

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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

**PUBLIC COPY**

[REDACTED]

B4

DATE: JUL 22 2011 OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

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:

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 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, with a fee of \$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. The matter is now before the AAO on motion to reopen and reconsider. The motion will be dismissed.

The petitioner is a Texas corporation that seeks to employ the beneficiary as its president. 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 two grounds of ineligibility. The director concluded that the petitioner failed to establish 1) that the beneficiary was employed abroad in a managerial or executive capacity or 2) that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

On appeal, counsel for the petitioner disputed the director's findings, pointing to evidence of the growth that the petitioner has undergone since the filing of the Form I-140 and asserting that the beneficiary was employed abroad in a primarily managerial or executive capacity.

The AAO dismissed the appeal, concluding that the petitioner failed to overcome the director's findings. The AAO rejected the discussion addressing the petitioner's change in staffing since the date the petition was filed, pointing out that the petitioner must establish its eligibility based on the facts in existence at the time of filing. With regard to the beneficiary's position abroad, the AAO determined that the petitioner 1) failed to adequately describe the beneficiary's actual daily job duties and 2) did not establish that the beneficiary either supervised other supervisory, managerial, or professional employees or managed an essential function of the foreign entity.

On motion, counsel submits a brief, contending that the petitioner's submissions meet the regulations that govern the motion to reopen and the motion to reconsider.

Prior to addressing the requirements of either motion, the AAO will address several of counsel's key arguments.

First, counsel is incorrect in asserting that the AAO placed undue focus on the date of filing as a pivotal time period and in referring to the AAO's approach as "irrational" and unsupported by regulations. As expressly discussed at 8 C.F.R. § 103.2(b)(12) and precedent case law, the petitioner must establish eligibility as of the date of filing the petition and cannot base its claim on a new set of facts that had not materialized when the petition was originally filed. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Although counsel is correct in noting that tax and payroll documents are often requested beyond the date the Form I-140 was filed, the AAO points out that such documents have probative value in assisting U.S. Citizenship and Immigration Services (USCIS) to determine the petitioner's ability to pay, which the petitioner must possess at the time of filing "and continuing until the beneficiary obtains lawful permanent residence." 8 C.F.R. § 204.5(g)(2). Regardless, the primary step to meeting the criteria specified at 8 C.F.R. § 204.5(g)(2) is establishing eligibility at the time of filing. In other words, if the petitioner did not have the ability to pay the wage offered at the time of filing, any documents that would establish the petitioner's ability to pay beyond the date of filing would become irrelevant.

Second, with regard to counsel's emphasis on the petitioner's stage of development, the AAO notes that the petitioner maintains the burden of establishing eligibility for the benefit sought regardless of how little or how

long the petitioner has been in existence. In other words, while the AAO will not adversely consider the petitioner's early stage of development, the petitioner is nevertheless held to the same burden as other entities that are in more advanced stages of their development. While the AAO does not dispute that all businesses, big or small, require leadership, the mere fact that someone sits at the top of an organizational hierarchy and manages an organization does not establish eligibility for classification in the immigrant category of multinational manager or executive. The petitioner must focus on the statutory, rather than the layman's, definition of the terms manager and executive. *See* sections 101(a)(44)(A) and (B) of the Act. As such, a small business that is in its early stages of development may not be eligible to petition on behalf of a beneficiary under section 203(b)(1)(C) of the Act. While this does not preclude the petitioner from filing another petition at a later date when it becomes eligible, a petition cannot be approved unless eligibility is present at the time of filing.

In order to determine a petitioner's eligibility, USCIS considers numerous factors, including the beneficiary's managerial or executive employment capacity, which is assessed in light of the beneficiary's job descriptions as well as information pertaining to the petitioner's staffing and the beneficiary's placement with regard to other staff members. Counsel's assertion that the petitioner need not specifically identify who filled the positions listed in the petitioner's charts at any given time is not persuasive. The petitioner's organizational chart alone is not sufficient. Rather, the chart is merely the petitioner's way of making factual assertions regarding its staffing hierarchy. It is noted that 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). As such, the petitioner must not only provide its organizational chart, but it must also provide evidence to establish that the employees named in the chart were actually working for the petitioner when the petition was filed.

With regard to the merits of the petitioner's combined motion to reopen and reconsider, the AAO finds that the petitioner has not established that it meets the criteria of either motion. The regulations at 8 C.F.R. § 103.5(a)(2) state, 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.<sup>1</sup>

In the instant case, the petitioner's motion to reopen is primarily supported by documents regarding events that had not materialized at the time the petition was filed, including lease agreements showing start dates in 2007 and 2008. As noted in this decision as well as the AAO's decision on appeal, 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. at 49. Therefore, while documents concerning events that were not in existence at the time of filing are technically "new" based on the dictionary definition, counsel's discussion of events that did not precede the date the petition was filed are irrelevant and do not establish a valid basis for reopening the AAO's prior decision.

---

<sup>1</sup> 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 general, 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 reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the petitioner has not met that burden. The motion to reopen will be dismissed.

Next, with regard to the 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 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 instant matter, while counsel cites passages from precedent decisions, he fails to explain how the AAO's decision strays from any precedent case law. For instance, counsel cites a precedent AAO decision in which the AAO stressed the preponderance of the evidence standard of proof. Counsel seemingly contends that the mere fact that the AAO denied the petition in the instant matter is in itself evidence of the AAO's failure to adhere to precedent set in its own decision. The AAO cannot subscribe to such a contention. Furthermore, counsel's references to unpublished decisions will not be considered, as they are not binding on the AAO in its administration of the Act. *See* 8 C.F.R. § 103.3(c).

Accordingly, in light of the above, the petitioner's combined motion to reopen and reconsider 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.

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 "[a]ccompanied 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.