

(b)(6)



U.S. Citizenship
and Immigration
Services

DATE: FEB 20 2014 OFFICE: TEXAS SERVICE CENTER

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal and the petitioner's two subsequently filed motions to reopen and motions to reconsider. The matter is now before the AAO on a third motion to reopen and a motion to reconsider. The motion will be dismissed; the director's and the AAO's decisions will remain undisturbed.

The petitioner is a Florida limited liability company that seeks to employ the beneficiary as the "functional manager" of an automotive body repair shop. 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 based on the following grounds: (1) the petitioner failed to establish that the beneficiary was employed abroad in a managerial or executive capacity; (2) the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity; and, (3) the petitioner failed to establish that it has been doing business for one year prior to filing the petition. In a decision dated September 19, 2011, the AAO dismissed the appeal affirming all three grounds for denial.

On October 18, 2011, counsel for the petitioner filed a combined motion to reconsider and motion to reopen. On the Form I-1290B, Notice of Appeal or Motion, counsel requested an "extension of 30 days to file our Brief because of the need to obtain affidavits and documents from a distant source, the founder and owner of the petitioner, who is currently in Trinidad." Counsel also stated that "new facts are available regarding the personnel employed by the petitioner" and emphasized that "this information is central to the motion to reopen." The petitioner did not submit any new evidence pertaining to its personnel. Counsel relied on *Matter of Obaigbena*, 19 I&N Dec. 553 (BIA 1988) in support of his request for an extension of time to submit a brief.

The AAO dismissed the motion to reopen and reconsider since a petitioner is not permitted additional time to submit a brief or additional evidence to the AAO in connection with a motion. As stated in the AAO's decision, an affected party has 30 days from the date of an adverse decision to file a motion to reopen or reconsider. *See* 8 C.F.R. § 103.5(a)(1)(i). If the adverse decision was served by mail, an additional three days are added to the proscribed period. 8 C.F.R. § 103.5a(b). Any motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

In its decision, the AAO emphasized that, although the regulation at 8 C.F.R. § 103.3(a)(2)(vii) states that a petitioner may be permitted additional time to submit a brief or additional evidence to the AAO in connection with an appeal, no such provision applies to a motion to reopen or reconsider.

On April 5, 2013, counsel for the petitioner filed a second motion to reopen and reconsider. On motion, counsel for the petitioner asserted that the Service denied the Motion to Reconsider without regard to *Matter of Obaigbena*, 19 I & N 553 (1988), which counsel argued was a

precedent decision that must be followed by the Service. Counsel also stated that the denial amounted to an abuse of discretion because it was contrary to law.

In the AAO's decision, dated November 29, 2013, the AAO noted that the case cited by counsel relates to the submission of a response to a notice of intent to deny, and not to the submission of supporting evidence in support of a motion to reopen and reconsider. The AAO noted that the case cited by counsel is distinguishable based on the applicable regulations, and counsel's reliance on *Matter of Obaigbena* is misplaced.

In the current motion, counsel contends that the AAO should adhere to *Matter of Obaigbena* on the principle of fairness. Counsel stated that "although the Board was dealing with a notice of intent to deny, in all fairness, the principle articulated could equally apply to a motion to reopen and reconsider." Counsel further stated that the current petition is pending since 2007 and "it would seem that Obaigbena's emphasis on fair and reasonable dealing would transfer to a request for a reasonable extension of time in the setting of a motion to reopen and reconsider."

As noted above, the case cited by counsel is distinguishable based on the applicable regulations, and counsel's reliance on *Matter of Obaigbena* is misplaced. In the current motion, counsel does not provide any regulations or precedent decisions to indicate that fairness is a factor that should be considered. 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)).

Furthermore, USCIS regulations do not permit a petitioner to submit a brief within 30 days of filing a motion. The instructions to Form I-290B expressly state: "Although a petitioner may be permitted additional time to submit a brief and/or additional evidence to support an appeal, no such provision applies to motions. Any additional evidence must be submitted with the motion."

The regulation at 8 C.F.R. § 103.2(a)(1) provides:

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 C.F.R. chapter 1 to the contrary, and such instructions are incorporated into the regulations requiring its submission.

Therefore, the AAO's decision to dismiss the motion based on the petitioner's failure to submit a brief and/or evidence with the motion was in accordance with the regulations governing motions. The motion was properly dismissed as it did not meet the requirements of a motion to reopen or reconsider. 8 C.F.R. § 103.5(a)(4).

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." Furthermore, the regulation at 8 C.F.R. § 103.5(a)(2), governing motions to reconsider, 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 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.

As noted in the AAO's decision dated November 29, 2013, even if counsel had timely submitted a brief and evidence in support of the previous motion, the motion would have been dismissed for failing to meet the requirements of a motion to reopen or a motion to reconsider. The untimely submitted "new" evidence consisted solely of brief affidavits from the beneficiary and [REDACTED] which summarized the beneficiary's duties with the petitioner and the foreign entity. The affidavits did not contain any information that could be deemed "new," nor did they address the specific deficiencies which were discussed at length in the AAO's decision dated September 19, 2011.

On motion, counsel contends that affidavits are probative evidence and meet the preponderance of evidence standard. Counsel contends the affidavits are new because they "summarize and recite all the details to establish eligibility in the decision of September 19, 2011, since that decision was inaccurate and inapposite in its application of the burden of proof." Counsel also contends that "the facts of this petition do fit the requirements of the statute." Although counsel contends that the immigrant visa petition should be granted, counsel failed to provide evidence to corroborate that claim and overcome the director's decision. Furthermore, since the additional evidence was not submitted at the same time the first motion was filed, the AAO cannot consider the additional evidence submitted by counsel.

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. *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" of proof. *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 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 and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.