



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **APR 24 2014**

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center revoked the approval of the preference visa petition after issuing a notice of his intention to revoke the approval and his reasons therefore.¹ The Administrative Appeals Office (AAO) dismissed the petitioner's appeal of the revocation decision as well as its subsequent motion to reconsider. The matter is now before the AAO on a second motion to reconsider.² The AAO will grant the motion for the purpose of addressing the director's prior finding of fraud. However, the AAO's underlying decision dismissing the appeal will be affirmed.

The petitioner is a Texas corporation which claimed five employees at the time of filing the petition and seeks to employ the beneficiary as its executive vice president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. In a decision dated June 25, 2010, the director revoked the approval of the petition with a finding of fraud. The director determined that the petitioner failed to provide sufficient probative and reliable evidence to establish that it has a qualifying relationship with the beneficiary's claimed foreign employer.

On appeal, counsel challenged the director's reliance on adverse evidence that pertained to the petitioner's prior counsel and his criminal fraud-based conviction.

After conducting a *de novo* review of the record, the AAO concluded that the petitioner failed to overcome the director's findings of ineligibility. Specifically, the AAO determined that the record lacked sufficient credible probative evidence establishing that the petitioner has a qualifying relationship with the foreign entity where the beneficiary is claimed to have been employed. The AAO found that the petitioner failed to resolve certain evidentiary inconsistencies that exist among the documents that were provided to establish the foreign entity's ownership of the U.S. petitioner. The record shows that the AAO neither upheld nor withdrew the director's prior finding of fraud.

The petitioner subsequently filed a motion to reconsider, in which it challenged the director's finding of fraud and sought to invoke the protections under the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), despite the fact that the approval of the petitioner's Form I-140 was revoked thus indicating that the petition was no longer valid.

The AAO dismissed the petitioner's motion, concluding that the petitioner failed to meet the requirements of a motion to reconsider. The AAO found that counsel failed to cite pertinent precedent case law addressing the

¹ Among other issues, the director observed in the notice that the petitioner's previous counsel, [REDACTED], had been convicted of immigration fraud in 2009. Specifically, on August 24, 2009, a judgment in a criminal case was entered in the U.S. District Court for the Southern District of Texas, Houston Division, after Mr. [REDACTED] pleaded guilty to conspiracy to engage in visa fraud, encouraging and inducing aliens for the purpose of commercial advantage and private financial gain to come to the United States, making false statements, and money laundering.

² Although the petitioner marked Box A, which applies to the filing of an appeal with attached supporting evidence, the petitioner's supporting statement, titled "Brief in Support of I-290B Motion to Reopen and Reconsider," indicates that the petitioner intended to file a motion rather than a second appeal. As such, the petitioner's Form I-290B will be treated as a motion rather than a second appeal, which the AAO does not have jurisdiction to consider.

AAO's conclusion that the petitioner failed to overcome inconsistencies in documents that were offered to establish the existence of a qualifying relationship between the petitioner and the foreign entity where the beneficiary was purportedly employed. Again, the AAO neither upheld nor withdrew the director's prior finding of fraud.

In support of the petitioner's current motion, counsel submits a brief titled, "Brief in Support of I-290B Motion to Reopen and Reconsider," asserting that the petitioner was not among the list of companies for whom the petitioner's prior counsel filed fraudulent petitions. Counsel further contends that the AAO essentially precluded the petitioner from submitting evidence that would resolve the various inconsistencies discussed in the director's decision.

Although the petitioner's motion will be granted, counsel's assertions are not supported by the evidence of record. The very purpose of the AAO's role in the appeal process is to review the matter before it on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). In other words, the AAO will consider on appeal any new evidence a petitioner submits to address deficiencies and/or issues pertaining to the petitioner's eligibility. In general, the only exception from the *de novo* review is evidence that the petitioner submits on appeal for the first time after having failed to such evidence in compliance with a prior request for evidence. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

In the present matter, counsel does not explain what evidence he sought to submit on appeal, but was precluded from doing so based on the AAO's alleged refusal to consider such evidence. Therefore we cannot address counsel's general allegation of error. Furthermore, the unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Even if, *arguendo*, counsel's contention was meant to be applied to new evidence the petitioner sought to submit on motion, the AAO notes that the motion to reopen, rather than a motion to reconsider, is the proper vehicle to submit any new evidence. The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, 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. Further, the new facts must possess such significance that, "if proceedings . . . were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case." *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992); *see also Maatougui v. Holder*, 738 F.3d 1230, 1239-40 (10th Cir. 2013).

The record in the matter at hand shows that the petitioner checked Box E when filing the prior Form I-290B, thus indicating its intent to file a motion to reconsider. As such, the AAO had no reason to look for or consider new evidence in support of the previously dismissed motion. Furthermore, while counsel's brief indicates that the petitioner has filed a combined motion to reopen and reconsider, the record does not indicate that any new evidence has been submitted to meet the requirements of 8 C.F.R. § 103.5(a)(2).

Next, counsel focuses on the fraud finding that the director originally issued in the revocation decision dated June 25, 2010. Counsel asserts that the petitioner lacked the element of intent, which is necessary for a finding of fraud.

In line with counsel's assertion, it is well established in published case law that a finding of fraud requires a determination that the alien made a false representation of a material fact with knowledge of its falsity and with the intent to deceive an immigration officer. Furthermore, the false representation must have been believed and acted upon by the officer. See *Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956). In reviewing the facts presented in the matter at hand, the record does not support a finding of fraud. As previously noted in the AAO's original decision dated August 14, 2012, the criminal conviction of the petitioner's prior counsel, by itself, is not sufficient to invalidate the petitioner's assertions of fact, despite any suspicions that may have arisen due to prior counsel's criminal wrong-doing. Therefore, the director's finding of fraud will be withdrawn.

The above discussion notwithstanding, the record nevertheless contains considerable inconsistencies as to who owns the petitioning entity. While the petitioner has consistently maintained that the foreign entity owns the majority of the petitioning entity, thus indicating that the petitioner is a subsidiary of the entity abroad, the matter of the petitioner's credibility still remains in question given the petitioner's failure to provide evidence to resolve the documentary anomalies and the inconsistent evidence of its ownership. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Despite counsel's continued assertions that U.S. Citizenship and Immigration Services (USCIS) acted unfairly by revoking approval that was issued years ago, the law with respect to revocations is clear. Generally, with regard to revocations, section 205 of the Act, 8 U.S.C. § 1155, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

The record in the present case shows that USCIS properly informed the petitioner of certain anomalies that existed in the evidence that submitted to establish the existence of a qualifying relationship. The petitioner was then given the opportunity to address and rebut the adverse findings introduced in the notice of intent to revoke. The record shows that the petitioner has not, in fact, provided independent objective evidence resolving how many shares of stock the petitioner issued, who owns the petitioning entity's stock, and what, if any, was the compensation the petitioner allegedly received for the issuance of stock. Counsel's attempt to

reconcile the previously noted inconsistencies by claiming that the errors described herein were merely clerical is not sufficient, as any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92. As noted earlier, the unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. at 188-89 n.6.

In summary, while the AAO withdraws the director's finding of fraud and makes no independent finding of willful misrepresentation, the record shows that the petitioner has failed to overcome adverse findings that pertain to the petitioner's ownership. As such, the AAO finds that the petitioner has failed to provide sufficient credible evidence to establish the existence of a qualifying relationship with the beneficiary's foreign employer and is therefore ineligible for the immigrant visa sought herein.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

ORDER: The AAO's previous decisions are affirmed. The approval of the petition remains revoked.

FURTHER ORDER: The director's finding of fraud made on June 25, 2010 is withdrawn.