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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: DEC 0 9 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The petitioner subsequently filed an appeal that was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a combined motion to reopen and motion to reconsider. The motion will be denied.

The petitioner is a California corporation engaged in immigration and investment services. The petitioner states that it is a subsidiary of in China. The petitioner seeks to employ the beneficiary as its 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 director denied the petition, finding that the petitioner had not timely and adequately responded to a request for evidence (RFE). As a result of the petitioner's failure to respond, the director concluded that the petitioner had failed to establish that it has a qualifying relationship with the foreign employer, that the beneficiary was employed in a qualifying managerial or executive capacity abroad, or that the beneficiary will be employed in a qualifying managerial or executive capacity in the United States.

On appeal, counsel stated that the petitioner submitted a timely response to the RFE and that the petitioner provided sufficient evidence to establish that it has a qualifying relationship with the foreign employer and that the beneficiary had one year of full-time qualifying managerial or executive employment abroad.

The AAO dismissed the petitioner's appeal. The AAO found that the petitioner had submitted a timely response to the director's RFE and that the petitioner had submitted sufficient evidence to establish that the beneficiary had been employed abroad in a qualifying managerial or executive capacity. However, the AAO concluded that the petitioner failed to establish that it had a qualifying relationship with the foreign employer and observed that information reported on the petitioner's corporate tax returns and stock ledger was inconsistent with the petitioner's claims regarding its ownership. The AAO also concluded that the petitioner had not demonstrated that it would employ the beneficiary in a qualifying managerial or executive capacity. In reaching this conclusion, the AAO noted the petitioner's failure to submit requested evidence, including a detailed duty description for the beneficiary, the percentages of time he would devote to specific tasks, and position descriptions for the beneficiary's two subordinate employees.

The petitioner now files a motion to reopen and reconsider the AAO's decision dated September 27, 2013.

The purpose of a motion to reopen or motion to reconsider is different from the purpose of an appeal. While the AAO conducts a comprehensive, *de novo* review of the entire record on appeal, the AAO's review in this matter is limited to the narrow issue of whether the petitioner has presented and documented new facts or documented sufficient reasons, supported by pertinent precedent decisions, to warrant the re-opening or reconsideration of the AAO's decision to dismiss the petitioner's previous appeal.

The regulation at 8 C.F.R. § 103.5(a)(2) states:

> 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.

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.

This regulation is supplemented by the instructions on the Form I-290B, Notice of Appeal or Motion, by operation of the rule at 8 C.F.R. § 103.2(a)(1) that all submissions must comply with the instructions that appear on any form prescribed for those submissions.[1] With regard to motions for reconsideration, Part 3 of the Form I-290B submitted by the petitioner states:

> Motion to Reconsider: The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions.

On motion, counsel asserts that the petitioner's prior attorney failed to submit evidence that clearly demonstrates that the petitioner has a qualifying relationship with the foreign employer and evidence that the petitioner will employ the beneficiary in a managerial or executive capacity. Counsel submits s stock certificate reflecting that the foreign employer owns 80,000 shares of the petitioner's stock (or 80% of the authorized shares) and the petitioner's 2012 IRS Form 1120S, U.S. Income Tax Return for an S Corporation, indicating that the foreign employer owns 80% of the petitioner. Additionally, counsel provides an updated position description for the beneficiary which includes the percentage of time he allocates to specific duties.

The petitioner's combined motion will be denied as it has not met the requirements of either a motion to reopen or a motion to reconsider.

Counsel states that the petitioner's former counsel failed to submit evidence to establish that the petitioner had a qualifying relationship with the foreign employer and that the beneficiary will act in a qualifying managerial or executive capacity in the United States. In support of this assertion, counsel provides a completed California Attorney Complaint Form dated October 15, 2013. It is unclear whether the form was

---

[1] The regulation at 8 C.F.R. § 103.2(a)(1) states in pertinent part :

> [E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission.

filed with the state bar of California. In an attachment to the complaint form, the petitioner indicates that the complaint is being filed based on former counsel's failure to communicate important deadlines, his failure to properly counsel his client, his lack of responsiveness, and his failure to provide appropriate legal analysis when responding to United States Citizenship and Immigration Service (USCIS) requests for evidence.

Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

The petitioner has not provided sufficient detail or explanation in the asserted complaint against its former counsel to support reopening the matter based upon ineffective assistance counsel. As noted above, a claim of ineffective assistance of counsel requires that the petitioner set forth in detail agreements made with counsel and the actions and representations of counsel that negatively affected the petition. However, the petitioner has not provided sufficient detail regarding its agreements or the actions of counsel, but only offered vague allegations such as noting counsel's lack of responsiveness, his failure to communicate deadlines, or to do appropriate legal analysis. Counsel does not indicate any agreements between the parties or the specific actions of counsel that led to a denial of the petition, such as the specific evidence he did, or did not, submit, which deadlines he failed to communicate, or the nature of his erred legal analysis. Further, no evidence is submitted that establishes that the submitted complaint against counsel was actually filed with the California bar or that former counsel has been informed of these allegations and will have an opportunity to respond. As such, counsel's assertion that the denial of the petition was based upon ineffective assistance of counsel is not persuasive and the petitioner had not submitted sufficient new evidence to support reopening the matter on this ground.

With respect to qualifying relationship, and as previously stated herein, counsel submits on motion a stock certificate reflecting that the foreign employer owns 80,000 shares of petitioner stock (or 80% of the outstanding shares) and a 2012 IRS Form 1120S indicating the foreign employer's 80% ownership of the petitioner. The AAO finds this evidence insufficient to reopen the matter. First, the petitioner previously submitted the aforementioned stock certificate in response to the director's RFE. As such, this evidence was already considered by the AAO in dismissing the petitioner's appeal.[2] Additionally, the newly submitted 2012 IRS Form 1120S fails to address the discrepancies in the previously submitted evidence with respect to the petitioner's ownership. For instance, the petitioner's IRS Forms 1120S for both 2009 and 2010 stated that the petitioner was jointly owned by during those tax years. Also, the petitioner's IRS Form 1120S for 2011 stated that the petitioner was wholly owned by the aforementioned

[2] 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 College Dictionary* 736 (2001)(emphasis in original).

Mr. [redacted] However, the petitioner's meeting minutes and stock ledger reflect that the petitioner was never jointly owned by Mr. [redacted] and Ms. [redacted] or wholly owned by Mr. [redacted] None of the petitioner's previously submitted supporting documentation substantiated the information reported in the company's tax returns for 2010 and 2011. In addition, the petitioner's stock ledger does not reflect the issuance of stock in 2009 when the petitioner was incorporated. On motion, the petitioner fails to submit any new evidence to directly address these discrepancies on the record beyond an unsigned 2012 IRS Form 1120S reflecting the foreign employer's asserted 80% ownership of the petitioner. The AAO finds this new evidence insufficient to reopen the matter with respect to qualifying relationship.

As to the issue of whether the beneficiary will act in a qualifying managerial or executive capacity in the United States, counsel has again not submitted sufficient new evidence to reopen the matter. As noted, this office dismissed the petitioner's appeal due to its failure to submit evidence requested by the director, including a detailed description of the beneficiary's duties with percentages of time spent on his tasks and duty descriptions for the beneficiary's two subordinates. Now, on motion, counsel attempts to submit this evidence. But, the regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Additionally, the petitioner has not submitted sufficient evidence to demonstrate that the failure to submit requested evidence in response to the director was due to ineffective assistance of counsel. Therefore, the petitioner has not provided sufficient new evidence to reopen this office's previous decision with respect to whether the beneficiary would act in a managerial or executive capacity in the United States.

Indeed, additional evidence and assertions submitted on motion further support this office's previous conclusion that the petitioner had not established that it will employ the beneficiary in a managerial or executive capacity. For instance, the 2012 IRS Form 1120S submitted on motion indicates that the petitioner earned only $57,056 in gross revenue during this year and paid no salaries or wages. Considering that the beneficiary's stated annual salary is $45,000 per year, this level of revenue does not support a conclusion that the petitioner can support its two claimed employees or, as it claim on motion, to pay $3,000 per month to students to support the business. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. 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, 591-92 (BIA 1988). In fact, counsel's assertions on motion suggest that the petitioner's business and the beneficiary's proposed managerial or executive role are largely prospective. For example, counsel submits a business plan on motion emphasizing the petitioner's future growth and notes that the petitioner will hire seven additional employees. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). As such, assertions as to the beneficiary's potential future eligibility are not relevant and also insufficient to reopen the matter.

Finally, on motion, counsel has not stated sufficient reasons for reconsideration supported by pertinent citations to statutes, regulations, or precedent decisions to establish that the AAO's decision was based on an incorrect application of law or USCIS policy. *See* 8 C.F.R. § 103.5(a)(3). In fact, no reference to law or agency policy is set forth in counsel's brief, nor is any statement as to its incorrect application of law proffered. For this reason, the motion to reconsider will be denied.

Motions for reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden.

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, it is the petitioner's burden to establish eligibility for the immigration benefit sought. 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 met that burden.

ORDER: The motion is denied.