

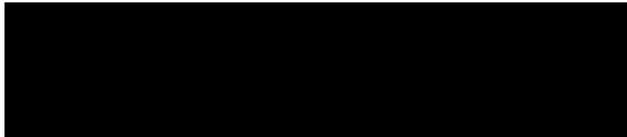
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: MAR 14 2011

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)

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 \$630. 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).

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), where the appeal was dismissed. The petitioner subsequently filed a motion to reopen and reconsider seeking further review of the AAO's decision. The director erroneously assumed jurisdiction over the matter and issued an adverse decision affirming denial of the petition.¹ The petitioner subsequently appealed the director's dismissal of the motion and that matter is now before the AAO on appeal. Due to the director's error in assuming jurisdiction over the petitioner's motion, the AAO will withdraw the director's improperly issued decision on the motion. As it is clear that the petitioner filed its most recent appeal based on the director's erroneously issued decision on motion, a matter over which the service center did not have jurisdiction, the AAO will enter this decision on the previously filed motion to reopen and reconsider, which should have been forwarded to the AAO at the time it was filed. After giving full consideration to the petitioner's submissions on motion and in support of the most recently filed appeal, the AAO concludes that the petitioner did not meet the requirements for the benefit sought and the motion will therefore be dismissed.

The petitioner is a Maryland corporation engaged in the business of acquiring and exporting various goods to China. It seeks to employ the beneficiary as its president and chief executive officer. 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 determination that the petitioner failed to establish that: 1) the beneficiary was employed abroad in a qualifying managerial or executive capacity; and 2) the beneficiary would be employed in the United States in a managerial or executive capacity. The petitioner appealed the denial disputing the director's findings. Although the AAO withdrew the first ground as a basis for denial, the second ground was upheld and the denial was therefore affirmed on appeal.

On motion, counsel submitted a brief pointing out that the petitioner had previously responded to the director's instructions in the RFE by providing what counsel deemed "a lengthy description of the [b]eneficiary's specific job duties which, we believe, are detailed, even minute, and inclusive." Counsel then went on to state that it is unreasonable to strictly quantify each job duty in terms of a specific time allocation, contending that the beneficiary's job duties are not static and will often include contract negotiation. Although counsel acknowledged the AAO's adverse comment as to the generality of one of the items listed in the percentage breakdown that was offered in response to the RFE, counsel stated that "it would be ridiculous [to] fix a time for this job duty." Counsel merely stated that the beneficiary advises his subordinate managers and executives to look for products on the market that meet customers' needs. No specific information was provided to establish the extent of the beneficiary's supervision over his subordinates or the specific length and nature of such interactions.

In discussing the beneficiary's subordinates, counsel stated that their job duties are self-evident and failed to establish that the employees are actually managerial other than in position title. Counsel further stated that because of the petitioner's small size, the beneficiary's subordinates assume the various necessary clerical responsibilities.

¹ The regulation at 8 C.F.R. § 103.5(a)(1)(ii) states that the official having jurisdiction in the matter of a motion to reopen or reconsider is the official who made the latest decision in the proceeding. As the motion was filed in response to the AAO's adverse decision on appeal, the AAO retains jurisdiction in the instant matter.

Additionally, the petitioner provided its 2007 and 2008 tax returns as well as evidence of business transactions that took place in 2008 and 2009.

The AAO finds that the petitioner's submissions do not meet the requirements of either a motion to reopen or a motion to reconsider.

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.²

In the present matter, the only additional evidence that has been submitted applies to time periods that followed the filing of the instant Form I-140. It is noted that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). As the petition in the present matter was filed in 2006, the evidentiary value of documents that address time periods following the filing of the petition is limited at best, as such documents do not establish whether the petitioner was eligible at the time of filing the petition.

With regard to a motion to reconsider, the regulations at 8 C.F.R. § 103.5(a)(3) state the following, 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 USCIS 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 present matter, the petitioner provides no pertinent precedent decisions, nor is there any evidence that the director's initial denial was incorrect based on the evidence provided at the time of the adverse decision. The AAO further notes that while a comprehensive review of the entire record is conducted on appeal, a review in the case of a motion to reconsider is strictly limited to an examination of any purported misapplication of law or service policy, which must be supported by precedent case law. Counsel's supplemental discussions of the beneficiary's proposed employment, including the additional statements describing the subordinate employees' job assignments, do not meet the provisions of a motion to reconsider. Any information regarding the beneficiary's proposed employment, particularly his job duties, should and could have been provided on appeal. There is no regulatory or statutory provision that allows a petitioner more than one appellate decision per every petition filed. In the present matter, an appellate decision was issued and the deficiencies were adequately addressed. The petitioner cannot rely on the filing of a motion as

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).

an appropriate tool in order to revisit deficiencies that were previously addressed on appeal in a comprehensive analysis.

Accordingly, the AAO will dismiss the petitioner's motion to reconsider 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.

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.