



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 denied by the Director, Texas Service Center. The petitioner appealed the matter to the Administrative Appeals Office (AAO). The appeal was dismissed and the matter is now before the AAO on motion to reopen and reconsider. The motion will be dismissed.

The petitioner is a Florida corporation that seeks to employ the beneficiary as its executive. 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.

The director reviewed the petitioner's submissions and determined that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to his entry to the United States as a nonimmigrant to work for the petitioning employer. 8 C.F.R. § 204.5(j)(3)(i)(B). Additionally, relying on the common law definition of the term "employee," the director also concluded that the petitioner failed to establish that it and the beneficiary would have an employer-employee relationship. The director therefore denied the petitioner's Form I-140 in a notice dated August 18, 2009.

The petitioner subsequently filed an appeal disputing the director's findings. The AAO dismissed the appeal, rejecting the petitioner's reliance on the Adjudicator's Field Manual (AFM). The AAO determined that reliance on the AFM was misplaced, and clarified that the AFM is an internal tool that is intended for use by USCIS employees in the course of their reviews of petitioners' respective records. The AAO stated that the AFM is not to be used as a substitute for statutory or regulatory provisions and noted that the AFM does not have the effect of binding precedent.

The AAO concluded that the petitioner failed to properly address the beneficiary's employment abroad, which served as the main basis for denial. The AAO declined to address the issue that dealt with the common law definition of "employee," concluding that there was no need to address the common law issue when there was a clear statutory basis for dismissing the appeal.

On motion, counsel submits a brief asserting that the AAO dismissed the appeal based on "an incorrect factual basis, and incorrect misrepresentation of the full decision." Counsel further contends that the AAO failed to address the issue of a qualifying relationship, asserting that the director's denial was partly based on this issue as well. Lastly, counsel restates portions of the director's discussion regarding the common law definition of the term "employee" and refers to regulations pertaining to the L-1 nonimmigrant petition for intracompany transferees.

The AAO finds that counsel's assertions fail to address the statutory basis for the AAO's dismissal and address only the common law issue that the AAO declined to address. Counsel also erroneously asserts that the AAO failed to address the issue of a qualifying relationship. The issue of a qualifying relationship was not one of the grounds for denial. Therefore, the AAO was not required to address this issue on appeal.

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 did not introduce any new facts or evidence in support of the motion. Therefore, the petitioner clearly failed to meet the requirements for a motion to reopen.

The regulation at 8 C.F.R. § 103.5(a)(3) states the following, 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.

Citing legal precedent in a supporting brief is not sufficient to meet the above requirements. The regulation clearly states that the cited legal precedent must support a finding that the prior adverse decision—in this case the AAO's dismissal of the appeal—was based on an incorrect application of law or Service policy. Therefore, while the motion brief cites to several legal precedent decisions, most of which had been previously cited in the director's decision, counsel has failed to establish that there was an error on the part of the AAO in dismissing the petitioner's appeal. Counsel references the size of the petitioning business, which was neither mentioned in the director's decision nor in the subsequent decision issued by the AAO. Moreover, if counsel intended to address the common law definition of "employee," despite the fact that the AAO declined to provide a full discussion of this issue on appeal, then it is unclear how a discussion of the petitioner's staffing or organizational size would have served as an effective means of meeting counsel's objective. Regardless, the record shows that counsel failed to cite legal precedent establishing a legal error in the AAO's decision.

In light of the above findings, 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.

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).