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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: **JUL 23 2013** OFFICE: NEBRASKA 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:

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

Acting Chief, Administrative Appeals Office

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

The petitioner is a North Carolina corporation engaged in the business of international trade. It seeks to employ the beneficiary as its vice 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 based on two grounds of ineligibility concluding that the petitioner failed to establish that: 1) the beneficiary was employed abroad in a qualifying managerial or executive capacity and 2) the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

On February 15, 2012, the AAO dismissed the petitioner's appeal, finding that the petitioner failed to state the beneficiary's specific tasks or to offer time allocations for those tasks with regard to the beneficiary's foreign and proposed employment. In addition to finding that the petitioner offered deficient job descriptions, the AAO also questioned the petitioner's staffing capabilities in being able to relieve the beneficiary from having to allocate his time primarily to the performance of the petitioner's non-qualifying operational tasks.

The AAO also addressed a third finding, one which the director had not previously addressed. Specifically, the AAO determined that the petitioner submitted insufficient documentation concerning its claimed parent-subsidiary relationship with the beneficiary's employer abroad.

On motion, counsel focused on the beneficiary's leadership position as a key indicator of whether his position is within a qualifying managerial or executive capacity. Counsel also introduced a supplemental job description, a letter dated March 7, 2012 from the petitioner's accountant regarding the petitioner's ownership, and a duplicate of a previously submitted letter containing a description of the beneficiary's employment abroad.

On March 4, 2013, the AAO issued a decision dismissing the petitioner's motion. With regard to the petitioner's motion to reopen, the AAO declined to consider the supplemental evidence, finding that the items cited above could have been submitted prior to the AAO's original decision dismissing the appeal and thus the additional evidence could not be deemed as being previously unavailable. Moreover, the AAO pointed out that the supplemental job description was originally requested prior to the denial of the petition. The AAO properly notified the petitioner that 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). The AAO also cited precedent case law, which established that U.S. Citizenship and Immigration Services has the right not to consider previously requested evidence when such evidence was submitted for the first time on appeal or on motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

With regard to the petitioner's motion to reconsider, the AAO determined that counsel failed to cite any legal precedent or applicable law that would indicate an error on the part of the AAO in dismissing the petitioner's appeal. The AAO also clarified that the beneficiary's leadership position is not synonymous with being

employed in a managerial or executive capacity. The AAO pointed to its original decision, which listed numerous factors that are considered when making a determination as to whether the petitioner meets the evidentiary burden of establishing that the beneficiary would be employed in a qualifying managerial or executive capacity as those terms are defined at section 101(a)(44) of the Act.

The primary focus in this matter is the petitioner's motion to reopen in support of which the petitioner contends that an error was committed in translating the beneficiary's position title with regard to his position abroad. Namely, counsel points out that the beneficiary was employed abroad in the position of technical director, which he asserts was an executive position, rather than the position of technical manager, which he states may be indicative of a first-line manager. Counsel also asks the AAO to consider evidence pertaining to the foreign entity, including the beneficiary's job description and job descriptions of the beneficiary's subordinate and superior, as well as documents pertaining to the beneficiary's U.S. employment, including the U.S. entity's organizational chart and documents of business transactions.

As indicated in the AAO's prior decision, 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

As with the evidence submitted in support of the prior motion, the AAO again finds that the current supporting documents do not meet the above regulatory requirement in that none can be deemed as having been previously unavailable. Additionally, with regard to counsel's statements pertaining to the error in translation of the beneficiary's position title in his prior position with the foreign entity, the AAO finds that undue emphasis has been placed on position title. As discussed in the AAO's prior decision, position title is not the determining factor in whether a position can be deemed as one within a qualifying managerial or executive capacity. The beneficiary's specific job duties and the organizational placement of the position in question are among the primary considerations in determining a beneficiary's employment capacity within a given organization.

Here, the AAO has previously determined that the petitioner failed to provide adequate evidence to support a favorable finding. It is apparent that counsel seeks to overcome such adverse finding on motion. However, as indicated above, a motion to reopen is not the proper vehicle with which to address the original findings of a service center. The petitioner was given an opportunity on appeal to overcome the director's findings. The primary focus of a motion to reopen is any evidence that was previously unavailable, which, if made available at the time of the appeal, could have resulted in withdrawal of one, or more than one, of the director's adverse findings. Any documents that were previously available or were created subsequent to the adverse decision for the purpose of overcoming prior adverse findings do not meet the criteria for a motion to reopen. The additional evidence provided in support of the petitioner's second motion cannot be deemed as new or previously unavailable for purposes of meeting the regulations pertaining to the motion to reopen. Therefore,

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).

(b)(6)

Page 4

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 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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not sustained that burden.

ORDER: The motion is dismissed.