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)

[redacted]

DATE: JUN 17 2013 OFFICE: TEXAS SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

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 AAO inappropriately applied the law in reaching its 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 motion 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 any motion to 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. The matter is now before the AAO on motion to reopen and reconsider. The motion will be dismissed.

The petitioner is a Texas organization that seeks to employ the beneficiary as its president and chief executive officer (CEO). 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 denied the petition based on the determination that the petitioner had failed to establish that it had been doing business in the United States for one year prior to filing this petition as required by 8 C.F.R. § 204.5(j)(3)(i)(D). On appeal, counsel asserted that the service center erroneously deemed the petitioner as a new office without taking into account the fact that the petitioner has an ownership interest in an entity that had been operating since 2005.

In a decision dated May 17, 2011, the AAO dismissed the petitioner's appeal concluding that the petitioner failed to provide probative evidence to overcome the ground for denial. The AAO determined that while the petitioning entity purchased an existing business that predated the petitioner itself, the record was devoid of evidence establishing that the petitioner replaced or absorbed the rights and obligations of its predecessor. The AAO pointed out the fact that the petitioner was established on September 4, 2008, thus making it factually impossible for the petitioner to have been doing business as of January 29, 2008, i.e., one year prior to the filing of the instant Form I-140. Even if the petitioner had been able to establish that it was engaged in the "the regular, systematic, and continuous" course of business since the date of its incorporation, it could not have been doing business one year prior to the filing date of the petition. *See* 8 C.F.R. § 204.5(j)(3)(i)(D).

The AAO also issued two additional adverse findings with regard to issues that had not been previously addressed in the director's decision. The AAO determined that the job descriptions the petitioner submitted in support of the petition with regard to the beneficiary's foreign and proposed employment were overly vague and failed to disclose the specific job duties the beneficiary performed abroad and those he would perform in his proposed position with the U.S. entity. The AAO determined that in light of the insufficiency of relevant information pertaining to the beneficiary's foreign and proposed employment it was unable to conclude that the beneficiary was employed abroad or that he would be employed in the United States in a qualifying managerial or executive capacity.

On motion, counsel provides a brief in which he reasserts statements made on appeal with regard to the doing business filing requirement at 8 C.F.R. § 204.5(j)(3)(i)(D). Counsel also addresses the issue of a qualifying relationship, which was not raised either by the director in the original decision or by the AAO on appeal, and later goes on to dispute the AAO's findings with regard to the beneficiary's foreign and proposed employment providing equally vague statements as those provided in the January 21, 2009 statement submitted originally in support of the petition. Although counsel claims that a business plan, an organizational chart, and a list of positions and duties is being presented as part of Exhibit 3 in support of the motion, the petitioner's supplemental documents are not actually labeled to indicate which submission is "Exhibit 3" and of the three documents counsel claims as part of Exhibit 3, only a business plan was provided to support the motion. Other supplemental documents include the petitioner's stock certificate and share transfer ledger, the minutes of a reorganizational meeting that took place on

September 4, 2008, a copy of the petitioner's 2009 tax return, and the petitioner's state employer's quarterly reports for the second, third, and fourth quarters of 2010 and for the first quarter of 2011.

After having reviewed the petitioner's submissions, the AAO finds that the petitioner does not meet the requirements of a motion to reopen or a motion to reconsider.

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] The record has not been supplemented with any new facts that had not been previously addressed. The petitioner has not met the requirements of a motion to reopen.

Turning to the requirements for a motion to reconsider, 8 C.F.R. § 103.5(a)(3) states that the motion 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 prior decision 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.

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. Rather, counsel reiterated the points made previously in the appellate brief and addressed an issue—that of qualifying relationship—that was irrelevant to the instant proceeding given that neither the director nor the AAO issued an adverse finding with regard to that issue.

In light of the deficiencies described 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).

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[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).

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.