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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

DATE: **AUG 13 2013**

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

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 (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 a combined motion to reopen and reconsider. The motion will be dismissed.

The petitioner is a New York corporation that seeks to employ the beneficiary in the United States 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. The director denied the petition concluding that the petitioner failed to establish that the beneficiary had been employed abroad and that he would be employed in a managerial or executive capacity.

The petitioner appealed the denial disputing the director's findings. After a comprehensive review of the record, the AAO determined that the petitioner successfully overcame the adverse finding pertaining to the beneficiary's employment abroad. However, the AAO dismissed the appeal based on a determination that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

On motion, counsel submits a brief addressing the AAO's various adverse findings regarding the beneficiary's proposed U.S. employment. Specifically, counsel provides background information in an effort to clarify the petitioner's practice of hiring part-time employees to address certain operational business complications. Additionally, the petitioner provides the following: (1) two statements dated June 28, 2013 - one from the petitioner's vice president and the other from the petitioner's president, both of whom described the petitioner's setbacks and its plans for future expansion; (2) invoices for equipment purchased; (3) an undated statement from the petitioner's sales department manager; (4) a statement dated June 28, 2013 from the petitioner's independently contracted electrician briefly addressing the petitioner's problems with power outages; and (5) an undated document titled, "Joint Petition Statement," signed by the petitioner's 20 part-time employees who explained that they currently work part-time because the petitioner does not have enough work to accommodate full-time employees.

Turning first to the motion to reopen, the regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that the motion 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

In the instant matter, while the petitioner has provided documents in an effort to address the AAO's prior adverse findings, such documents cannot be deemed new simply by virtue of having been created in response to the AAO's decision. Moreover, the statements that document the petitioner's various operational hurdles do not shed light on the job duties the beneficiary was expected to perform at the time of filing or whether the job duties to be performed would be primarily within a qualifying managerial or executive capacity. Finally,

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

the petitioner previously stated in its response to the-RFE that the majority of its employees do in fact work full-time, and subsequently failed to address the director's observation that the company's IRS Form W-2s indicated otherwise. Regardless, the petitioner has not presented documents that satisfy the requirements for a motion to reopen.

Next, turning to the petitioner's motion to reconsider, the pertinent regulatory provision requires the petitioner to state the reasons for reconsideration and provide supporting evidence in the form of pertinent precedent decisions to establish that the AAO's 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).

Furthermore, 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 failed to support his 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.

In light of the above, the motion to reopen and 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.

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.