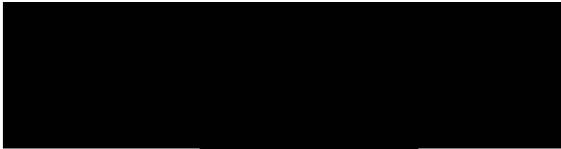


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Services

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FILE: [REDACTED]
SRC 03 251 52093

Office: TEXAS SERVICE CENTER Date: **JUL 25**

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

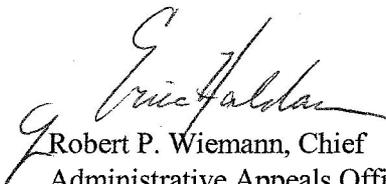
PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to
Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved by the Director, Texas Service Center. Upon further review, a Notice of Intent to Revoke (NOIR) was issued and the approval of the petition was ultimately revoked. The petitioner appealed the matter to the Administrative Appeals Office (AAO). The appeal was dismissed. The matter is now before the AAO on motion to reopen and reconsider. The motion will be dismissed.

The petitioner is a Texas corporation seeking to employ the beneficiary as its business development 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. The director revoked the approval of the visa petition on the basis of five independent grounds of ineligibility. More specifically, the director found that the petitioner failed to establish: 1) that the U.S. entity and the beneficiary's foreign employer had a qualifying relationship at the time the Form I-140 was filed; 2) that the beneficiary would be employed by the U.S. entity in a managerial or executive capacity; 3) that the beneficiary was employed abroad in a qualifying managerial or executive capacity; 4) that the U.S. and foreign entities continue to do business; and 5) that the petitioner had the ability to pay the beneficiary's proffered wage at the time the Form I-140 was filed. The director also noted that the petitioner failed to respond to the NOIR.

On appeal, counsel argued that the petitioner responded to the NOIR and, in support of his assertion, submitted a copy of a Federal Express shipment tracking record. In reviewing this document, the AAO properly noted that the tracking record did not identify the origin of the sent material and further observed that a copy of the petitioner's response to the NOIR was not provided. The AAO further found that the petitioner failed to address the various substantive legal grounds for the revocation of the petition on appeal and concluded that the director's initial approval of the petitioner's Form I-140 was erroneous.

Counsel also contended that the beneficiary ported to a new employer during a time when she had a valid, approved Form I-140. On this basis, counsel requested that this case be remanded back to the Texas Service Center for approval of the beneficiary's Form I-485 under the American Competitiveness in the Twenty-First Century Act (AC21), Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000). The AAO duly addressed counsel's argument, concluding that the beneficiary's new job and the portability considerations of AC21 are issues that must be addressed in the adjudication of the beneficiary's Form I-485 rather than in the matter of the petitioner's Form I-140. Nevertheless, the AAO properly observed that in order for the portability provisions to apply, the underlying petition must be "valid" to begin with if it is to "*remain* valid with respect to a new job." **Section 204(j) of the Act, 8 U.S.C. § 1154(j) (emphasis added).** In light of the beneficiary's ineligibility for the visa classification sought by the petitioner, the AAO noted that the petition was not valid to begin with and that as a result, AC21 provisions would not be applicable in the present matter.

On motion to reopen and reconsider, counsel continues to assert that the petitioner's response to the NOIR was timely submitted and further argues that the NOIR raised issues based on an erroneous understanding of the facts regarding the beneficiary's change of employment, which took place after the Form I-140 was filed and approved. These concerns indicate that counsel is seeking a *de novo* review in this proceeding. However, on motion, the AAO's scope of review is limited by the regulatory provisions that pertain to the motions to reopen and reconsider.

Specifically, 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

In the instant matter, counsel submits the petitioner's response to the NOIR, claiming that this document was timely submitted when initially requested. However, if the petitioner, in fact, timely responded to the NOIR, it had every opportunity to submit such response on appeal at which time the AAO would have accorded it full consideration prior to issuing the dismissal of the appeal. Instead, counsel provided an inconclusive Federal Express shipment and delivery confirmation without providing the document that was purportedly delivered. The petitioner's response to the NOIR and the accompanying documents cannot be deemed "new." Therefore, counsel has failed to establish that the petitioner's response meets the regulatory requirements of a motion to reopen.

With regard to 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 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.

Here, 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. Rather, counsel seemingly seeks *de novo* review of issues that should have been previously addressed on appeal. Counsel also fails to distinguish between a motion to reopen and a motion to reconsider, instead treating them as a hybrid of sorts without due consideration for the applicable regulatory provisions that limit the AAO's powers of review over an appellate decision.

Accordingly, both motions will be dismissed pursuant to 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.

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).