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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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DATE: MAR 15 2012

OFFICE: NEBRASKA SERVICE CENTER



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 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) where 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 Delaware corporation that operates a cocoa processing facility. It seeks to employ the beneficiary as a production 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 denied the petition, concluding that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity or that the beneficiary would be employed in the United States in a managerial or executive capacity.

The petitioner filed an appeal in support of which counsel submitted a brief contending that the beneficiary manages an essential function and has hiring and firing authority as well as discretion over daily operations within the production department. Counsel explained that the beneficiary's responsibilities in his foreign and proposed positions are similar and further asserted that the beneficiary manages the essential function of production through his oversight of supervisory or managerial personnel.

The AAO found that counsel's statements were not persuasive in overcoming the director's decision and therefore dismissed the appeal.

On motion, counsel submits another legal brief along with supporting statements from the president of the petitioning entity and president of an entity that is familiar and does business with the petitioner. Counsel disputes the AAO's finding that the beneficiary cannot be both a personnel and a function manager, asserting that by virtue of managing personnel, the beneficiary in effect manages the production function.

The term "function manager" is limited to those individuals who do not have subordinates under their supervision. While it can be said that any personnel manager is indirectly managing an essential function through the personnel that he or she has under their charge, the primary focus of a personnel manager is to oversee the work of others. The same is not true of a function manager, who, by virtue of primarily managing a function, does not directly oversee the work of others. As can be gauged from reviewing the components of "managerial capacity," someone whose main focus is managing others, i.e., a personnel manager, is tasked with evaluating the work of subordinates, hiring and firing those subordinates, or recommending those and other personnel actions. *See* section 101(a)(44)(A)(iii) of the Act. In other words, the key management component for a personnel manager is to directly oversee the work of a subordinate staff that is comprised of supervisory, professional, or managerial employees. *See* section 101(a)(44)(A)(ii). On the other hand, a function manager's role focuses on the beneficiary's discretionary authority with respect to an essential function and while the underlying duties of that function are performed by others, the beneficiary is not tasked with managing the individuals who carry out the duties of the essential function.

In the present matter, it appears that the beneficiary's focus in his positions with the U.S. and foreign entities is the supervision of employees. As such, the burden is on the petitioner to establish that the subordinates both abroad and in the United States were and would be supervisory, professional, or managerial employees. Having failed to meet this burden, the AAO was and continues to be unable to conclude that the beneficiary is not a first-line supervisor. *See* section 101(a)(44)(A)(iv).

The AAO further notes that the supporting documents submitted in this matter do not meet the requirements of a motion to reopen or a motion to reconsider. 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 petitioner has not introduced any facts that were previously unavailable and could not have been submitted earlier in this proceeding.

The regulation at 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 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.

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." 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. 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).