homes. It is not clear how one full-time employee and two part-time employees would be able to relieve the beneficiary from involvement in day-to-day functions such as sales, auto servicing, inventory, motor home maintenance and inspection, stocking, bookkeeping, purchasing and other administrative and operational tasks associated with the day-to-day operation of the business.

The petitioner has not provided any additional evidence in support of the motion to overcome the director's and AAO's concerns. The petitioner submits the petitioner's IRS Form 1120 for 2011 and evidence of wages paid to employees in 2012. 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. 8 C.F.R. § 103.5(a)(2). Further, 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). The petitioner has not submitted evidence on motion to overcome the adverse findings with respect to the beneficiary's proposed employment capacity in the United States.

The third and final issue to be addressed is the petitioner's claimed qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C.

§ 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms “affiliate” and “subsidiary”).

In dismissing the petitioner's appeal, the AAO observed that there was an inconsistency between the petitioner's ownership as stated in its Articles of Incorporation and the ownership as stated on the company's issued stock certificate number 1. As such, the AAO found the evidence insufficient to corroborate the claimed parent-subsidiary relationship between the foreign and U.S. companies.

On motion, counsel contends that the petitioner submitted sufficient evidence to establish that it has a qualifying relationship with the beneficiary's foreign employer. Counsel states that the owners of the corporation are legally designated on the shares of stocks and not the articles of incorporation and that the sole shareholder is listed on the stock certificate as Mr. [REDACTED]

Counsel does not explain the inconsistent information between the articles of incorporation and the stock certificate. The petitioner submitted the articles of incorporation, signed on February 2, 2005, that states the corporation has two shareholders: [REDACTED] (50% ownership) and [REDACTED] (50% ownership). However, the submitted stock certificate, Number 1, states the foreign company owns 100% of the petitioner. It is not clear why the information stated in the articles of incorporation is different from the ownership information listed on the stock certificate. It is also unclear why counsel on motion states that the sole shareholder is [REDACTED] and not the foreign company.

Due to the inconsistent information in the record regarding the ownership of the U.S. company, the petitioner cannot rely on its stock certificate alone to establish its ownership. The petitioner must provide additional evidence such as a corporate stock certificate ledger, stock certificate registry, corporate bylaws, proof of purchase of the stocks, minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity.

On motion, counsel did not provide any additional documentation regarding ownership between the U.S. company and the foreign company. In fact, the petitioner submits a copy of its IRS Form 1120, U.S. Corporation Income Tax Return, for 2011 which further contradicts its initial claim that it is a wholly-owned subsidiary of the foreign entity. Specifically, on the Form 1120 at Schedule K, the petitioner indicated "No" where asked if the company is owned by a foreign entity. 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).

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 eligibilitythe requested immigrant visa.

On motion, the petitioner does not establish that the AAO's decision was based on an incorrect application of law or Service policy. The brief does not provide information or evidence that would establish a 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 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.<sup>1</sup>

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 filing of the petition and is therefore not relevant to establishing the petitioner's and beneficiary's eligibility as of the date of filing.

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.

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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).

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 discussed in the director's decision and the AAO's decision, the petitioner did not provide sufficient evidence to establish the petitioner meets the regulatory requirements to establish eligibility for the requested immigrant visa.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met. The petitioner has not sustained that burden. Accordingly, the motion will be denied and the AAO's previous decision will not be disturbed.

**ORDER:** The motion is denied.