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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: **MAY 30 2014**

Office: IMMIGRANT INVESTOR PROGRAM 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:

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 employment-based immigrant visa petition and affirmed the decision on motion. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal of that decision on June 18, 2013. The matter is now before the AAO on a motion to reconsider. The motion will be dismissed, the previous decision of the AAO will be affirmed, and the petition will remain denied.

On Form I-290B, Notice of Appeal or Motion, the petitioner indicates in Part 2 that she is filing a motion to reconsider. Furthermore, the petitioner's brief is entitled, "PETITIONER'S MOTION TO RECONSIDER."

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 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.

In support of the petitioner's motion, the petitioner submits a brief, screenshots from [http://\[REDACTED\]](http://[REDACTED]) copies of Document 702, Application and Certificate for Payment regarding the construction of the [REDACTED] and the new commercial enterprise's (NCE) quarterly federal tax documentation for the third quarter of 2013. Although the petitioner indicates that she is filing a motion to reconsider, the supporting documentation appears applicable to a motion to reopen pursuant to the regulation at 8 C.F.R. § 103.5(a)(3), which states that "[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. . . ." Accordingly, the petitioner's motion will be considered as both a motion to reopen and as a motion to reconsider.

In order to properly file a motion to reopen or a motion to reconsider, the regulation at 8 C.F.R. § 103.5(a)(1)(i) provides that the affected party must the motion within 30 days of the decision. If the decision was mailed, the motion must be filed within 33 days. *See* 8 C.F.R. § 103.8(b). The date of filing is not the date of mailing, but the date of actual receipt at the location designated for filing. *See* 8 C.F.R. § 103.2(a)(7)(i).

The date of the decision dismissing the appeal is June 18, 2013, and the decision properly notified the petitioner that she had 30 days (33 days if mailed) of the decision to file a motion. Although the petitioner dated the motion October 24, 2013, the receipt date of the motion is December 24, 2013, 189 days after the date of the decision dismissing the appeal. Regardless, neither date is within 33 days of the decision dismissing the appeal. Accordingly, the motion is untimely filed.

As it relates to motions to reopen, the regulation at 8 C.F.R. § 103.5(a)(1)(i) provides that "failure to file before this period expires, may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner." In this case, the petitioner does not claim, nor does the record of proceeding reflect, that the petitioner's failure to file

before the period expired was reasonable and beyond her control. In fact, the petitioner does not provide any explanation as to why the motion was filed approximately six months after the decision. Notably, the basis of the motion is a “new” policy memorandum dated May 30, 2013. The petitioner does not explain why a motion based on that memorandum could not be reasonably filed within 33 days of the June 18, 2013 decision dismissing the appeal.

A motion that does not meet applicable requirements shall be dismissed. *See* 8 C.F.R. § 103.5(a)(4). Here, the untimely motion does not meet the requirements of a motion to reopen or a motion to reconsider. Accordingly, as the motion is untimely filed, the motion must be dismissed.

Even if the motion was timely filed, the petitioner’s motion does not overcome any of the original grounds in the June 18, 2013 decision. That decision explains that the petitioner did not demonstrate the following:

1. That she placed the required amount of capital at risk for the purpose of generating a return on capital based on a lack of evidence of any undertaking of actual business activity as of the filing date and a failure to explain sufficient capital expenses required for the business;
2. That the petitioner did not establish that her claimed investment had created or would create at least 10 full-time positions for qualifying employees based on her abandonment of that issue on appeal; and
3. That the petitioner did not document her lawful source of the required amount of capital based on inconsistencies between some of the translations and a lack of evidence tracing the complete path of funds.

On motion, the petitioner claims that the June 18, 2013 decision did not consider USCIS policy memorandum, *EB-5 Adjudications Policy* (PM-602-0083), which was issued on May 30, 2013. Specifically, the petitioner claims that the decision did not “adhere to the correct standard of proof.” Page 2 of the policy memorandum states:

As a preliminary matter, it is critical that our adjudication of EB-5 petitions and applications adhere to the correct standard of proof. In the EB-5 program, the petitioner or applicant must establish each element by a preponderance of the evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). That means that the petitioner or applicant must show that what he or she claims is more likely so than not so. This is a lower standard of proof that both the standard of “clear or convincing,” and the standard “beyond a reasonable doubt” that typically applies to criminal cases. The petitioner or applicant does not need to remove all doubt from our adjudication. Even if an adjudicator has some doubt as to the truth, if the petitioner or applicant submits relevant, probative, and credible evidence that leads to the conclusion that the claim is “more likely than not” or “probably true”, the petitioner or applicant has satisfied the standard of proof.

Although the June 18, 2013 decision did not specifically mention the May 30, 2013 policy memorandum, the decision did not indicate that the appeal was adjudicated based on a higher standard of proof other than a preponderance of the evidence. Moreover, the preponderance of the evidence standard mentioned in the policy memorandum was not a reference to a newly issued policy for standard of proof used to adjudicate petitions and applications; rather the memorandum referenced the preponderance of the evidence standard as the longstanding correct standard of proof. Notably, *Matter of Chawathe*, 25 I&N Dec. at 375-76, is a 2010 decision and cites case law back to 1965 for preponderance of the evidence being the correct standard of proof. The petitioner cites no legal authority for the proposition that an appellate decision that does not expressly articulate a longstanding preponderance of evidence standard is presumed to have used a higher standard.

Furthermore, the June 18, 2013 decision discussed the petitioner's claims and explained why the documentary evidence did not support her claims, including numerous inconsistencies and discrepancies. For these reasons, the petitioner did not establish by a preponderance of the evidence that she qualified as an employment creation alien pursuant to section 203(b)(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b).

On motion, the petitioner does not address any of the specific findings in the June 18, 2013 decision. Instead, the petitioner makes general preponderance of the evidence assertions such as "[t]he engagement of architectural designs and preparation of school material demonstrated by a preponderance of the evidence that a school would be established and the investment has been placed at risk," "[t]he petitioner submitted a comprehensive business plan that demonstrated by a preponderance of the evidence that the NCE will create at least 10 full-time positions for qualifying employees," "[the] [p]etitioner has demonstrated by a preponderance of the evidence [her] lawful source of funds was from the sale of her 20% ownership interest in [REDACTED]." The petitioner did not, however, explain how the June 18, 2013 decision, which identified several inconsistencies and other deficiencies, utilized a standard of proof other than by a preponderance of the evidence. Cf. *Desravines v. U.S. Atty. Gen.*, 343 Fed.Appx. 433, 435 (11th Cir. 2009) citing *Tedder v. F.M.C. Corp.*, 590 F.2d 115, 117 (5th Cir.1979) (holding that a passing reference without substantive arguments is insufficient to raise that ground on appeal).

A motion to reconsider must include specific allegations as to how the previous decision erred as a matter of fact or law, and it must be supported by pertinent legal authority. 8 C.F.R. § 103.5(a)(3). As the petitioner has not identified any specific error of law or fact, we would have dismissed the motion to reconsider in the alternative.

Regarding the documents submitted on motion, they represent events occurring after the filing of the petition, including events occurring after the June 18, 2013 decision. The petitioner originally filed the petition on June 23, 2011. The screenshots from [http://\[REDACTED\]](http://[REDACTED]) claim that the [REDACTED] "was kicked off in May 2012" and "was completed in December with a scheduled opening in May 2013." Moreover, the Document 702s reflect a contract date of January 9, 2013 for services from March 2013 to July 2013. Further, the NCE's quarterly tax returns were for the third quarter of 2013. While the petitioner could argue that the 2013 quarterly tax returns are relevant to the credibility of the

employment projections at the time of filing, the remaining documentation does not relate to whether the NCE had undertaken any meaningful business activity as of the date of filing. It is well established that in visa petition proceedings, a petitioner must establish eligibility at the time of filing and that a petition cannot be approved if, after filing, the petitioner becomes eligible under a new set of facts or circumstances. 8 C.F.R. §§ 103.2(b)(1), (12); 72 Fed. Reg. 19100 (Apr. 17, 2007) (adopting 8 C.F.R. § 103.2(b)(1); 59 Fed. Reg. 1455, 1458 (Jan. 11, 1994) (explaining in the commentary to 8 C.F.R. § 103.2(b)(12) that supplemental evidence must establish that the petitioner was eligible for the benefit when the petition was filed); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971) (holding that a petitioner may not demonstrate the beneficiary's eligibility as a member of the professions based on coursework that postdates the filing of the petition). Moreover, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS and regulatory requirements. *Matter of Izummi*, 22 I&N Dec. 169, 175-176 (Assoc. Comm'r 1998) (adopting the reasoning in *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981) for the proposition that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition."). See also *Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 1025, 1038, n.4 (E.D. Calif. 2001) *aff'd* 345 F.3d 583 (9th Cir. 2003) (upholding a finding that a construction management agreement with substantive changes "could not be accepted for the first time on appellate review"); *EB-5 Adjudications Policy*, PM-602-0083, 24-25 (May 30, 2013) (citing *Matter of Izummi*, 22 I&N Dec. at 176 and 8 C.F.R. § 103.2(b)(1) for the proposition that a petitioner cannot establish eligibility under a new set of facts during the pendency of the Form I-526 petition).

Accordingly, much of the documentation cannot be considered on a motion to reopen, and we would have dismissed the motion in the alternative. Moreover, the petitioner did not submit any evidence to resolve the inconsistencies between the translations relating to the petitioner's source of funds.

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 is dismissed, the decision of the AAO dated June 18, 2013 is affirmed, and the petition remains denied.