

(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 **FEB 04 2014** Office: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]

PETITION: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

ON BEHALF OF PETITIONER:

[REDACTED]

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, California Service Center, denied the petitioner's Immigrant Petition by Alien Entrepreneur (Form I-526), after first issuing a notice of intent to deny. Subsequently, on April 17, 2012, the Administrative Appeals Office (AAO) dismissed the petitioner's appeal, finding that she did not meet the eligibility requirements necessary to qualify for the preference visa petition, and that she willfully misrepresented a material fact. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed and the petition will be denied with a formal finding of misrepresentation.

I. FACTUAL AND PROCEDURAL HISTORY

On the Form I-526 petition, the petitioner indicated that the petition is based on an investment in a new commercial enterprise (NCE). The NCE is a joint venture between the petitioner and . In his notice of intent to deny (NOID), the director advised the petitioner that United States Citizenship and Immigration Services (USCIS) records indicated that the address for in - is the same address listed on two other Form I-526 petitions filed by unrelated investors claiming to invest in two separate joint ventures: and and and . The director further advised the petitioner that during a September 9, 2010 site visit, a USCIS officer could not confirm that any other joint ventures or occupied or leased more than 2,000 square feet on the 4th floor of the building, contrary to the claimed 11,044 square feet of office space referenced in the sublease between and . Ultimately, the director denied the petition, finding that the petitioner had not demonstrated an at-risk investment or that the NCE had created or would create the necessary employment. The director entered a "finding of fraud" based on the petitioner's submission of a false sublease. The director also concluded that the petitioner had misrepresented that had employed individuals, who were in fact employed by and noted that the Forms I-9s, Employment Eligibility Verifications, for appeared to have been altered.

Similarly, in its July 22, 2011 notice of intent to dismiss the appeal and find material misrepresentation (NOID), the AAO advised the petitioner that was in fact the listed business on a fourth Form I-526 petition claiming job creation on the 4th floor of . The record of proceeding for contains the original lease between and (in care of , dated October 18, 2008). The lease was for a total of 375, not 11,044, square feet. The AAO dismissed the petitioner's appeal, finding that: (1) she did not demonstrate her funds were placed at risk or that would meet the job creation requirements; (2) she did not demonstrate she had invested in a targeted employment area; and (3) she had sought to procure a benefit provided under the Act through the willful misrepresentation of a material fact.

II. MOTION TO REOPEN

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. 8 C.F.R. § 103.5(a)(2). In essence, a party requesting a reopening seeks a new hearing based on new evidence. See *Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991). The party seeking a reopening bears a heavy burden of demonstrating that if his or her motion to reopen were granted, the new evidence would change the outcome of the case. *Matter of Chavez-Martinez*, 24 I&N Dec. 272, 274 (BIA 2007) (citing *INS v. Abudu*, 485 U.S. 94, 110 (1988)). Motions to reopen an immigration proceeding are disfavored for the same reasons as are petitions for rehearing and motions for a new trial based on newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323, (1992) (citing *INS v. Abudu*, 485 U.S. at 108). “There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases.” *INS v. Abudu*, 485 at 107. Moreover, the United States Citizenship and Immigration Services (USCIS) “has some latitude in deciding when to reopen a case. [USCIS] should have the right to be restrictive. Granting such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a *prima facie* case.” *Id.* at 108. The result also needlessly wastes the time and efforts of the triers of fact who must attend to the filing requests. *Id.*

On motion, the petitioner, through counsel, “accepts the determination that his 2009 EB-5 petition failed to establish his statutory eligibility.” Notwithstanding this concession, the petitioner, through counsel, states in the motion that she disagrees with the AAO’s finding that her funds were not placed at risk or that she did not invest in a targeted employment area. Neither the petitioner nor counsel has cited any legal or factual basis in support of the petitioner’s position that her investment was at risk. Counsel’s mere statement on motion that the AAO erred, without providing any legal or factual support, is insufficient to raise the matter before the AAO. See *Desravines v. United States Att’y Gen.*, No. 08-14861, 343 F. App’x 433, 435 (11th Cir. 2009) (finding that issues not briefed on appeal by a *pro se* litigant are deemed abandoned); *Tedder v. F.M.C. Corp.*, 590 F.2d 115, 117 (5th Cir. 1979) (deeming abandoned an issue raised in the statement of issues but not anywhere else in the brief). Accordingly, the AAO will not address the petitioner’s assertion that her funds were at risk despite an agreement that [REDACTED] would bear 100 percent of any loss. The AAO will address the targeted employment area documents below.

On motion, the petitioner, through counsel, “denies the allegation of willful misrepresentation.” The petitioner has filed additional supporting evidence, and “[o]n the basis of the evidence submitted previously and now, the petitioner moves the AAO to rescind the order finding that [she] ‘sought to procure a benefit provided under the Act through the willful misrepresentation of a material fact.’” The AAO’s decision is reaffirmed for the following reasons.

First, the evidence the petitioner has filed on motion does not overcome the AAO’s April 17, 2012 finding that she made material misrepresentation through her submission of the December 1, 2009 sublease, which contains false information. Page 1 of the sublease provides that [REDACTED] “is the tenant of certain premises containing a total of eleven thousand forty-four (11,044) rentable square feet area (‘Leased Premises’), located [at] [REDACTED]

[REDACTED] (the 'Building')." This statement is false. The October 18, 2008 lease agreement between [REDACTED] and [REDACTED] which the AAO attached to its July 22, 2011 notice of intent to dismiss based on material misrepresentation, contradicts the sublease. Specifically, the 2008 lease agreement indicates that [REDACTED] leased 375 square feet, not 11,044 square feet, on the 4th floor, at [REDACTED]

On motion, the petitioner, through counsel, concedes that the "square footage of [REDACTED] leased premises was 375 sq. ft.²," a portion of which [REDACTED] sublet to three separate businesses: [REDACTED]

[REDACTED] Counsel asserts that "the sublease does not state that the petitioner is subleasing 11,044 square feet. Rather, it says, somewhat inartfully, that the sublessor is a tenant in a building that, in total, has 11,400 rentable square feet." (Bold in original.) As discussed below, the evidence in the record, including documents filed on motion, does not support counsel's reading of or assertions relating to the sublease. 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 Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1,3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Initially, the petitioner submitted evidence showing that [REDACTED] the new commercial enterprise, not the petitioner, was the sublessor under the December 1, 2009 sublease. Moreover, the plain language of the sublease contradicts counsel's assertion on motion that the sublease stated that [REDACTED] was one of multiple tenants of a building that had a total of 11,044 square feet. Instead, the plain language of the sublease provides that [REDACTED] was "the tenant" of the "Leased Premises" that contained "a total of eleven thousand forty-four (11,044) rentable square feet area" located on the 4th floor of [REDACTED] (Emphasis added.) Significantly, the false sublease makes no reference to [REDACTED] actual leased premises, which consisted of 375 square feet. The sublease provides that [REDACTED] has agreed to sublet a part of the leased property described in Exhibit A to [REDACTED] The AAO noted in its July 22, 2011 NOID that the petitioner did not submit Exhibit A to the sublease. In fact, as of the date of this decision, the petitioner has not submitted Exhibit A, which purportedly specifies the actual subleased premises. Furthermore, the sublease indicates that [REDACTED] sublet from [REDACTED] a portion of the leased premises, which according to the 2008 lease agreement between [REDACTED] and [REDACTED] was located on the 4th floor of [REDACTED] Other evidence of record, however, including [REDACTED] Employer's Quarterly Federal Tax Returns, Internal Revenue Service (IRS) Form 941s, for the fourth quarter of 2009 through third quarter of 2010; January 2010 payroll documents; and 2009 Employer's Annual Federal Unemployment (FUTA) Tax Return, IRS Form 940, indicates [REDACTED] was located on the 2nd, rather than the 4th, floor of the building. The record, including documents filed on motion, lacks evidence showing that either [REDACTED] [REDACTED] has ever leased the 2nd floor of the building. As discussed in the AAO's April 17, 2012 decision, neither the June 5, 2009 addendum to the lease agreement, which at best constitutes [REDACTED] [REDACTED] nonbinding option to lease additional space at an undetermined future date, if it

is available, nor any other evidence in the record establishes that [REDACTED] has expanded its initial lease agreement for 375 square feet on the 4th floor of the building.

In addition, as discussed in the AAO's April 17, 2012 decision, the petitioner's submission of the false sublease constitutes misrepresentation material to her visa petition eligibility. Specifically, the petitioner submitted the false sublease to demonstrate that she had invested or was actively in the process of investing in [REDACTED] and that [REDACTED] was in operation. On motion, the petitioner has not challenged the AAO's finding that the sublease is material to her eligibility.

Second, the petitioner has not submitted new evidence on motion that overcomes the AAO's April 17, 2012 finding that the petitioner made a material misrepresentation. In support of the motion, the petitioner has filed a number of supporting documents, most of which predate the AAO's April 17, 2012 decision and/or they are documents the petitioner had previously submitted, including [REDACTED] Employer's Quarterly Federal Tax Returns, IRS Form 941s. The petitioner has not shown that these documents constitute new evidence. The remaining evidence – including an April 30, 2012 letter from Pennsylvania Department of Labor and Industry to [REDACTED] relating to a targeted employment area, May 2012 email correspondence between [REDACTED] employees relating to hiring employees in [REDACTED] photographs relating to air conditioning problems at [REDACTED] and [REDACTED] 2012 account list – postdates the AAO's decision, but is irrelevant to and does not overcome the AAO's finding that the petitioner submitted a sublease that falsely represented the size of the [REDACTED] space in support of her petition. Notably, [REDACTED] April 22, 2009 email expressly describes the [REDACTED] space as 20' by 14' (280 square feet) with room for five desks. This email does not overcome the AAO's determination that the sublease falsely represented the space as 11,044 square feet.

Third, the documents submitted on motion provide inconsistent information relating to [REDACTED] business location, especially during the period after [REDACTED] entered into the December 1, 2009 sublease, but before the October 2, 2010 lease for premises at [REDACTED]. Specifically, on motion, the petitioner has submitted [REDACTED] 2009 Transmittal of Wage and Tax Statements, IRS Form W-3; 2009 Wage and Tax Statements, IRS Form W-2s; 2009 Annual Summary and Transmittal of U.S. Information Returns, IRS Form 1096; and 2009 Miscellaneous Incomes, IRS Form 1099-MISCs. The IRS Form W-3 and Form W-2's list [REDACTED] as [REDACTED] business address. This address, however, appears to be a residential address, not a business address.¹ In addition, according to [REDACTED] IRS Form 941s for the fourth quarter of 2009 through third quarter of 2010, and January 15, 2010 payroll documents from Period Payroll Services, [REDACTED] was located at [REDACTED] 2nd floor, not 4th floor, in [REDACTED] and not in [REDACTED].

¹ The petitioner has listed this address as her address on appeal and on Forms G-28, Notice of Entry of Appearance as Attorney or Accredited Representative.

Moreover, according to the petitioner's motion and the July 11, 2011 amendment of the lease agreement, in July 2011, [REDACTED] and [REDACTED] relocated from Suite 150 to Suite 120 at [REDACTED]. The IRS Form 941 for the third quarter of 2011, which includes July 2011, however, shows that [REDACTED] remained in Suite 150-I, not Suite 120.

Furthermore, on motion, the petitioner has submitted [REDACTED] bank statements for accounts ending in [REDACTED] and [REDACTED]. The bank statements show [REDACTED] address as [REDACTED] from November 2009 through November 2011, and [REDACTED] in [REDACTED] from December 2011 through February 2012. [REDACTED] address appears as the address of [REDACTED] on other documents in the record, including the October 2, 2010 lease. The bank statements do not corroborate the petitioner's claim that [REDACTED] was ever located at [REDACTED] 2nd or 4th floor, or at [REDACTED] in [REDACTED] or at [REDACTED].

The petitioner's motion includes other inconsistent documents. For example, the October 2, 2010 lease agreement is between [REDACTED] and [REDACTED]. The subsequent July 11, 2011 amendment of lease agreement is between [REDACTED] and [REDACTED]. Neither the petitioner nor counsel has provided an explanation as to why [REDACTED] entered into an amendment of a lease agreement to which it was not a party. As the AAO noted in its April 17, 2012 decision, the record contains no evidence that [REDACTED] and [REDACTED] are one and the same. In addition, the amendment of lease agreement, dated July 11, 2011, provides that the effective date "shall be the date that is the earlier to occur of: (a) the date Lessor delivers possession of Suite 120 to Lessee, or (b) July 1, 2011." As such, according to this provision, the effective date of the amendment of lease agreement would be July 1, 2011, at the latest. Yet, the amendment is dated July 11, 2011, after the effective date of the amendment.

With the initial submission, the petitioner did not disclose the number of I-526-related businesses operating out of the [REDACTED] address and submitted a lease that falsely represented the amount of leased space. On motion, the petitioner submits a photograph of a sign for [REDACTED] at the [REDACTED] location, which lists 10 affiliated companies, including the NCE and the other three joint ventures discussed above. The record does not resolve how many of these 10 affiliated companies are partially owned by Form I-526 petitioners. Regardless, this evidence does not resolve the AAO's finding of misrepresentation regarding the petitioner's truthful representation of the amount of space available to it in a shared location.

The petitioner has provided inconsistent documents on motion. "[I]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts [or documents], absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has provided no such evidence to explain or reconcile the inconsistent documents.

These inconsistent documents cannot overcome the AAO's finding that the petitioner submitted a document with false information, specifically the December 1, 2009 sublease.

Fourth, the evidence the petitioner submitted on motion does not establish, as counsel asserts, that the "petitioner's good faith intentions and actions [are] plain to see" or that the "petitioner and her joint venture partner have, at all times, acted in good faith." The April 30, 2012 letter from the Pennsylvania Department of Labor and Industry states that in 2011, the [REDACTED] County, in an area of eleven contiguous census tracts, had an unemployment rate of 13.5 percent and thus constituted a targeted employment area. The regulation at 8 C.F.R. § 204.6(e) states, in pertinent part, that a targeted employment area is one which, "at the time of investment" is an area that has experienced unemployment of at least 150 percent of the national average rate.² The petitioner filed the petition in January 2010 based on an investment in December 2009. As such, an April 2012 letter that discusses 2011 unemployment figures is insufficient to establish that "at the time of investment" the petitioner invested in a targeted employment area. See 8 C.F.R. §§ 204.6(e), (i).

Moreover, the email correspondence filed on motion makes no references to [REDACTED] its efforts to hire employees or its leased space. At best, the email correspondences relate to [REDACTED] hiring efforts and the leased space at [REDACTED]. Similarly, although counsel asserts that [REDACTED] first moved to Suite 150, then Suite 120 at [REDACTED] in October 2010 and July 2011, respectively, the petitioner has submitted no lease or rental agreement showing that [REDACTED] is a renter, a lessor or a sublessor of either space. [REDACTED] is not a party to the October 2, 2010 lease agreement, or the July 11, 2011 amendment to the lease agreement. In addition, section 14 of the lease agreement provides that the lessee must obtain the lessor's consent before subletting the leased space. The petitioner has provided no evidence showing that [REDACTED] the lessee, has obtained the lessor's consent to sublet to [REDACTED]. As discussed above, the photograph of [REDACTED] sign at the [REDACTED] location reveals a total of 10 affiliated companies without any explanation as to how the space is divided among them.

Furthermore, the documents the petitioner filed on motion do not substantiate counsel's assertion that "[u]nlike a sham or [s]hell enterprise, [REDACTED] continues to develop and grow." On motion, the petitioner has filed a spreadsheet, entitled "[REDACTED] Company Accounts 2012," purported to be a list of its "151 customers." [REDACTED] November 2009 through February 2012 bank statements for accounts ending in [REDACTED] and [REDACTED] however, do not show that [REDACTED] has ever received any payments from any of the alleged customers. Instead, the bank statements show that the deposits into the accounts derived from [REDACTED] "Phone/In-Person Transfer by [REDACTED]" "Phone/In-Person Transfer by [REDACTED]"

² The AAO's April 17, 2012 decision mistakenly cited 8 C.F.R. § 204.6(e) for the proposition that the area must be a targeted employment area at the time of filing. The proper citation is *Matter of Soffici*, 22 I&N Dec. 158, 159-60 (Assoc. Comm'r 1998).

Payroll,” “Phone Request,” and [REDACTED] own accounts. The petitioner has not shown that any of the deposits relate to any of the alleged customers listed on the 2012 spreadsheet. This evidence cannot overcome the AAO’s concern in the April 17, 2012 notice that the bank statements in the record, which showed no payments from clients, were not consistent with the receipts for waiting room services that were marked “paid” and required payment directly to [REDACTED]

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. Accordingly, the previous decision of the AAO will be affirmed, and the petition will be denied with a finding of misrepresentation.

ORDER: The decision of the AAO dated April 17, 2012 is affirmed, and the petition remains denied with a finding of misrepresentation.