



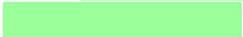
U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **JUN 12 2013**

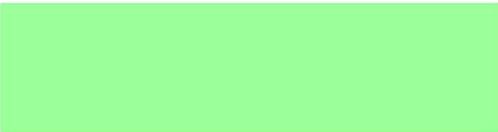
OFFICE: NEBRASKA SERVICE CENTER

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

**DISCUSSION:** The preference visa petition was initially approved by the Director, Nebraska Service Center. On further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, 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 petitioner subsequently filed an appeal with the Administrative Appeals Office (AAO). The appeal was dismissed and the matter is now before the AAO on a motion to reconsider.

At the time the Form I-140 was filed, the petitioner was operating as a sole proprietorship in the State of Missouri. The petitioner seeks to employ the beneficiary as its general manager. 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 December 22, 2008, the director issued a decision revoking the approval of the visa petition based on four independent grounds of ineligibility. The director concluded that the petitioner failed to establish that: 1) it was a qualifying entity that was authorized to file an employment-based petition on behalf of the beneficiary at the time the Form I-140 was filed; 2) it had the ability to pay the beneficiary's proffered wage commencing on the priority date; 3) the beneficiary was employed abroad within a qualifying managerial or executive capacity; or 4) the petitioner would employ the beneficiary in a managerial or executive capacity.

The petitioner appealed the denial disputing the director's conclusions and challenging the director's decision to revoke the petition on grounds that were not previously included in the notice of intent to revoke (NOIR). Counsel reasserted arguments that he previously raised in response to the NOIR and contended that the director erred in retroactively applying portions of the USCIS Adjudicator's Field Manual (AFM).

In a decision dated October 5, 2010, the director dismissed the petitioner's appeal, concluding that the petitioner failed to present persuasive evidence or information to overcome the first two grounds listed above. The AAO rejected counsel's claim that the director retroactively applied the AFM, finding that the petitioner would not have been eligible at the time of filing the petition but for the guidelines in the AFM. The AAO determined that it was the statute and regulations that were in effect at the time of filing the petition that determined the petitioner's ineligibility and that the AFM was cited merely to show that internal service guidelines were in accord with what the statutory and regulatory provisions already dictated at the time the petition was initially filed.

The AAO rejected counsel's interpretation of the definition of *affiliate*, a term that is defined at 8 C.F.R. § 204.5(j)(2). The AAO concluded that counsel focused on only one part of the term's definition and failed to consider that in order to meet the regulatory criteria of an *affiliate*, the petitioner must demonstrate that it is one of two subsidiaries where both entities are owned and controlled by the same parent or individual. The AAO observed that counsel emphasized only the portion of the definition that focused on the term "individual," implying that the beneficiary is the individual who owns and controls the U.S. entity, but failed to acknowledge that the petitioner must also be one of two subsidiaries and that in order to fit the definition

of *subsidiary*, the petitioner must establish that it is a firm, corporation, or other legal entity.<sup>1</sup> 8 C.F.R. § 204.5(j)(2). As stated in the AAO's prior decision, unlike a firm, corporation, or other legal entity, a sole proprietorship is a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). As such, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). The AAO determined that the sole proprietorship's filing of an employment-based petition was synonymous with the beneficiary extending an offer of employment to himself, which is precluded by law given that a petitioner who is a nonimmigrant temporary worker, much like the beneficiary, is not competent to offer permanent employment to an alien beneficiary for the purpose of obtaining an immigrant visa for the beneficiary under section 203(b)(1)(C) of the Act. *Matter of Thornhill*, 18 I&N Dec. 34 (Comm. 1981).

Additionally, the AAO addressed USCIS's prior approval of the instant petition and several previously filed L-1A nonimmigrant petitions, concluding that approving a petition that the petitioner was ineligible to file in the first place clearly shows an error on the part of the service center and would not result in a mandate for the AAO to approve applications or petitions where eligibility has not been demonstrated, merely because of prior erroneous approvals. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Treating acknowledged errors as binding precedent is not compulsory on the USCIS or any agency. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). To the contrary, by virtue of affirming the director's decision, the AAO allowed USCIS to rectify an error, which initially occurred when the service center approved a petition that did not merit approval.

The AAO continued by withdrawing the director's two additional findings, which were not previously cited in the NOIR, finding that withdrawal was mandated by the provisions of 8 C.F.R. § 205.2(b), which precludes the director from citing adverse findings in the final revocation without first giving the petitioner the opportunity to address such findings by including them in the NOIR. The AAO added, however, that the decision to withdraw the two additional bases for revocation was not intended to serve as an indication that the petitioner successfully established that the beneficiary was employed abroad or that he would be employed in the United States within a qualifying managerial or executive capacity. In fact, the AAO found that the record supported both adverse findings, which would not have been disturbed as valid bases for revocation if the director had properly introduced them in the NOIR.

Finally, with regard to counsel's attempt to invoke AC21 protections as a result of the time delay between the date the Form I-140 was approved and the date of the approval's revocation, the AAO found that AC21 provisions did not apply to the petitioner in the present matter, as the petition was not valid and therefore cannot be deemed as remaining valid for the purpose of invoking protection under AC21.

On motion, counsel reasserts many of the same assertions that he previously raised on appeal, claiming that the AAO's decision was erroneous in its failure to properly address the director's retroactive application of AFM provisions and its lack of consideration of previously issued favorable decisions regarding the petitioner, including the earlier approval of the instant petition as well as other non-immigrant petitions filed by the same petitioner. The AAO finds that counsel has not offered information that meets the requirements of a motion to reconsider.

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<sup>1</sup> An entity, other than a natural person, who has sufficient existence in legal contemplation that it can function legally, be sued or sue and make decisions through agents as in the case of corporations. *Black's Law Dictionary* 620 (6th Ed. 1991).

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.

Furthermore, 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.

The petitioner’s motion does not meet any of the above criteria. While counsel does cite legal precedent decisions, none establish an error on the part of the AAO in dismissing the petitioner’s appeal based on the reasons described above. Rather, counsel advances arguments that are similar, if not identical, to those that were previously raised and addressed on appeal. Therefore, 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.

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.