



U.S. Citizenship
and Immigration
Services

34

[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: DEC 02 2009
WAC 05 126 53801

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:

[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 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).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center. The petitioner subsequently filed a combined motion to reopen and reconsider before the director, who dismissed the motion and affirmed the prior decision. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California corporation that seeks to employ the beneficiary as its director of product development. 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 following grounds: 1) the petitioner failed to establish that the beneficiary's proposed employment would be within a managerial or executive capacity; and 2) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer. On motion, the petitioner, through counsel, provided a brief disputing both grounds for denial. Counsel claimed that new evidence was being submitted in the form of information regarding the petitioner's prior use of an outside payroll service. Counsel also asserted that the record contains substantial evidence to establish that the requisite qualifying relationship exists between the beneficiary's foreign and U.S. employers.

The director rejected counsel's argument and dismissed the motion, finding that the petitioner failed to cite any pertinent precedent decisions establishing that the director's adverse determination was erroneous at the time of the initial decision. Accordingly, the director concluded that the petitioner failed to establish that reconsideration of the denial was warranted.

On appeal, counsel addresses the director's initial denial, asserting that the director's adverse findings were duly addressed on motion. However, the fact that counsel addresses the merits of the director's original decision, rather than the latest decision regarding the previously filed motion, indicates that counsel has misconstrued the distinction between a motion and an appeal, each of which serves a different purpose and is subject to a different scope of review.

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

The regulation at 8 C.F.R. § 103.5(a)(3) states 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 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.

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).

The above provisions indicate that the scope of review in the case of a motion is strictly limited, regardless of whether the petitioner files a motion to reopen, which seeks examination of new evidence, or a motion to reconsider, which seeks to establish any misapplication of law or service policy. In the present matter, while the petitioner offered evidence that was not previously offered, there is no indication that such evidence was previously unavailable. Thus, while the director did not expressly address the provisions of a motion to reopen, the proceeding did not warrant reopening in light of the petitioner's failure to provide new evidence. Counsel's submissions also did not warrant reconsideration of the director's decision, as no pertinent precedent decisions were cited to establish that the director's decision was erroneous based on the record as constituted at the time of the denial.

Although the petitioner has since filed an appeal from the director's decision dismissing the motion, it is noted that the scope of the AAO's appellate review is limited to the subject matter addressed in the decision that is being reviewed on appeal. As the subject matter of the director's decision is limited to an explanation of how the petitioner's submissions fell short of meeting the requirements of a motion, the AAO's scope of review must be confined to a determination of whether the director's dismissal of the petitioner's motion was warranted. Based on the appellate brief and other documents that have been submitted in support of the appeal, counsel assumes that the AAO's appellate review applies to all of the director's prior decisions. However, the AAO does not have the authority to rule on any decision other than the one that is being appealed.

While a petitioner may subject the director's adverse decision to review either on appeal or on motion, the petitioner in the present matter chose the latter option, thereby placing the matter before the director per 8 C.F.R. § 103.5(a)(1)(ii), which states that jurisdiction over any given matter rests with the official who made the latest decision in the proceeding. As the director made the decision that served as the basis for the motion, the director is therefore the official with whom jurisdiction over the motion remains. Although the petitioner clearly has the right to appeal the director's decision with regard to the motion, the AAO's discussion must be limited to the subject matter of the decision that the petitioner has appealed. In the present matter, the director's decision is limited to a discussion of why the petitioner's motion was dismissed. Therefore, the AAO's decision is limited to a determination of whether the director's decision was correct. In reviewing the petitioner's submissions in support of the motion, the AAO finds that the director's decision was warranted and the motion was properly dismissed. *See* 8 C.F.R. § 103.5(a)(4).

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.