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U.S. Citizenship
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Services

B4

File: [REDACTED]
LIN 05 110 51433

Office: NEBRASKA SERVICE CENTER

Date: NOV 01 2007

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

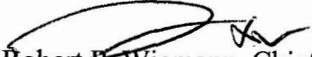
Petition: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

[REDACTED]

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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner subsequently filed an untimely appeal with the Administrative Appeals Office (AAO) to review the director's decision. Instead of forwarding the appeal to the AAO as required by 8 C.F.R. § 103.3(a)(2)(iv), the director determined that the appeal was improperly filed and rejected it.¹ The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) further states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the service center director. *See* 8 C.F.R. § 103.5(a)(1)(ii). Accordingly, the director considered the petitioner's untimely submission as a motion and dismissed it pursuant to 8 C.F.R. § 103.5(a)(4) for failure to meet the provisions of 8 C.F.R. §§ 103.5(a)(2) or (3). The petitioner submitted a timely appeal with regard to the director's latest decision. The matter is currently before the AAO for review. The appeal will be dismissed.

Notwithstanding the director's harmless error in rejecting the appeal without jurisdiction, he properly considered the petitioner's submissions in light of the regulations at 8 C.F.R. §§ 103.5(a)(2) and (3), addressing a motion to reopen and a motion to reconsider, respectively. In doing so, the director dismissed the motion, concluding that the petitioner did not meet the regulatory requirements. As such, the matter currently before the AAO on appeal is whether the petitioner satisfied the requirements cited in 8 C.F.R. §§ 103.5(a)(2) and (3) for a motion to reopen and a motion to reconsider, respectively, and whether the director properly dismissed the motion.

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.

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 previously proceeding.²

In the present matter, counsel's brief in the untimely appeal merely referred to information that was previously provided. Thus, in essence, counsel addressed the merits of the director's initial denial of the petitioner's Form I-140. However, as previously indicated, the petitioner's filing of an untimely appeal precludes a *de novo* review of the entire record.

¹ To remedy the director's error in not forwarding the first appeal to the AAO, this office is issuing a separate decision in which it rejects that appeal as untimely filed. However, the AAO is not remanding the matter back to the director because, as discussed *infra*, he has already considered the untimely appeal as a motion as required by 8 C.F.R. § 103.2(a)(2)(v)(B)(2), making any such remand on this basis moot.

² 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).

In the second appeal, counsel asserts that the previously provided explanation for the filing of an untimely appeal is in itself a new fact. However, this "new" fact does not lend itself to further review, as it has no bearing on the issue of the petitioner's eligibility to classify the beneficiary as a multinational manager or executive. As counsel presented no new facts that are relevant to the issue of the petitioner's eligibility, the director properly determined that the petitioner did not meet the regulatory requirements of a motion to reopen.

With regard to a motion to reconsider, the regulations at 8 C.F.R. § 103.5(a)(3) state, 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 [Citizenship and Immigration Services (CIS)] 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 the prior brief, counsel objected to the director's failure to mention various portions of the beneficiary's job description as provided earlier in the proceeding. However, there is no statute, regulation, or case law that requires the director to specifically restate all information that he considers in rendering his decision. Furthermore, the mere fact that the director did not repeat all of the information provided by the petitioner does not indicate that such information was not considered. In fact, the director specifically referred to the hourly breakdown of the beneficiary's proposed duties and on that basis determined that the beneficiary would not spend at least 50% of his time at work performing qualifying managerial or executive tasks. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Thus, the director's determination was legally sound, as it was clearly based on the relevant statutory language and guiding case law precedent.

Counsel provided no evidence to suggest that the director misapplied the relevant law or CIS policy in light of the evidence on record at the time of the director's initial decision.

On appeal, counsel states that the director cited 8 C.F.R. § 103.3(a)(1)(v)(B)(2), which does not exist. However, the director's error was clearly a typographical one, as apparent by the fact that the director did not merely cite the section of the regulations, but also recited, verbatim, the provisions found therein. Thus, the director's citing 8 C.F.R. § 103.3(a)(1)(v)(B)(2) instead of 8 C.F.R. § 103.3(a)(2)(v)(B)(2), which does exist and applies directly to the matter at hand, was a harmless typographical error, not a substantive error that should lead to a reversal of the director's decision. Moreover, on page five of the appellate brief, counsel cites the proper section of the regulations, thereby clearly acknowledging its existence and his familiarity with the relevant provisions therein.

Additionally, counsel asserts that the director's decision to not include the beneficiary's description in its entirety indicates that the director failed to consider relevant information, which is a legal error that must be corrected by reconsidering the matter on motion. However, as stated above, the director is not required to

specifically reiterate each of the petitioner's statements in order to establish that the relevant information has been considered. Moreover, the director's recitation of the beneficiary's hourly breakdown of duties is a clear indication that the most relevant information was, in fact considered, and that it was the primary basis for the director's decision.

Furthermore, counsel failed to comply with the regulatory requirements cited in 8 C.F.R. § 103.5(a)(3), which requires that the basis for requesting reconsideration be supported by precedent case law. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. In the present matter, counsel's citation of North Dakota and Georgia district court cases from the Eighth and Eleventh Circuits are even less persuasive, as the current petitioner is based in Illinois and, therefore, originated in an entirely different circuit, i.e., the Seventh Circuit.

Accordingly, counsel's argument that the director has abused his discretion is entirely without merit.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.