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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: AUG 2 8 2013 OFFICE: TEXAS 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 (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
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved on May 4, 2010 by the Director, Texas Service Center. On further review of the record, the director determined that suspect documentation had been submitted in support of the petition and that the petitioner was therefore not eligible for the benefit sought. Accordingly, the director properly served the petitioner with a notice of his intention to revoke the approval of the preference visa petition, and his reasons therefore. The director ultimately revoked the approval of the petition. In response, the petitioner filed a motion to reopen and reconsider, which the director dismissed. The matter later came before the Administrative Appeals Office (AAO) on appeal, which was dismissed, and it is now before the AAO on a motion to reopen and reconsider. The motion will be dismissed.

The petitioner is a Texas corporation that seeks to employ the beneficiary in the United States as its president/managing director. 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 record shows that the director revoked approval of the petition based on the determination that the petitioner submitted fraudulent tax documents claiming more employees than the petitioner actually employed. The director pointed to inconsistencies in the organizational charts submitted with regard to the foreign entity and concluded that the petitioner failed to provide sufficient evidence to establish that it has a qualifying relationship with the foreign entity.

The director dismissed the petitioner's motion to reopen and reconsider based on the finding that the petitioner failed to meet the regulatory requirements for the filing of motions set forth at 8 C.F.R. § 103.5. The petitioner therefore filed an appeal in support of which counsel restated the explanation and assertions that he previously provided on motion. Counsel asked the AAO to consider the non-fraudulent documents in light of the petitioner's "highly unusual situation" in which counsel alleged that the beneficiary was the victim, rather than the perpetrator, of fraud. The AAO reviewed the documents submitted in support of the motion and affirmed the director's conclusion. The AAO therefore dismissed the appeal.

In the present motion, the petitioner's new counsel provides a brief stating that at the time he assumed his role as the petitioner's counsel, he provided documentation that the AAO did not review prior to dismissing the appeal. Counsel refers to evidence of ongoing business activities from 2010 to 2012, IRS Form W-2s, W-3s, and W-4s, invoices, utility bills, and documents of financial transactions, many of which were previously unavailable. Counsel also reasserts the prior claims that the petitioner made in response to the notice of intent to revoke (NOIR), where the petitioner claimed that a subordinate of the beneficiary acted unlawfully, alleging that such individual embezzled money that was intended to pay the payroll taxes of U.S. employees, who were paid "under the table" during a time when the beneficiary was outside the country and allegedly unaware of the criminal activity. Counsel asks the AAO again to review a statement the beneficiary made claiming that he made a police complaint against his subordinate employee who allegedly committed the unlawful acts.

After reviewing the record in its entirety for a second time, the AAO finds that the documents counsel referenced and submitted in support of the instant motion, even if considered earlier, would not have resulted in the AAO sustaining the appeal.

First, with regard to the sworn statement the beneficiary provided in an effort to address the petitioner's submission of fraudulent tax documents, the AAO notes that the beneficiary's attempt to explain the damaging inconsistencies cited in the director's notice of revocation are not sufficient unless accompanied by competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Although counsel offers the alleged police complaint to corroborate the beneficiary's statement, the actual complaint document is devoid of relevant information and thus cannot be deemed as reliable evidence that verifies the beneficiary's claim. Specifically, the only information contained in the complaint includes an incident number, theft as the crime allegedly committed, the date of the alleged crime, address where the complaint was made, and what appears to be an identification number in place of the name of the officer who presumably recorded the complaint. The complaint does not identify the names of either the complaining party or the alleged offender, nor does the complaint provide any specific details about the type of theft that was allegedly committed. Therefore, the AAO cannot rely on the deficient police complaint to corroborate the beneficiary's statement in which he claims to have no knowledge and no part in the submission of fraudulent tax documents.

As previously stated in the AAO's decision dated December 10, 2012, 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. *Id.*at 591. As such, the director was justified in questioning the reliability of the beneficiary's statement and the validity of documents that the petitioner submitted after having been made aware of U.S. Citizenship and Immigration Services' (USCIS) knowledge of the petitioner's submission of fraudulent documents to support its claimed eligibility. Given the prior submission of unreliable documents, the director reasonably believed that any documents that the petitioner subsequently submitted, or may submit in the future, may also be unreliable.

Furthermore, given that a large number of the supporting documents that current counsel offered in support of his July 2012 statement were dated after the petition's filing date of March 4, 2010, the AAO finds that consideration of such documents would not have resulted in an approval of this petition. A petitioner must 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). USCIS cannot and shall not give evidentiary weight to tax and business documents that reflect events and circumstances that took place after the filing of the petition. Despite the fact that the AAO's decision did not specifically acknowledge counsel's submission of additional documents, a determination of the petitioner's ineligibility would not have been altered given that counsel offered documents that had no evidentiary value given that they did not pertain to the petitioner's eligibility at the time of filing. The AAO is not required to address documents piecemeal when if finds that such documents are irrelevant to the matter at hand.

Moreover, with regard to bank documents that show fund transfers between the petitioner and the foreign entity throughout 2010, while such documents may establish that the two entities had an ongoing business relationship, these documents do not establish that the nature of the business association between the two entities in question rose to the level of a qualifying relationship in which the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." *See generally* § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); *see also* 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Assoc. Comm. 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In this matter, the fund transfer documents, which the petitioner submitted earlier in response to the NOIR and subsequently in support of its motion and appeal, do not establish common ownership and control. Despite the petitioner's submission of a stock certificate, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity and thus are not sufficient as general evidence of a petitioner's claimed qualifying relationship.

Finally, turning to the requirements of a motion to reopen and a motion to reconsider, 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.[1]

In the present matter, the petitioner did not present any new facts when filing the motion to reopen and reconsider before the director. Rather, the petitioner's prior counsel raised many of the same arguments and offered much of the same supporting evidence that was previously introduced in response to the NOIR. As such, the director properly dismissed the petitioner's motion and the AAO properly affirmed that decision when the information was presented on appeal. Counsel has not offered new evidence in support of the current motion such that would warrant reopening this matter.

[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).

Next, turning to the motion to reconsider, the regulations require that the state the reasons for reconsideration and support the motion with 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 matter, the petitioner's prior counsel cited the precedent decision of *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989), which stated that the standard of proof that applies to the proceeding at hand requires the director to approve the petition, despite the presence of some doubt, "if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is 'probably true' or 'more likely than not,' the applicant satisfied the standard of proof." It is noted that merely quoting phrases from precedent case law is not sufficient to meet the requirements of a motion to reconsider where the petitioner must establish that the decision was based on an incorrect application of law or Service policy. In the present matter, counsel did not establish how the director's decision was contrary to the principles established in the published decision, particularly given that the director expressly discussed the evidence that contributed to the adverse finding regarding the petitioner's failing credibility.

While the AAO acknowledges that the petitioner's current counsel cited additional case law in the statement he submitted to support the appeal, he too failed to establish how the director's decision was erroneous given that a considerable portion of the director's original decision was based on the petitioner's submission of fraudulent documents, which undermined the petitioner's credibility and the validity of its claim. As discussed above, neither counsel's claims nor the claims made by the beneficiary in his attempt to rehabilitate the petitioner's credibility can serve as evidence in and of themselves. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 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).

In sum, the petitioner failed to submit sufficient evidence to warrant reopening and/or reconsideration of the director's decision revoking the approval of the petition. Therefore, the AAO properly affirmed the dismissal of the motion when the matter was presented on appeal. While the AAO has considered the new brief and resubmission of various documents, which have been provided in support of the current motion, the petitioner's submissions fail to state new facts that would warrant reopening the AAO's prior decision. Further counsel has not cited precedent case law establishing that the AAO's dismissal of the appeal was the result of misstated facts or incorrect application of law or Service policy.

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.

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. Here, the petitioner has not sustained that burden.

ORDER: The motion is dismissed.