

(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 13 2013**

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas 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 motion will be dismissed.

The petitioner, a New York corporation, states that it employs a staff of four employees and is engaged in providing consulting services. It seeks to employ the beneficiary in the United States as its general 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 would be employed in a managerial or executive capacity.

The petitioner appealed the denial disputing the director's findings. On May 30, 2013, the AAO issued a decision dismissing the appeal and affirming the director's decision. The dismissal of the appeal was based on the petitioner's failure to provide an adequate job description and to establish that its organizational composition at the time of filing was sufficient to relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying tasks.

In support of the motion to reopen, the petitioner offers additional evidence in the form of a deed executed by the petitioner approximately one year after the filing of the petition, evidence of the beneficiary's involvement in ensuring that the petitioner complies with the New York City building codes and registering the petitioner for water and sewer services, and letters from the petitioner's office administrator and vice president, each of whom briefly discussed the beneficiary's foreign and U.S. employment.

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 matter, the petitioner has failed to provide documentation that meets the requirements for a motion to reopen. The supplemental letters were created for the purpose of addressing the AAO's adverse findings. The information that was provided in the letters could have been provided prior to the AAO's decision and thus it cannot be deemed as new or previously unavailable. Similarly, documents that serve as evidence of events and circumstances that did not take place until after the filing of the petition are not relevant for the purpose of determining whether the petitioner established eligibility based on the facts and circumstances that existed at the time of filing. Precedent case law mandates that a petitioner 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. 45, 49 (Comm. 1971). Therefore, evidence of events that had not materialized at the time of filing is irrelevant in the instant proceeding and need not be considered.

---

<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 NEW COLLEGE DICTIONARY 753 (3rd Ed., 2008)(emphasis in original).

In support of the motion to reconsider, counsel submits a lengthy brief in which he disputes the AAO's decision citing district court decisions, which are non-precedent and generally fail to point to AAO error, as the portions quoted by counsel merely restate legal principals which the AAO did not and does not dispute. On page 14 of counsel's brief, counsel references a district court case which discusses a court's reversal of an AAO decision that was deemed to have lacked a basis for dismissal, *Importers, Inc. v. U.S. Dept. of Homeland Security*, 445 F.Supp.2d 1174, 1180 (C.D. Cal., 2006). The instant case can be easily distinguished from the one cited in counsel's brief given that the AAO provided a comprehensive analysis in which it specifically cited the information that the petitioner provided with regard to the beneficiary's proposed employment and explained precisely why the evidence was deemed to be insufficient. Additionally, the record reflected other deficiencies, which the AAO cited, including the petitioner's inadequate organizational structure at the time of filing and the fact that none of the employees on the petitioner's payroll at that time were assigned consulting tasks. Given the petitioner's claim that the petitioner operates as a consulting services provider, and the lack of staff to perform these services, the AAO could not conclude that the beneficiary would be relieved from performing non-qualifying operational tasks.

Looking to page sixteen of counsel's brief, the AAO takes note of quoted portions of the beneficiary's job description. Specifically, counsel asserts that the AAO erroneously found the job description to be deficient. However, merely disagreeing with the AAO's analysis of the evidence is not sufficient to overcome the AAO's findings. Although counsel goes on to cite a decision from the second circuit in support of the assertion that the AAO was obligated to consider the record in its totality, there is no evidence to suggest that the AAO failed to meet this burden. In fact, the AAO expressly stated its intent to consider the entire record before coming to a conclusion regarding the petitioner's eligibility. *See* AAO May 30, 2013 decision, p. 4. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Next, counsel points to the fact that the tasks the AAO deemed as non-qualifying would constitute only 20% of the beneficiary's overall position. Counsel maintains that the remaining 80% of the beneficiary's time would be allocated to qualifying managerial- or executive-level tasks. This assertion, however, is not supported by the evidence of record considered in light of the numerous deficiencies the AAO pointed out with regard to the job description, which the AAO determined was overly vague and lacking in substantive information about the beneficiary's actual daily tasks. It was as a result of the petitioner's failure to provide this crucial evidence that precluded the AAO from being able to affirmatively determine the nature of the proposed employment. The regulation at 8 C.F.R. § 204.5(j)(5) expressly requires the petitioner to provide a list of the beneficiary's proposed job duties as supporting evidence in the filing of the instant Form I-140.

Additionally, counsel's claim that the AAO failed to consider portions of the beneficiary's job description is also meritless, as the AAO is not required to specifically restate and address each portion of the job description in order to establish that all relevant evidence has been considered. As pointed out above, the AAO provided a comprehensive discussion explaining the deficiencies in the beneficiary's job description. The AAO need not and will not address this issue anew when it has done so already in its prior decision.

Lastly, the precedent case law counsel cites to support his reliance on [REDACTED] is irrelevant in the matter at hand and does not establish that the AAO's decision to disregard the information offered at [REDACTED] was incorrect.

Unlike the immigrant classification sought for the beneficiary in the matter at hand, where a labor certification is not required, the immigrant and nonimmigrant classifications that were contemplated in the cited cases required labor certifications, thus explaining the respective petitioners' need to invoke and refer to information found at *O\*Net*. The AAO issued findings that reflected a thorough review of all information provided with regard to the beneficiary's proposed employment. The AAO will not review legal arguments that could have been provided on appeal.

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 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). 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.

In this case, counsel failed to support his motion with relevant precedent decisions or other comparable evidence to establish that the decision was based on an incorrect application of law or USCIS policy. The motion to reconsider will therefore 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.

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.