

Administrative Appeals Office  
U.S. Citizenship and Immigration Services  
Invasion of Privacy - 2012

**PUBLIC COPY**

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**

[Redacted]

B7

DATE: Office: CALIFORNIA SERVICE CENTER

**JUN 11 2012**

[Redacted]

IN RE: [Redacted]

PETITION: 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 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 Director, California Service Center, denied the immigrant visa petition on March 23, 2011. The director reaffirmed that decision on motion. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Prior to denying the petition, the director issued two requests for evidence (RFE) to the petitioner. Both requests sought additional evidence relating to the source of the funds invested in the regional center. After affording the petitioner two opportunities to sufficiently document the full path of the invested funds, the director denied the petition on March 23, 2011. The petitioner then filed a motion to reopen and a motion to reconsider on the denied immigrant visa petition on April 25, 2011. The director dismissed both motions on May 19, 2011. The petitioner then appealed the decision on the motion to reopen and motion to reconsider to the AAO.

The decision on appeal is the director's dismissal of the motions to reopen and reconsider. Since the director dismissed the motions based on a procedural aspect relating to the motions, the petitioner must first demonstrate within this appeal that the director's dismissal on the motions was in error. In cases such as this, if a petitioner establishes that the director's dismissal of the motions was in error, the AAO will evaluate the merits of the director's decision on the Form I-526. However, if a petitioner fails to demonstrate that the director's dismissal of the motions was in error, the appeal will be dismissed without regard to the merits of the Form I-526 decision. The director dismissed the motion to reopen based on her determination that the petitioner failed to present new facts that were supported by affidavits or other documentary evidence. The director dismissed the motion to reconsider based on her determination that the petitioner failed to state reasons for the reconsideration that were supported by precedent decisions. Ultimately, the director dismissed the combined motion to reopen and reconsider because, "this filing does not meet the definition of either a motion to reopen or motion to reconsider."

A motion to reopen does not contest the correctness of (or simply request a reevaluation of) the prior decision on the previous factual record. Rather, a motion to reopen proceedings seeks to reopen proceedings so that new evidence can be presented and so that a new decision can be entered, normally after a further evidentiary hearing. *See Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991). A motion to reconsider, however, is a fundamentally different motion. *Id.* at 402 (citing *Sanchez v. INS*, 707 F.2d 1523, 1529 (D.C.Cir.1983); *Chudshevid v. INS*, 641 F.2d 780, 783 (9th Cir.1981)).

Regarding the motion to reopen, the petitioner submitted additional documentary evidence. This evidence consisted of: (1) webpage printouts from Oandopl.com, the organization associated with the petitioner's franchise; (2) a *Bloomberg Businessweek* article relating to Oando PLC; (3) a letter from the petitioner's attorney in Nigeria; and (4) a letter from the petitioner's accountant in Nigeria. A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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.<sup>1</sup> New evidence is considered to be material to the present case and not

---

<sup>1</sup> The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered,

previously submitted. The petitioner has failed to demonstrate that the aforementioned additional documentary evidence that the petitioner submitted with the motion to reopen was not available and could not have been discovered or presented in the previous proceeding, and therefore cannot be considered a proper basis for a motion to reopen. Accordingly, the AAO concurs with the director's dismissal of the petitioner's motion to reopen.

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 U.S. Citizenship and Immigration (USCIS) policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider is based on the existing record and petitioners may not introduce new facts or new evidence relative to their arguments. *Id.* The Board of Immigration Appeals (BIA) generally provides that a motion to reconsider asserts that at the time of the previous decision, an error was made. It questions the decision for alleged errors in appraising the facts and the law. The very nature of a motion to reconsider is that the original decision was defective in some regard. *See Cerna*, 20 I&N Dec. at 402.

A motion to reconsider cannot be used to raise a legal argument that could have been raised earlier in the proceedings. *See Matter of Medrano*, 20 I&N Dec. 216, 220 (BIA 1990, 1991). Rather, the "additional legal arguments" that may be raised in a motion to reconsider should flow from new law or a *de novo* legal determination reached in its decision that could not have been addressed by the party. Further, a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). Instead, the moving party must specify the factual and legal issues raised previously that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *Id.* at 60.

Regarding the motion to reconsider, within the brief accompanying the motions, counsel relied on two of the same precedent decisions utilized with the director's decision. Counsel relied on these precedent decisions in support of his position that the director's decision on the Form I-526 was incorrect. Counsel referred to *Matter of Soffici*, 22 I&N Dec. 158 (Assoc. Comm'r 1998) as it relates to the lawful source of the invested funds stating:

The facts in *Soffici* are in direct contrast to the present matter. . . . In the current case the Petitioner submitted a deed establishing ownership of property, an affidavit of transfer and payment, plans for construction of a building, and a contract for sale of the property in the amount of \$500,000 (US). Therefore, the Director's reliance on *Soffici* in this case is improper.

The director relied on the *Soffici* decision in an attempt to ascertain where the petitioner derived the money to invest into a foreign property. The sale of this property served as the basis for the petitioner's investment in the regional center. A petitioner must reasonably demonstrate the origins

---

found, or learned <new evidence> . . . ." Webster's II New Riverside University Dictionary 792 (1984) (Emphasis in original.)

of the funds invested into this program to sufficiently establish that the invested funds were obtained by lawful means. *See Matter of Soffici*, 22 I&N Dec. at 158. It remains that the petitioner failed to demonstrate how she earned the funds “to acquire the land, build on the land and purchase shares of the company,” all of which the director requested that the petitioner document within the second RFE. The petitioner has failed to document the origin of the funds that she used to acquire and develop the property that ultimately proved to be the vehicle for her investment in the regional center. Consequently, the director’s reliance on the *Soffici* decision was appropriate and the petitioner has not provided a proper basis for a motion to reconsider.

Also within the motions brief, counsel referred to *Matter of Ho*, 22 I&N Dec. 206 (Assoc. Comm’r 1998). The director cited to *Matter of Ho*, finding that a petitioner may not sufficiently document the lawful source of the invested funds “simply by submitting the following: bank statements showing deposits; a letter indicating the number and value of shares of capital stock held by the petitioner in a foreign business; and documents which show someone else as the legal owner of capital.” On motion, counsel acknowledged that the director was correct in her assessment of the tenets of the *Ho* decision; however, counsel surmised that the facts in the present case are different. Specifically, counsel noted that the petitioner in *Matter of Ho* failed to provide evidence that he and his spouse “had sold any of [their Taiwan] assets as the source of the funds invested in the United States.” Counsel claimed that because the petitioner in the present case showed how she “acquired the land, built it out and sold the property for \$500,000,” she has complied with the lawful source of funds requirements discussed in *Matter of Ho*. In fact, the director found that the petitioner’s tax documents for the most recent years failed to demonstrate how she accumulated a sufficient amount of funds to make the large purchase of land.

The petitioner purchased the land in question in June of 2007 for N2,000,000 (two million Nigerian Naira). The petitioner’s tax documents on record at the time of the decision reflect that the petitioner’s total assessable income in 2006 and 2007 was N88,210 and N90,710 respectively. This is far short of the N2,000,000 that the petitioner needed to purchase the land in 2007. Within the petitioner’s response to the second RFE, she provided an undated letter in which she indicated that the tax documents only reflect a stipend that she received from her position as a Director in [REDACTED]. She further indicated that the main source of her income derived from her franchise dealership under [REDACTED], but that she was not taxed on this income as [REDACTED] paid all duties and taxes on this activity. She did not provide relevant sections of the Nigerian tax code to support the assertion that this income was not taxable to her.

The petitioner concluded the letter by indicating that her family purchased [REDACTED] in 2005 but the tax documentation could not be “regularized” until two years later as Nigeria is a developing country. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). A petitioner must document that primary evidence does not exist or cannot be obtained before relying on secondary evidence. *Id.* A petitioner must provide an original written statement on government letterhead to establish that a record does not exist. 8 C.F.R. § 103.2(b)(2)(ii). Only where the petitioner demonstrates that both primary and secondary evidence does not exist or cannot be obtained may a petitioner rely on two or more affidavits sworn

to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. 8 C.F.R. § 103.2(b)(2)(i).

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. *Matter of Ho*, 22 I&N Dec. at 210-211; *Matter of Izummi*, 22 I&N Dec. 169, 195 (Assoc. Comm'r 1998). Without documentation of the path of the funds, the petitioner cannot meet her burden of establishing that the funds are her own funds. *Id.* The petitioner failed to document the manner in which she obtained the funds to purchase and develop the property. Consequently, she has failed to establish that she obtained the funds through lawful means. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. These “hypertechnical” requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1040 (E.D.Calif. 2001) *aff'd* 345 F.3d 683 (9th Cir. 2003) (affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns). The petitioner has failed to demonstrate that the director’s reliance on *Matter of Ho* was erroneous. As such, she failed to establish that her filing met the requirements of a motion to reconsider.

The petitioner’s April 25, 2011 filing did not meet the requirements for a motion to reopen or for a motion to reconsider. Therefore, the petitioner failed to demonstrate that the director’s dismissal of the motions was in error.

**ORDER:** The appeal is dismissed.