

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

**PUBLIC COPY**

U.S. Department of Homeland Security  
20 Massachusetts Ave., N.W., Rm. 3000  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

B4



FILE:

WAC 04 114 53762

Office: CALIFORNIA SERVICE CENTER

Date:

**DEC 19 2008**

IN RE:

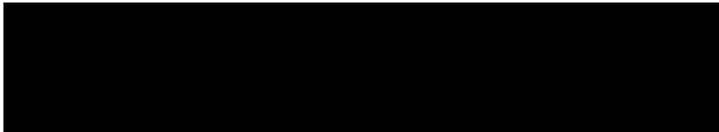
Petitioner:

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:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center. The petitioner appealed the matter to the Administrative Appeals Office (AAO), where the appeal was dismissed. The petitioner subsequently filed a motion to reopen, which was granted, but the AAO ultimately affirmed the prior adverse decision. The matter is now before the AAO on a second motion to reopen and reconsider. The motion will be dismissed.

The petitioner is a California corporation that seeks to employ the beneficiary as its controller and vice president of administration. 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. The director denied the petition based on the conclusion that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

The petitioner appealed the denial disputing the director's findings and claiming that the beneficiary would be employed in a managerial and an executive capacity. In a decision dated December 21, 2005, the AAO dismissed the appeal affirming the director's conclusion. The AAO found that the beneficiary would be performing the petitioner's non-qualifying administrative and operational tasks and that he would not be supervising managerial, professional or supervisory employees who would relieve him from having to primarily perform non-qualifying tasks. In addition to the director's findings, the AAO further concluded that the petitioner failed to establish that the beneficiary was employed abroad in a managerial or executive capacity. The AAO provided detailed discussions of the job descriptions previously given by the petitioner, explaining in detail the basis for its adverse findings.

On first motion, counsel argued that dismissing the appeal amounted to an abuse of discretion, claiming that the AAO failed to consider the beneficiary's contribution to the success of the U.S. entity. Counsel offered an additional job description for the beneficiary.

Although the AAO granted the petitioner's motion, it found that counsel's submissions were insufficient to overcome the prior decision, which the AAO ultimately affirmed. Again, the AAO provided a thorough and comprehensive analysis of the petitioner's submissions, finding that the petitioner failed to meet the regulatory, statutory, and case law provisions that called for a statement of the beneficiary's actual job duties in order to enable U.S. Citizenship and Immigration Services (USCIS) to determine whether the beneficiary's employment in the United States and abroad could be deemed as qualifying within a managerial or executive capacity.

The AAO further noted that the petitioner did not challenge three of its prior adverse findings. Specifically, the petitioner did not dispute 1) that at the time of filing it did not employ a support staff to relieve the beneficiary from having to perform lower-level tasks associated with payments, collections, refunds, or handling refund requests and legal issues; 2) that the beneficiary would not supervise a staff of managerial, supervisory, or professional employees; and 3) that the beneficiary was not employed abroad in a qualifying managerial or executive capacity.

On second motion, counsel asserts that the beneficiary is employed in an executive capacity, leaving out the prior claim that the beneficiary's prospective employment fits the definition of managerial capacity as well. Regardless, in support of this claim counsel offers an affidavit written by the petitioner's office manager and

submits evidence of the educational levels of the beneficiary's claimed subordinates. However, these additional documents do not meet the requirements of a motion to reopen.

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 previous proceeding.<sup>1</sup>

Accordingly, the evidence offered in support of the most recent motion does not fit the definition of what is deemed as new evidence, as neither the affidavit nor the educational levels can be found as having been previously unavailable. In fact, the petitioner had been advised on numerous occasions, both by the director and by the AAO, of the various deficiencies that lead to the adverse findings in the present matter. Thus, the petitioner had ample opportunity to supplement the record with the necessary information either on appeal or even earlier, in response to the request for evidence. It is not credible that the supplemental information is new and that it was previously unavailable. The issue of the beneficiary's proposed employment and whether that employment fits the definition of managerial or executive capacity had been fully addressed on several occasions. Counsel's submissions in the present matter do not warrant yet another full discussion of an issue that has already been decided.

Additionally, while counsel asserts that USCIS had previously ignored the list of five goals and policies that are reiterated in the current brief, there is no basis for this claim. The record shows that the AAO accorded the petitioner the benefit of a full and comprehensive review of all the facts and issues it deemed to be the most relevant in determining the petitioner's eligibility for the immigration benefit sought. The mere fact that every piece of information offered by the petitioner was not specifically enumerated in prior decisions is not indicative of any oversight on the part of the AAO. Rather, it appears that the facts which counsel may have deemed as key elements were not similarly prioritized by the AAO. In its current review of the list of goals and policies, the AAO finds no reason to detract from its prior holdings. Contrary to counsel's belief, nothing in the list of goals and policies gives any further insight into the beneficiary's daily activities or suggests that the job duties that would be performed can be deemed primarily managerial or executive in their nature. Thus, counsel's argument is without merit.

Lastly, while counsel filed this motion as a combined motion to reopen and reconsider, there is no indication that counsel addressed the requirements for 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 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.

---

<sup>1</sup> 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 present matter, counsel does not cite any legal precedent or applicable law that would indicate an error on the part of the AAO in dismissing the petitioner's appeal. Therefore, the motion will be dismissed in accordance with 8 C.F.R. § 103.5(a)(4), which states, in pertinent part, that a motion that does not meet applicable requirements shall be dismissed.

As a final note, the proper filing of a motion to reopen and/or reconsider does not stay the AAO's prior decision to dismiss an appeal or extend a beneficiary's previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

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 motion is dismissed.