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

(b)(6)

DATE: JUN 12 2013 OFFICE: TEXAS 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

DISCUSSION: The preference visa petition was initially approved by the Director, Texas Service Center. On further review of the record, the director determined that the petitioner was not eligible for the benefit sought. 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. The matter subsequently came before the Administrative Appeals Office (AAO) on appeal, which was dismissed. The matter is now before the AAO on motion to reopen and reconsider. The motion will be dismissed.

The petitioner is a Florida corporation, which claimed to have seven employees at the time of filing and currently seeks to employ the beneficiary as its president. The petitioner seeks 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.

On November 3, 2010, the director issued a decision revoking the prior approval of the petitioner's Form I-140. The director based his decision on the conclusion that the petitioner failed to establish that it has the ability to pay the beneficiary's proffered wage or that it has employed or would employ the beneficiary as a multinational manager or executive. The director also found that the petitioner's Form I-140 was signed by someone who was not an employee of the petitioner, thus implying that the Form I-140 was improperly filed.

On appeal, the petitioner's prior legal representative asserted that the petitioner's prior attorney, was negligent in advising the petitioner and further alleged that may have falsified the signature of the petitioner. The representative claimed that the beneficiary had been paid the proffered wage from the date of filing through 2010 and contended that the director placed too much emphasis on the petitioner's small staffing size. The representative maintained that the beneficiary would be employed in a managerial and an executive capacity and pointed to the beneficiary's use of his discretionary authority to terminate two out of five of the petitioner's employees in order to transition through a harsh economic climate.

On motion, the petitioner's current counsel submits a brief asserting that the petitioner has the ability to pay the beneficiary's proffered wage and offers additional evidence in the form of payroll taxes from 2006 through 2011 in an effort to overcome the AAO's adverse findings. Counsel further asserts that the petitioner brought up prior counsel's negligence and carelessness in order to address issues concerning the petitioner's credibility, not for the purpose of prevailing on a claim of ineffective assistance of counsel.

Turning first to the motion to reopen, 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]

Counsel does not introduce any new facts that could not have been previously discovered, nor does he support the motion with previously unavailable evidence. Rather, the entirety of the supporting evidence consists of

[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).

payroll and tax documents that apply to the years that predate the AAO's earlier decision. Therefore, such documents cannot be deemed as previously unavailable. Any documents that were issued subsequent to December 1, 2008, i.e., the date the petition was filed, would be irrelevant for the purpose of determining whether the petitioner had the ability to pay the beneficiary's proffered wage at the time of filing the petition, regardless of their relevance to the issue of whether the petitioner was able to maintain its eligibility. 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). Here, the petitioner has not provided evidence that would meet the requirements of a motion to reopen.

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 U.S. Citizenship and Immigration Services (USCIS) policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider contests the correctness of the original decision—in this case the AAO's decision dismissing the appeal—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 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.