

(b)(6)

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

DATE: NOV 14 2013

OFFICE: TEXAS 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:

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 petition for an immigrant visa, and the Administrative Appeals Office (AAO) dismissed the petitioner's appeal. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The AAO will dismiss the motion to reopen. The AAO will grant the motion to reconsider, in part, and affirm its previous decision.

The petitioner is a corporation organized in the State of Florida operating a gas station, convenience store and car wash. The petitioner claims to be a subsidiary of [REDACTED] located in India. The petitioner 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 based on three independent grounds of ineligibility, finding that the petitioner failed to establish: (1) that it has a qualifying relationship with the beneficiary's foreign employer; (2) that the foreign employer employed the beneficiary in a managerial or executive capacity; and (3) that the beneficiary would be employed in a qualifying managerial or executive capacity in the United States.

The petitioner subsequently filed an appeal. The AAO dismissed the petitioner's appeal and affirmed the director's decision to deny the petition. The AAO concurred with the director's finding that the petitioner had failed to establish that it had a qualifying relationship with the foreign employer. The AAO noted the petitioner's failure to submit evidence sufficient to establish the foreign employer's purchase of a majority of the petitioner's shares. The AAO also concluded that the petitioner failed to establish that the beneficiary was employed in a qualifying managerial or executive capacity abroad. In dismissing the appeal, the AAO emphasized that the petitioner provided a vague duty description for the beneficiary and further noted that there were unresolved discrepancies in the record with respect to the foreign entity's staffing levels and organizational structure during the beneficiary's period of employment abroad. Further, the AAO concurred with the director's determination that the petitioner had not demonstrated that it would employ the beneficiary in a qualifying managerial or executive capacity, emphasizing that the petitioner provided a vague description of the beneficiary's job duties that was inconsistent with his asserted role. In addition, the AAO emphasized the petitioner's failure to provide duty descriptions for many of the beneficiary's subordinates and also noted various discrepancies in the petitioner's submitted organizational chart.

The petitioner now files a motion to reopen and reconsider the previous AAO decision.

On motion, counsel contends that the record clearly establishes that the foreign employer has "de jure" control over the petitioner through its ownership of 51% of the petitioner's shares. Counsel states that there is no legal basis for the AAO's imposition of an evidentiary requirement requiring the petitioner submit evidence to show the foreign employer's purchase of 510 of the petitioner's 1,000 outstanding shares in April 2008. Counsel asserts that Florida corporate law does not require the actual purchase of shares, but that shares may be exchanged for "any consideration," including "tangible or intangible property." As such, counsel states that the AAO's focus on the purchase price and transfer of consideration is misplaced. In support of the motion, the petitioner resubmits its articles of incorporation, stock certificates, stock transfer ledger and corporate tax returns in order demonstrate the foreign employer's 51% ownership of the petitioner.

The petitioner also submits additional evidence in support of its assertion that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity. This evidence includes letters of support from former business associates, as well as bank letters attesting to the beneficiary's control of substantial assets. Counsel asserts that the additional evidence demonstrates the nature and scope of the beneficiary's financial holdings, his reputation in the business community in Trinidad and Tobago, and his former executive management of the foreign employer.

Additionally, counsel asserts that the petitioner currently employs sufficient employees in the United States to perform the day-to-day operational duties of the business thereby establishing that the beneficiary is more likely than not functioning as the president and highest level executive of the petitioner. On motion, the petitioner provides a financial statement and lease executed by the beneficiary as evidence of his executive capacity with the petitioner.

The purpose of a motion to reopen or motion to reconsider is different from the purpose of an appeal. While the AAO conducts a comprehensive, *de novo* review of the entire record on appeal, the AAO's review in this matter is limited to the narrow issue of whether the petitioner has presented and documented new facts or documented sufficient reasons, supported by pertinent law and precedent decisions, to warrant the re-opening or reconsideration of the AAO's decision to dismiss the petitioner's previous appeal.

The regulation at 8 C.F.R. § 103.5(a)(2) states:

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.

The petitioner has not submitted sufficient new facts or new evidence in support of its motion to reopen the matter. As noted above, the petitioner resubmitted its articles of incorporation, stock certificates, stock transfer ledger and corporate tax returns in an effort to demonstrate that the petitioner is 51% controlled by the foreign employer. However, the evidence provided on motion with respect to demonstrating a qualifying relationship is not new evidence, but evidence that was already considered by the AAO in dismissing the petitioner's appeal.¹

In support of its assertion that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity, the petitioner submits several letters from [REDACTED] all of which are dated in 2008. The letters, which were provided by a local business association, a business associate, a bank, and an insurance company, attest to the beneficiary's job title with the foreign entity, his business acumen, his work ethic, his personal income and financial assets, and the foreign entity's assets. In addition, the petitioner provides two excerpts from local papers reflecting the beneficiary acting in the capacity of vice president of the [REDACTED]

The petitioner has not submitted new facts or evidence to satisfy the requirements of a motion to reopen. First, the evidence submitted by the petitioner is not considered new as all of the letters predate the filing of

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 College Dictionary* 736 (2001)(emphasis in original).

the petition in April 2012 by several years and therefore could have been submitted previously. Regardless, the evidence submitted by the petitioner is not relevant to determining whether the beneficiary acted in a qualifying managerial or executive capacity. While the evidence suggests that the beneficiary was regarded as a successful business person, the evidence provided on motion with respect to the beneficiary's foreign employment does not address the underlying grounds for denial of the petition, namely, the petitioner's failure to provide a detailed description of the beneficiary's duties and failure to resolve inconsistencies in the record regarding the foreign entity's staffing levels and organizational structure during the beneficiary's period of employment abroad. As such, the petitioner has not submitted new evidence to reopen the matter with respect to the beneficiary's foreign employment.

With respect to the beneficiary's employment in the United States, the petitioner submits a "Gas Station/Convenience Store Lease" dated February 26, 2009 which includes the beneficiary's signature on behalf of the petitioner, and a "Closing Statement" also dated February 26, 2009, specifying the details of a sale of the gas station/convenience store to the petitioner in [REDACTED] FL. However, the submitted evidence cannot be considered new evidence, as it pre-dates the filing of the petition by three years. Further the evidence is not relevant to demonstrating that the beneficiary will act in a qualifying managerial or executive capacity. The AAO does not question whether the petitioner owns a business in the United States, whether it conducts business, or whether the beneficiary has signatory authority for the petitioner. However, an individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The petitioner has not submitted any new evidence to demonstrate the beneficiary will primarily focus on setting the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. *See* section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). In fact, the petitioner has again failed to submit new evidence relevant to overcoming the specific grounds for denial of the petition. Specifically, the petitioner has not submitted any additional evidence relating to the beneficiary's actual day-to-day duties, nor has it attempted to resolve the discrepancies in the record within regard to the petitioner's staffing and organizational structure.

In sum, the petitioner has not submitted evidence that satisfies the requirements of a motion to reopen and thus the motion to reopen will be dismissed.

The regulation at 8 C.F.R. § 103.5(a)(3) states:

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 [U.S. Citizenship and Immigration Services (USCIS)] 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.

This regulation is supplemented by the instructions on the Form I-290B, Notice of Appeal or Motion, by operation of the rule at 8 C.F.R. § 103.2(a)(1) that all submissions must comply with the instructions that appear on any form prescribed for those submissions.² With regard to motions for reconsideration, Part 3 of

² The regulation at 8 C.F.R. § 103.2(a)(1) states in pertinent part :

the Form I-290B submitted by the petitioner states: "Motion to Reconsider: The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions."

As previously noted, counsel asserts on motion that the director and the AAO applied an evidentiary requirement not supported by law by requiring that the petitioner to submit evidence of monies, property, or other consideration furnished by the foreign employer in exchange for ownership of 510 shares out of the petitioner's 1,000 outstanding shares. Counsel asserts that the petitioner has demonstrated with the preponderance of the evidence that the foreign employer has "de jure" control of the petitioner in form of stock certificates, a stock ledger, and tax documentation. Counsel states that the stock issuance to the foreign employer was in full compliance with Florida law. Counsel references Florida law which states that consideration may "consist of any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, promises to perform services evidenced by a written contract, or other securities of the corporation."

The petitioner has stated sufficient legal reasons to reconsider whether it has a qualifying relationship with the foreign employer. However, following a reconsideration of this matter, the AAO does not find counsel's assertions persuasive.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 204.5(j)(3)(ii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest. As such, USCIS may request any reasonably available evidence it deems relevant to establishing eligibility. However, beyond the stock transfer log, the petitioner has continually failed to submit evidence sufficient to support that the foreign employer actually paid consideration for stock in the petitioner, including actual evidence of this money being paid to the petitioner, relevant minutes reflecting this transaction, or other such evidence to support the transaction. Also, the petitioner has not explained why this evidence is not available. To the contrary, counsel merely cites Florida law noting that consideration may come in various forms.

However, the nature of the consideration in this case is not in dispute, as the stock ledger reflects that the foreign employer paid \$510 in exchange for its interest in the petitioner. Therefore, other forms of consideration are not relevant to this matter, and the petitioner has failed to offer any other claimed forms of consideration exchanged for the petitioner's stock. As such, counsel's reference to Florida law is not persuasive and the record remains deficient with respect to the foreign entity's acquisition of the petitioner's

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission.

stock. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaiqbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Finally, counsel has not cited pertinent law or provided sufficient reasons to establish that the AAO incorrectly concluded that the beneficiary was not employed abroad and would not be employed in the United States in a qualifying managerial or executive capacity. In fact, counsel does not articulate any specific error made on the part of the AAO with respect to these grounds of ineligibility. In dismissing the appeal, the AAO found that the petitioner had failed to submit a sufficiently detailed description of the beneficiary's duties abroad or his duties with the petitioner. The AAO further noted that there were deficiencies and unresolved inconsistencies in the record with respect to the staffing levels and organizational structure of both the foreign employer and the petitioner.

On motion, counsel does not address these findings, nor does the petitioner submit additional explanations or documentation to overcome the evidentiary deficiencies that led to the dismissal of the petitioner's appeal. Rather, counsel appears to request another de novo review of the record to determine whether the beneficiary qualifies as a manager or executive abroad and in the United States, which this office has already provided.

Therefore, the petitioner has not stated sufficient reasons, supported by pertinent precedent decisions, to reconsider this office's previous determination that the petitioner failed to establish that the beneficiary was employed abroad or would be employed in the United States, in a qualifying managerial or executive capacity.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See 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.

As a final note, the proper filing of a motion to reopen and/or reconsider does not stay the AAO's prior decision to dismiss an appeal or extend a beneficiary's previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

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.

ORDER: The motion to reopen is dismissed. The AAO's decision dated August 22, 2013 is affirmed.