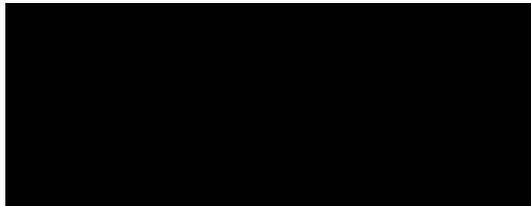




U.S. Citizenship
and Immigration
Services

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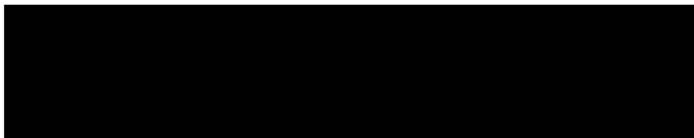
FILE: WAC 08 045 51357 Office: CALIFORNIA SERVICE CENTER Date: **DEC 01 2009**

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(iii)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director, California Service Center. The Administrative Appeals Office (AAO) dismissed the subsequently filed appeal and affirmed the director's decision to deny the petition. The matter is now before the AAO on a motion to reconsider. The motion will be dismissed and the director's and the AAO's decision will be undisturbed.

The petitioner is an engineering and civil design services firm that seeks to employ the beneficiary as a trainee for a period of eighteen months. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker trainee pursuant to section 101(a)(15)(H)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(iii).

The director denied the petition on six grounds: (1) that the petitioner had failed to set forth, with specificity, the type of training and supervision to be given, and the structure of the training program; (2) that the petitioner had failed to set forth the proportion of time to be devoted to productive employment; (3) that the petitioner had failed to show the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training; (4) that the petitioner had failed to indicate the source of remuneration received by the trainee and any benefit which will accrue to the petitioner for providing the training; (5) that the petitioner had failed to establish that the proposed training is unavailable in the beneficiary's home country; and, (6) that the petitioner had failed to establish that the proposed training will benefit the beneficiary in pursuing a career outside the United States.

In a decision dated October 29, 2008, the AAO withdrew four of the grounds for dismissal and affirmed two of the grounds for dismissal and added a third ground for dismissal. The AAO affirmed the director's decision and dismissed the appeal. On December 1, 2008, counsel for the petitioner filed a Form I-290B and identified it as a "Motion to Reconsider." On motion, counsel contends that the director and AAO erred in concluding that the petitioner has failed to comply with the regulations. Counsel for the petitioner submits a brief in support of the motion to reconsider.

Counsel's assertions do not satisfy the requirements of either a motion to reopen or 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.

Although counsel has submitted a motion titled "Motion to Reconsider," counsel does not submit any document that would meet the requirements of a motion to reconsider. Counsel states on motion that the "AAO gravely erred in concluding that the petitioner has failed to comply with 8

C.F.R. § 214.2(h)(7)(ii)(B)(1) and (4) and 8 C.F.R. § 214.2(h)(7)(iii)(G), on the basis of its own interpretation and overstretching of the plain language of the law."

On motion, counsel for the petitioner states that "we have seen and experienced simpler petitions for H-3 classification in the not so distant past, which were approved by the Service." Although counsel for the petitioner noted that the United States Citizenship and Immigration Services (USCIS) approved other petitions that had been previously filed, the petitioner did not provide copies of these cases, and the director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

In addition, counsel contends that a due process violation occurred with the instant petition. Although counsel argues that the petitioner's rights to procedural due process were violated, it has not shown that any violation of the regulations resulted in "substantial prejudice" to them. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). The petitioner has fallen far short of meeting this standard. 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. As previously discussed, the petitioner has not met its burden of proof and the denial was the proper result under the regulations. Accordingly, the petitioner's claim is without merit.

Counsel suggests that the director's adjudication of the petition was unfair. The petitioner has not demonstrated any error by the director in conducting her review of the petition. Nor has the petitioner demonstrated any resultant prejudice such as would constitute a due process violation. *See Vides-Vides v. INS*, 783 F.2d 1463, 1469-70 (9th Cir. 1986); *Nicholas v. INS*, 590 F.2d 802, 809-10 (9th Cir. 1979); *Martin-Mendoza v. INS*, 499 F.2d 918, 922 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975).

Counsel also states that "as the law and regulations so-require, a mere description or statement about the training program was enough basis for approval, because that is what the law requires

– a statement." In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *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 Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

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 E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also stated that "[t]ruth 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.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. See *U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Here, the submitted evidence does not meet the preponderance of the evidence standard. As noted in the director's decision and the AAO's decision, the petitioner did not provide sufficient evidence to establish that the petitioner's proposed training program meets the regulatory requirements to establish eligibility for the H-3 nonimmigrant visa classification.

The petitioner also contends that since the director did not request further information about how the training program will prepare the beneficiary in obtaining a career abroad, denying the case on this ground is "grossly unfair and unwarranted and in violation of the petitioner's right to due process." The regulation at 8 C.F.R. § 103.2(b)(8) clearly states that a petition shall be denied "[i]f there is evidence of ineligibility in the record." The regulation does not state that the evidence of ineligibility must be irrefutable. Where evidence of record indicates that a basic element of eligibility has not been met, it is appropriate for the director to deny the petition without a request for evidence. If the petitioner has rebuttal evidence, the administrative process provides for a motion to reopen, motion to reconsider, or an appeal as a forum for that new evidence. In the present case, the evidence indicated that the petitioner did not provide any evidence of an established branch office in the Philippines, or a business plan for opening a new office abroad and to immediately hire the beneficiary when she returns to her home country. Accordingly, the denial was appropriate, even though the petitioner might have had evidence or argument to rebut the finding. In addition, the petitioner did not provide any evidence regarding this issue with the motion to reconsider.

In addition, 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."

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.¹

A review of the evidence that the petitioner submits on motion reveals no fact that could be considered *new* under 8 C.F.R. 103.5(a)(2). The evidence submitted was either previously available and could have been discovered or presented in the previous proceeding, or it post-dates the 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 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 CFR 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 Associate Commissioner will not be disturbed.

ORDER: The motion will be dismissed. The AAO's decision dated October 29, 2008 will be undisturbed. The petition is denied.

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 RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).