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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 17 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:

[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.¹ The petitioner appealed the denial 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 engaged in the sale of gifts, novelties, decorations, ornaments, and glassware. It seeks to employ the beneficiary as its vice 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 the finding that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

On appeal, counsel disputed the director's conclusion, claiming that the beneficiary would assume the role of a function manager and further asserting that the qualifying nature of the proposed position was clearly established.

The AAO rejected counsel's arguments, focusing on the deficient job description and lack of an adequate support staff needed to relieve the beneficiary from having to primarily perform non-qualifying job duties. Additionally, the AAO found, beyond the director's decision, that the beneficiary could not have been employed abroad during the requisite time period and therefore did not meet the provisions of the initial filing requirement discussed at 8 C.F.R. § 204.5(j)(3)(i)(A).

On motion, counsel provides a brief stating that the petitioner wishes to supplement the record with the previously requested job description. Counsel also seeks consideration of the petitioner's 2007 and 2008 federal tax returns and lease agreement renewals to establish that the petitioner's business is bona fide and ongoing. The AAO notes that counsel does not dispute the additional finding issued in the AAO's prior decision with regard to the beneficiary's employment abroad.

After reviewing counsel's brief in light of the regulations pertaining to motions to reopen and reconsider, the AAO finds that the supplemental information does not meet the regulatory requirements.

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.

In the instant case, the new evidence the petitioner attempts to submit for consideration includes a supplemental job description, which the petitioner had the opportunity to provide at the time the request for such information was issued. The regulation at 8 C.F.R. § 103.2(b)(8) states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit

¹ The record shows that the petitioner previously filed another Form I-140 on behalf of the same beneficiary. The director denied that petition and the appeal that the petitioner subsequently filed was dismissed by the AAO on March 21, 2006. Although the AAO granted the petitioner's motion to reopen and reconsider the prior decision to dismiss the appeal was affirmed.

requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the supplemental job description submitted on motion.

Additionally, while the AAO acknowledges the petitioner's submission of the petitioner's bank statements and tax returns for 2007 and 2008, it is unclear how this information is relevant in establishing that the petitioner was able to employ the beneficiary in a qualifying managerial or executive capacity at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Although counsel offers such evidence in an attempt to establish that the petitioning entity was and continues to be a bona fide business, this fact was not disputed in any of the prior proceedings associated with the petition. Thus, any documentation that was submitted for the purpose of addressing an issue that did not serve as a basis for denial is irrelevant in this proceeding as it offers no probative evidence to establish that the petitioner was ready and able to employ the beneficiary in a qualifying capacity at the time of filing.

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, 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. Therefore, the motion 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