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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: DEC 13 2013

IN RE: Petitioner: [redacted]
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:

[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.

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. The fee for filing a Form I-290B is $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 preference visa petition was denied by the Director, Nebraska Service Center. The petitioner appealed the matter to the Administrative Appeals Office (AAO). The appeal was dismissed and the matter is now before the AAO on motion to reopen and reconsider. The motion will be dismissed.

The petitioner is a Florida limited liability company that seeks to employ the beneficiary as its general manager. Accordingly, the petitioner filed the instant immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director denied the petition on April 25, 2008 based on two independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity; and 2) the petitioner failed to establish that the U.S. company has a qualifying relationship with the beneficiary's foreign employer.

The petitioner subsequently filed an appeal which the AAO dismissed based on three independent grounds of ineligibility. The AAO affirmed the director's original findings and added a third finding, concluding that the petitioner failed to establish that the beneficiary was employed abroad in a managerial or executive capacity.

On motion, counsel submits a Form I-290B on which he stated: "Brief will be submitted within 30 days." There is no provision for filing a subsequent brief in support of a motion to reopen or a motion to reconsider. As the motion did not meet the requirements of either a motion to reopen or a motion to reconsider at the time it was filed, the motion must be dismissed.

Counsel subsequently submitted a letter dated July 7, 2009 in which he reiterates various aspects of the beneficiary's previously submitted job description and provides a supplemental job description with a percentage breakdown in an attempt to elaborate on the beneficiary's time allocation among the various responsibilities assigned to him in his proposed position. Additionally, in an attempt to remedy a deficiency that was addressed in the AAO's prior decision, counsel states that in 2007 the petitioner was issued its own state license to operate an independent car dealership.

The petitioner has further supplemented the record with the petitioner's business license with an expiration dated April 30, 2008, the petitioner's organizational chart, an agreement dated August 1, 2004 between the petitioner and [redacted] and a series of untranslated foreign language documents which counsel indicated were submitted for the purpose of establishing the foreign entity's existence as well as the foreign entity's alleged qualifying relationship with the U.S. petitioner.

As a preliminary matter, the AAO notes that while an appeal and a motion are both remedial actions, the legal purpose of an appeal is entirely distinct from that of a motion to reopen and/or reconsider. The AAO reviews appeals on a *de novo* basis, allowing the petitioner to supplement the record with any evidence or documentation that the filing party feels may overcome the grounds for the underlying adverse decision. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). However, the AAO's review of a motion to reopen or a motion to reconsider is limited to evidence that fits the specific criteria discussed at 8 C.F.R. § 103.5(a)(2) and 8 C.F.R. § 103.5(a)(3), respectively. Submitting evidence that does not fit the regulatory criteria specified at 8 C.F.R. § 103.5(a)(2) or 8 C.F.R. § 103.5(a)(3), depending on the type of motion the petitioner has filed, will not suffice even if such evidence may have overcome the grounds for denial if it had been submitted on appeal.

The regulation at 8 C.F.R. § 103.5(a)(2) states, 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.[1]

Although the AAO acknowledges that the petitioner had not previously submitted its business licenses it obtained in 2007, 2008, and 2009, at least two of these documents—specifically, the license that was obtained in 2007 and 2008—cannot be deemed as unavailable as of the date the petition was filed. Moreover, a petitioner must establish eligibility at the time of filing the petition. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Since the Form I-140 in the present matter was filed on August 29, 2006, a license obtained any time subsequent to the filing of the petition would not help to establish that the petitioner was eligible for the immigration benefit sought herein at the time the petition was filed.

The AAO now turns to the petitioner's submission of a document titled, [redacted] dated August 1, 2004. Although this document is new in the sense that it had not been previously submitted, the fact that this document is dated August 1, 2004 indicates that this document was clearly available at the time of the appeal. Given the fact that the director expressly questioned [redacted] connection to the petitioner in the original denial of the petition, it is unclear why the petitioner failed to submit this document in support of the appeal. Regardless, this document cannot be deemed as one that was unavailable at the time of the appeal and therefore it also does not meet the criteria required of a motion to reopen.

Next, the AAO acknowledges the petitioner's submission of numerous foreign language documents, which, according to the explanation found in counsel's July 10, 2009 letter, were intended for the purpose of determining the existence of a qualifying relationship between the petitioner and the beneficiary's foreign employer. However, as previously stated in the AAO's decision on appeal, the petitioner is required to submit certified translations of foreign language documents. In fact, the AAO expressly rejected previously submitted foreign language documents due to the petitioner's failure to submit certified translations. As the petitioner's failure to submit certified translations of foreign language documents precludes the AAO from being able to determine whether the evidence supports the petitioner's claims, such evidence is not probative and will not be accorded any weight in this proceeding. *See* 8 C.F.R. § 103.2(b)(3).

The AAO now turns to the petitioner's 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.

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[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).

In the instant case, 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.

The AAO further notes that the petitioner did not address the additional ground for denial, i.e., the AAO's finding that the petitioner failed to establish that the beneficiary was employed abroad within a qualifying managerial or executive capacity. Thus, even if the petitioner prevailed on the two grounds of ineligibility that were originally cited in the director's decision, a favorable finding would not be warranted in light of the petitioner's failure to address the third ground cited as an alternate basis for denying the petition.

Furthermore, the motion shall be dismissed for failing to meet an applicable requirement. The regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C) requires that motions be "accompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

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.