(b)(6)

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

DATE: AUG 1 3 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 denied by the Director, Nebraska Service Center. The petitioner appealed the matter to the Administrative Appeals Office (AAO). The appeal was dismissed and the matter is now before the AAO on motion to reopen and reconsider. The petitioner's motion to reconsider will be dismissed due to the petitioner's failure to meet the regulatory requirements stated at 8 C.F.R. § 103.5(a)(3). The motion to reopen will be granted and the new information will be considered in a discussion below. However, the underlying decision dismissing the appeal will be affirmed.

The petitioner is a California corporation that seeks to employ the beneficiary in the United States as its chief executive officer. 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.

On September 21, 2012, the director denied the petition, concluding that the petitioner failed to establish that the beneficiary was employed abroad or that he would be employed with the U.S. entity in a qualifying managerial or executive capacity. The director observed that the petitioner failed to establish that the beneficiary's subordinates in his position with the foreign entity were supervisory, professional, or managerial employees, as there was no evidence that either subordinate obtained a baccalaureate degree. With regard to the beneficiary's proposed employment, the director determined that the petitioner lacked sufficient staffing at the time of filing such that it was able to relieve the beneficiary from having to allocate his time primarily to non-qualifying tasks.

On appeal, the petitioner's prior counsel contended that the director placed undue focus on whether the beneficiary's subordinates were professional and failed to consider the supervisory nature of the subordinates' positions. Counsel also asserted that the beneficiary assumed the role of a function manager in his position with the foreign entity, claiming that the job description previously submitted contained sufficient information to support a finding contrary to the one issued by the director. Lastly, counsel disagreed with the director's adverse finding concerning the beneficiary's proposed U.S. position, contending that the beneficiary allocates his time primarily to executive functions.

On May 7, 2013, the AAO issued a decision dismissing the petitioner's appeal based on the conclusion that the petitioner failed to establish that has been and would be employed in a managerial or executive position requiring him to perform primarily qualifying duties. The AAO took numerous factors into consideration when making its decision, including the beneficiary's job descriptions pertaining to his foreign and U.S. employment, the beneficiary's subordinates at his employment overseas, and the petitioner's organizational hierarchy at the time of and subsequent to the filing of the instant petition. The record shows that a combination of factors, rather than one individual factor, contributed to the AAO's overall finding with regard to the beneficiary's employment capacity abroad and with the U.S. entity.

On motion, the petitioner's current counsel provides a brief in which he reiterates prior counsel's assertions, claims that the beneficiary's role in his position abroad was that of function manager, and points out that the AAO's analysis only determined that 29% of the beneficiary's time was allocated to the performance of non-qualifying tasks thus indicating that the remaining 71% of his time was spent performing tasks within a qualifying managerial or executive capacity. Counsel also disputes the AAO's adverse findings concerning the beneficiary's proposed position with the U.S. entity. Counsel asserts that the beneficiary's managerial subordinates would relieve the beneficiary from having to perform non-qualifying tasks and asks the AAO to

consider 2012 tax returns for the petitioner's two contract workers whose salaries were not accounted for in the petitioner's previously provided quarterly wage reports.

First, turning to the requirements for a motion to reconsider, the petitioner must state the reasons for reconsideration and support those reasons with any pertinent precedent decisions to establish that the prior decision was based on an incorrect application of law or U.S. Citizenship and Immigration (USCIS) policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new or previously unavailable evidence. See *Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991).

A motion to reconsider cannot be used to raise a legal argument that could have been raised earlier in the proceedings. *See Matter of Medrano*, 20 I&N Dec. 216, 220 (BIA 1990, 1991). Rather, the "additional legal arguments" that may be raised in a motion to reconsider should flow from new law or a *de novo* legal determination reached 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). 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.

In this case, counsel chose to reassert the claim that the beneficiary assumed the role of a function manager in his foreign employment. It is noted that the term "function manager" applies generally when a beneficiary does *not* supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within an organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function.

In this instance, the petitioner provided two different breakdowns of the beneficiary's duties, neither of which articulated how the beneficiary allocated the majority of his time to performing managerial duties or managing an essential function. Further, the evidence reflected that the beneficiary's two subordinates within the department were responsible for sourcing products and routine sales tasks; however, it was not shown how they would relieve him from performing the majority of the non-qualifying duties associated with the sales promotion and marketing functions he was claimed to manage. Most importantly, counsel failed to support the motion with any precedent decisions or other comparable evidence to establish that the decision was based on an incorrect application of law or USCIS policy. Therefore, the motion to 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.

Notwithstanding the AAO's dismissal of the petitioner's motion to reconsider, the motion to reopen will be granted for the purpose of considering newly submitted and previously unavailable IRS Form W-2 and 1099-MISC statements for 2012. Counsel submits these documents in an effort to establish that the petitioner had six in-house employees and two independent contractors as part of its organizational structure at the time of filing. Counsel also seeks to address an inconsistency that was reflected in the record between the petitioner's

second quarterly wage report, which showed a total of six employees, and the petitioner's organizational chart, which listed a total of twelve positions.

The newly submitted evidence is not sufficient to overcome the AAO's prior adverse findings. First, the very number of tax documents - eight Form W-2 statements and two Form 1099-MISC statements - is still inconsistent with an organizational chart depicting twelve positions. Second, of the eight 2012 Form W-2s, only two showed salaries that were commensurate with those of full-time employees who were likely to have worked for the petitioner during all of 2012. The remaining six Form W-2s showed salaries that were either not commensurate with those of full-time employees or were indicative of employees who only worked for the petitioner for a fraction of 2012 and may not have been employed by the petitioner at the time the Form I-140 was filed. A review of the two 2012 Form 1099-MISC statements of miscellaneous income indicates that one individual was compensated $3010 while the other was compensated $1208. Based on the wages the petitioner paid these two individuals in 2012 it is unclear that either was employed by the petitioner at the time the petition was filed.

In light of the above observations, the petitioner's new evidence does not resolve the inconsistency between the petitioner's organizational chart and second quarterly wage report for 2012, nor does it corroborate that the petitioner in fact had seven employees at the time of filing. While the evidence indicates that throughout 2012 the petitioner paid wages to eight employees and two contract workers, the wage information is insufficient to establish precisely when the employees and contract workers provided services to the petitioner. Thus the petitioner has not established that it had the staffing necessary to relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying tasks as previously determined in the AAO's May 7, 2013 decision. *See* section 101(a)(44)(A) and (B) of the Act.

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.