U.S. Department of Homeland Security
U. S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: AUG 0 7 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved by the Director, Nebraska Service Center. On further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with a notice of his intention to revoke (NOIR) the approval of the preference visa petition and his reasons therefore. The director ultimately revoked the approval of the petition. The matter was later reviewed at the Administrative Appeals Office (AAO) on two separate occasions—first on appeal and subsequently on motion to reopen and reconsider. The AAO dismissed both the appeal and the motion. The matter is now before the AAO on a second motion to reconsider. The AAO will dismiss the petitioner's motion.

The petitioner is a New York 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.

In the decision revoking approval of the petition, the director determined that the Form I-140 was not approvable based on two grounds: 1) the petitioner failed to establish that it had been doing business for one year prior to filing the Form I-140 per 8 C.F.R. § 204.5(j)(3)(i)(D); and 2) the petitioner failed to establish that the beneficiary was an employee of the foreign entity.

After reviewing the matter on appeal, the AAO withdrew the second ground as a basis for the revocation, concluding that the director failed to cite this ground in the notice of intent to revoke (NOIR) and thereby allow the petitioner to respond to the adverse finding. The AAO concluded the director was effectively precluded from citing the additional ground as a basis for revocation. *See* 8 C.F.R. § 205.2(b).

With regard to the remaining ground, the AAO concluded that the petitioner failed to overcome the director's adverse finding. The AAO dismissed the appeal based on the determination that the petitioner failed to provide sufficient evidence to show that it meets the criteria set out at 8 C.F.R. § 204.5(j)(3)(i)(D), requiring the petitioner to submit evidence that the prospective U.S. employer has been doing business for at least one year.

In the first motion, counsel repeated assertions that were previously introduced on appeal, claiming that U.S. Citizenship and Immigration Services (USCIS) rejected the petitioner's initial attempt to file the Form I-140 on July 30, 2007. In the alternative, counsel asked the AAO to consider the petitioner as the successor-in-interest to a previously existing enterprise, which had been doing business during the time period in question. The AAO declined to reopen the proceeding, concluding that counsel's assertions on motion were not "new" as they had been previously raised on appeal and thoroughly addressed in the AAO's original decision. The AAO explained that, despite counsel's assertions regarding the rejected petition, the critical date is the petition's priority date, i.e., the date the petition is filed with USCIS. *See* 8 C.F.R. § 204.5(d); *see also* 56 Fed. Reg. 60897, 60898 (Nov. 29, 1991). In the present record of proceeding, the Form I-140 petition is clearly stamped to record its receipt as of July 30, 2007. *See* 8 C.F.R. § 103.2(a)(7) ("The receipt date shall be recorded upon receipt by USCIS.").

Additionally, the AAO found that counsel failed to cite any legal precedent or applicable law to establish that the AAO erred in dismissing the appeal. The AAO further pointed out that counsel neglected to address any of the various discrepancies the AAO cited in its decision regarding either the statement from the petitioner's

accountant, who provided information that was contrary to the New York statutory provisions, or the foreign document anomalies, which indicate that the foreign entity was already operating in the United States through a U.S. subsidiary prior to having requested and received an approval for such operation.

In the present motion to reconsider, the petitioner's current counsel explains that he has recently been retained by the petitioner. Current counsel again attempts to direct focus to issues that the AAO considered and addressed on appeal, specifically regarding the Form I-140 filing date. Counsel asserts that while successor-in-interest cases have been discussed, the discussions took place primarily within a context where there was no merger, acquisition, or assumption of all legal obligations of a previously existing business. Counsel cites *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986), along with the Adjudicator's Field Manual (AFM) as well as internally generated service letters and memoranda. Counsel asserts that the petitioner's situation is one that involves the reorganization of two entities that are owned by the same parent organization and goes on to state that "all of the tests enumerated in *Matter of Dial Auto Repair Shop*. [sic] have been met to demonstrate successor[-]in[-]interest."

Upon review, the AAO finds that the assertions put forth by the petitioner's current counsel do not adequately support the motion to reconsider.

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 Service 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 other words, the purpose of a motion to reconsider is to contest the correctness of the original decision based on the previous factual record. A motion to reconsider based on a legal argument that could have been raised earlier in the proceedings will be denied. *See Matter of Medrano*, 20 I&N Dec. 216, 219-20 (BIA 1990, 1991). The "reasons for reconsideration" that may be raised in a motion to reconsider should flow from new law or a *de novo* legal determination reached by the AAO in its decision that could not have been addressed by the party. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). Further, a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. *Id.* Instead, the moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *Id.* at 60.

Thus, while the AAO recognizes that counsel is newly retained to represent the petition in this proceeding, the motion to reconsider cannot simply revisit issues that had been previously addressed in the prior proceeding that stemmed from the director's decision to revoke the petition. The AAO need not and will not address assertions piecemeal that it previously addressed in a comprehensive discussion on appeal.

The AAO fully addressed the successor-in-interest assertion in the original decision dismissing the appeal, where the AAO stated the following:

> By definition, the actions required to establish a successor-in-interest must be more than the mere acquisition of one company's stock by another company where both companies continue to exist and do business. In the present matter, aside from repeatedly claiming to be a successor-in-interest and providing documentation of limited probative value to show that the petitioner has purchased the stock of a previously existing U.S. entity, the petitioner has not provided the requisite documentary proof.

See AAO decision, p. 6 (March 9, 2011).

Although the AAO acknowledges counsel's reference to *Matter of Dial Auto Repair Shop,* merely referring to the precedent decision is insufficient for the purpose of meeting this motion's criteria. In order to warrant reopening this matter, counsel must not only cite a precedent decision, but he must establish that the legal principals established in the precedent decision, when applied to the facts in the matter at hand, indicate that the AAO's decision was based on an incorrect application of law or Service policy. Counsel's general claim that the petitioner meets the criteria expounded in the precedent decision is not sufficient, particularly when the AAO's original decision comprehensively analyzed the petitioner's submissions and catalogued a significant list of documentary inadequacies. The evidentiary inconsistencies alone not only preclude a finding in favor of a successor-in-interest argument, but also placed considerable doubt on the validity of the supporting documents and the credibility of the petitioner's overall claim.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In light of the above deficiencies, the AAO finds that the petitioner has failed to meet the requirements for a motion to reconsider. Accordingly the motion to reconsider will be dismissed. 8 C.F.R. § 103.5(a)(4) (stating, in pertinent part, that a motion that does not meet applicable requirements shall be dismissed).

As a final note, the dismissal of this motion does not bar the filing of a new visa petition, supported by the required evidence to demonstrate the petitioner's eligibility. The 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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not sustained that burden.

ORDER: The motion is dismissed.