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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

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DATE: JUL 21 2011 OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 and/or motion to reopen. The motion will be dismissed and the director's and the AAO's decision will be undisturbed.

The petitioner is a management group that seeks to employ the beneficiary as a trainee for a period of two years. 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).

On September 26, 2009, the director denied the petition on multiple grounds: (1) the petitioner failed to establish that the beneficiary would not engage in productive employment unless such employment is incidental and necessary to the training; (2) the petitioner failed to establish that the proposed training program would benefit the beneficiary in pursuing a career abroad; and, (3) the petitioner failed to establish that the beneficiary does not already possess substantial knowledge and skills in the proposed field of training.

In a decision dated December 13, 2010, the AAO affirmed all three grounds for dismissal and dismissed the appeal. On January 14, 2011, the petitioner filed a Form I-290B and identified it as a Motion to Reconsider and a Motion to Reopen. On motion, the petitioner contends that the director and AAO erred in concluding that the petitioner has failed to comply with the regulations. The petitioner for the petitioner submits a brief in support of the motion to reconsider and reopen.

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

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.

On motion, the petitioner submits an appeal brief that further clarifies the statements and documentation it presented previously. The petitioner also submitted two additional opinion letters

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).

and affidavits from [REDACTED] a 5-star hotel manager, and [REDACTED] Assistant Director of Operations of a travel agency from Turkey. Both letters certify that the training offered by the petitioner is not available in the beneficiary's home country of Turkey.

The documentation presented on motion does not overcome the concerns addressed in the director's denial and the AAO's dismissal of the appeal. In the support brief, the petitioner reiterates that it has "years of experience in the American hospitality industry and has the expertise and right resources to provide substantial training," and the petitioner's goal is to "help train the beneficiary to gain the most up to date knowledge and training that is unfortunately not available in Turkey."

The petitioner also stated that the beneficiary will undergo a rotational training that exposes the trainee to "various aspects of the industry," and the "objective is accomplished through various methods and training courses." The petitioner points out the detailed training program that was submitted with the initial petition. As noted in the AAO's previous decision, the petitioner did not provide sufficient detail of the activities that will be performed by the beneficiary on a day-to-day basis. The petitioner submitted an outline detailing the subject matters that will be reviewed every day but the petitioner failed to provide any detail on how the beneficiary will learn and practice each subject matter issue. As noted by the AAO, the beneficiary will receive 28 hours of on the job training each week for two years but the petitioner did not provide any detail of what the beneficiary will do during those hours. On motion, the petitioner continues to rely on the training outline but this is not sufficient evidence to explain what the trainee will do during the numerous hours of on-the job training.

In the motion brief, the petitioner asserts that the beneficiary will not engage in any productive employment during the training program. The petitioner points to the training program and contends that the purpose and goal of the duty during the training program is not to increase productivity or to relieve the supervisors of their duties. Given the fact that it is not clear what the beneficiary will do during the on-the-job hours, and the fact that several of the duties to be performed by the trainee appear to be tasks that are more than just "shadowing" other employees, the statements made by the petitioner are not sufficient to overcome the director's and AAO's concerns.

In addition, the director and AAO noted that the beneficiary will be trained on several computer systems that the petitioner stated were not available in Turkey. On motion, the petitioner states that the systems are in fact found in Turkey but "training of those tools is not yet available." The petitioner did not provide any evidence to corroborate this claim. It is unclear how the hospitality industry utilizes these systems but yet has no training on these systems for all of the employees that must use them. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

On motion, the petitioner also discussed the director's and AAO's concerns that the beneficiary already has substantial knowledge and skills in the proposed field of study. The beneficiary

graduated from Mugla University and received a degree in Travel Management. In addition, the beneficiary worked in several hotel and tourism operations during the summer months since 2001. The petitioner was also present in the United States in J-1 classification employed by Crowne Plaza Beach Resort and worked in food and beverage. The petitioner did not explain how the beneficiary's past education and employment experience differs from the training that will be provided by the petitioner.

On motion, the petitioner stated that "it found that the beneficiary only waited tables at Crowne Plaza Beach Resort for the Food and Beverage Department while he was in the United States in J-1 status. However, the petitioner submits the Form DS-7002, Training/Internship Placement Plan that was submitted for the J-1 training program with the Crowne Plaza Hilton Head Island Beach Resort and the detail of the J-1 program is much more elaborate than just being a waiter. It appears that the plan is to provide the beneficiary with an in-depth understanding of the Food and Beverage and Banquet Services operations of the hospitality industry. Aside from the petitioner's statement that the beneficiary was only a waiter during his J-1 program, the petitioner did not present any evidence to support this claim.

In addition, the beneficiary obtained a Bachelor's Degree in Travel Management from Mugla University. The petitioner submitted a page of the Mugla University website that stated the Department of Travelling Management prepares students in the areas of management, economics, communication, marketing, tourism geography, archeology and history of art, history of religion, mythology, airline management, ticketing and tour operations. Thus, this is not consistent with the petitioner's assertion that the beneficiary's degree in travel management did not focus on areas such as marketing, finance and budgeting, and management and administration. In addition, the beneficiary has several years of professional experience working in the hospitality industry. Again, the petitioner did not provide sufficient evidence to establish that the beneficiary does not already have substantial knowledge in the field of hospitality management. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Furthermore, the motion brief and supporting documentation submitted on motion do not present new evidence that was not available when the instant petition was filed. Instead, the brief attempts to clarify issues that were discussed in the director's and AAO's decisions but does not present new evidence to overcome the concerns presented in the director's denial and the AAO's dismissal of the appeal. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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.

In addition, the motion does not satisfy the requirements of 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.

On motion, the petitioner does not submit any document that would meet the requirements of a motion to reconsider. 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.

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.

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 AAO will not be disturbed.

ORDER: The motion is dismissed.