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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: FEB 04 2013 OFFICE: TEXAS SERVICE CENTER FILE:

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:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference via petition was denied by the director, Texas Service Center. The petitioner appealed the matter to the Administrative Appeals Office (AAO), where the appeal was dismissed. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motion will be dismissed and the director's and the AAO's decisions will not be disturbed.

The petitioner is a distributor of consumer goods that seeks to employ the beneficiary as its general manager. 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.

On April 12, 2010, the director denied the immigrant petition determining that the petitioner failed to establish that the beneficiary is an employee and that the beneficiary will be employed in a managerial or executive capacity.

The petitioner subsequently filed an appeal which the AAO summarily dismissed pursuant to the regulation at 8 C.F.R. § 103.3(a)(1)(v). The AAO noted that the petitioner failed to identify any erroneous conclusion of law or statement of fact as a basis for the appeal. Although counsel had indicated on the Form I-290B, Notice of Appeal or Motion, that he would submit a brief and/or additional evidence to the AAO within 30 days of filing the appeal, the record reflected that he did not file a brief or supplemental evidence within the allowed timeframe.

On May 2, 2012, counsel filed Form I-290B and stated that the petitioner is filing a motion to reopen and a motion to reconsider, and a brief and/or additional evidence is attached.

On the Form I-290B, counsel states that the "attached brief was submitted in a timely manner by US Mail to the appropriate office." Counsel also submits a document entitled, "Brief in Support of Appeal (Previously Filed and Pending)."

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/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 part 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 have been submitted on appeal.

The regulations at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "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]

On motion, counsel for the petitioner states that the AAO erred in summarily dismissing the appeal since a brief in support of the appeal was in fact sent to the appropriate office. On motion, counsel submits an un-dated document entitled, "Brief in Support of Appeal (Previously Filed and Pending)." However, counsel does not provide any supporting evidence to establish that this appeal brief was in fact timely filed to the appropriate office. In fact, counsel does not even indicate when or with which office the brief was claimed to have been submitted. The AAO reviewed the entire file and did not find the brief in support of the appeal that counsel claimed was sent previously. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As such, the AAO cannot consider the un-dated brief alone to be "new" evidence and will not grant the motion to reopen.

Furthermore, counsel's assertions do not satisfy the requirements of a motion to reconsider. 8 C.F.R. § 103.5(a)(3) states, 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 Service 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.

On motion, counsel for the petitioner claims that a brief in support of the appeal was filed "by US mail to the appropriate office." However, as noted above, counsel did not submit any evidence to corroborate this claim. On motion, the petitioner does not establish that the AAO's decision was based on an incorrect application of law or Service policy. The brief does not provide information or evidence that would meet the requirements of a motion to reconsider. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Therefore, the AAO's decision to summarily dismiss the petitioner's appeal will not be disturbed.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to

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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 College Dictionary* 736 (2001)(emphasis in original).

reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed. The director's and AAO's decisions will be undisturbed.