

(b)(6)



U.S. Citizenship  
and Immigration  
Services

[Redacted]

DATE: **MAR 07 2013** OFFICE: NEBRASKA SERVICE CENTER FILE [Redacted]

IN RE: Petitioner: [Redacted]  
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:  
[Redacted]

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 with the field office or service center that originally decided your case by filing a 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 matter is now before the AAO on a motion to reopen and reconsider. The motion will be dismissed; the previous decisions will not be disturbed.

The petitioner is an Ohio corporation engaged in retail and it seeks to employ the beneficiary as an executive. Accordingly, the petitioner endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director denied the petition on October 29, 2009, concluding that: (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 the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

The petitioner subsequently filed an appeal which the AAO dismissed on February 7, 2012, affirming the director's original findings.

On March 1, 2012, the petitioner filed Form I-290B and states that it is filing a motion to reopen and a motion to reconsider. The petitioner submitted a brief in support of the motion.

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 affected 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 fits 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 will not suffice.

The regulations at 8 C.F.R. § 103.5(a)(2) state, 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>

On motion, counsel for the petitioner provided a brief that outlines sections of the AAO's decision and lays out the grounds for challenging the decision. The petitioner did not submit any additional evidence. Since counsel submits a legal brief, and the affected party presents no new evidence, the motion reveals no fact that could be considered *new* under 8 C.F.R. § 103.5(a)(2).

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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).

The regulations outline 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, counsel contends that AAO was incorrect in stating that only the petitioner's eligibility will be addressed in the present matter and not eligibility based on the beneficiary's positions in two other U.S. businesses of which the beneficiary is a principal owner. Counsel states that information regarding the beneficiary's duties with the other companies is important to the examination of his executive duties since "it can be demonstrated that he has been a chief executive of two or three functioning corporation, then it is both implicit and explicit, particularly when substantiated by supporting documentation, that he is not a daily low legal worker."

However, as noted by AAO, the petition was filed by the specific employer on record and not by the other two businesses. The beneficiary's duties with other companies are irrelevant to the current petition. Section 204(a)(1)(F) of the Act specifically provides: "*Any employer desiring and intending to employ within the United States an alien entitled to classification under section . . . 203(b)(1)(C) . . . may file a petition with the [Secretary of Homeland Security] for such classification.*" (Emphasis added.) The AAO must review the beneficiary's duties as to his role with the employer that filed the petition, and not with other unaffiliated companies. If one of the other two businesses intends to employ the beneficiary, then it would be appropriate for that employer to file a separate visa petition pursuant to section 204(a)(1)(F) of the Act.

Counsel correctly notes that USCIS should review the all the facts and the beneficiary's duties before making a final decision. When examining the managerial or executive capacity of a beneficiary, USCIS reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. However, the facts must be regarding the petitioning entity and not entities that are not affiliated with the petitioner and do not work closely with the petitioner in providing services.

Counsel also states that the "AAO's denial goes on to pick apart whether at any specified time there were eight or fifteen employees; the exact titles of foreign employees, and numerous other small details from a huge volume of evidence that has been submitted in this file." The AAO's decision clearly laid out inconsistencies in the organizational charts, along with discrepancies in the claimed number of employees, which undermine the credibility of the petitioner.

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). If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

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 important. However, both decisions clearly outlined the conflicting information and the the documentation that the petitioner failed to submit. Ultimately, despite the voluminous record, the petitioner submitted insufficient evidence to establish eligibility for this immigration visa. 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 sec. 291 of the Act, 8 U.S.C. 1361; see also 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, 376 (AAO 2010).

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 Chawathe*, 25 I&N Dec. at 376 (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In evaluating the evidence, the truth 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.

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 relevant, probative, and credible evidence to establish the petitioner meets the regulatory requirements to establish eligibility for the I-140 immigrant visa 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 regulation at 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 not be disturbed. The petition is denied.