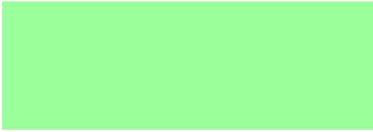




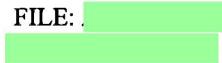
U.S. Citizenship
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Services

(b)(6)

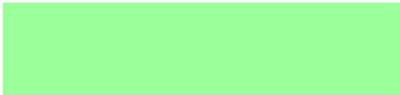


DATE: JAN 11 2013

OFFICE: NEBRASKA SERVICE CENTER

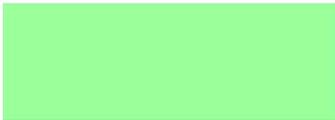
FILE: 

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 in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

(b)(6)

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 subsequently rejected as untimely filed pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(I). The director determined that the petitioner's submissions met the requirements of a motion and therefore issued a new decision denying the petition. The petitioner then filed another appeal, which the AAO dismissed. The AAO also dismissed the petitioner's subsequently filed motion to reconsider. The matter is now before the AAO on motion to reopen and reconsider. This motion will also be dismissed.

The petitioner is a corporation that seeks to employ the beneficiary as its comptroller general. 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 the existence of a qualifying relationship between itself and the beneficiary's foreign employer, [REDACTED] C.A., a Venezuelan entity.

In a decision dated December 9, 2009, the AAO dismissed the petitioner's appeal, affirming the director's decision. The AAO found that minimal evidence was submitted and that such evidence revealed no common ownership between the petitioner and the beneficiary's employer abroad. The AAO determined that the evidence indicates that the petitioner is owned by [REDACTED] while [REDACTED], the beneficiary's employer abroad, is majority owned by [REDACTED].

In a decision dated August 4, 2010, the AAO determined that the motion to reconsider was filed 34 days after the prior decision was issued and therefore dismissed the motion based on its untimely filing. *See* 8 C.F.R. § 103.5(a)(1)(i), which states that a motion to reopen or reconsider must be filed within 30 days of the decision the motion seeks to reopen or reconsider. Moreover, the AAO found that even if the petitioner's motion had been timely filed, it would nevertheless have been dismissed because the motion was not supported by precedent decisions, it did not state the reasons for reconsideration, and it was not accompanied by a statement specifying how the AAO's decision was based on an incorrect application of law or USCIS policy. The AAO further noted that the petitioner failed to explicitly acknowledge the grounds for the appeal's dismissal.

On current motion to reopen and reconsider, counsel submits an appellate brief in which she addresses the original basis for the director's decision—the determination that the petitioner failed to establish the existence of a qualifying relationship between itself and the beneficiary's employer abroad.

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

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).

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.

The scope of review of any matter on motion is predetermined by the subject matter of the decision that the motion seeks to reopen and/or reconsider. The AAO's prior decision was based on the determination that the petitioner's motion to reconsider was untimely filed. The AAO therefore issued a decision on August 4, 2010 dismissing the motion based on its untimely filing. Although the AAO provided a discussion of the facts pertaining to the petitioner's claimed qualifying relationship with the beneficiary's foreign employer, this was done as a courtesy to the petitioner in order to more fully clarify the grounds for the director's original adverse decision. The comprehensive discussion was not intended to invite the petitioner to have another opportunity to address the director's original decision. Therefore, regardless of the dicta included in the AAO's prior decision, the basis for dismissing the motion was its untimely filing.

In light of the above, the scope of this discussion will be limited to consideration of any new facts or adequately documented reasons, supported by pertinent precedent decisions, establishing that the AAO's prior conclusion—that the petitioner's motion to reconsider was untimely filed—was incorrect and that a withdrawal of the erroneous decision is warranted. After reviewing counsel's brief, the AAO finds that none of the elements addressed pertain to the issue of the untimely filing. Therefore, this 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 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.