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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

Date: Office: NEBRASKA SERVICE CENTER

FILE:

JUN 17 2013

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)

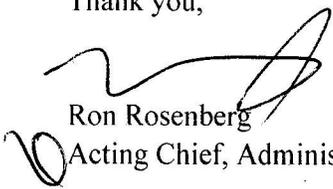
ON BEHALF OF PETITIONER:

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 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 Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The petitioner appealed the matter to the Administrative Appeals Office (AAO). The AAO dismissed the petitioner's appeal and subsequent motion to reopen and reconsider. The matter is now before the AAO again on a second motion to reopen and reconsider. The AAO will dismiss the motion.

The petitioner filed the immigrant petition to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner, a Texas corporation, states that it operates a retail furniture business and car rental business.¹ It seeks to employ the beneficiary as its director of business development. The director denied the petition on February 28, 2008, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

The AAO dismissed the petitioner's subsequent appeal on December 9, 2009, affirming the director's determination that the petitioner failed to establish that the beneficiary would be employed by the petitioner in a primarily managerial or executive capacity. Additionally, relying on its authority to review appeals on a *de novo* basis, the AAO identified three additional grounds of ineligibility, concluding: (1) that the petitioner failed to establish that the beneficiary was employed abroad during the relevant time period or that she was employed by the foreign entity in a qualifying managerial or executive capacity; (2) that the petitioner failed to demonstrate that it had the ability to pay the beneficiary's proffered wage at the time of filing; and (3) that the petitioner's forfeited legal existence precluded the petitioner from being deemed a "United States employer," thereby rendering the petitioner ineligible to offer the beneficiary permanent employment in the United States at the time the petition was filed.

On the petitioner's subsequently filed motion, counsel asserted that the director erred in determining that the beneficiary would not be employed in a managerial or executive capacity and that the AAO was incorrect in affirming the director's decision. Neither counsel nor the petitioner acknowledged the three additional grounds for denial identified in the AAO's decision. The AAO determined that the petitioner had failed to meet the requirements of a motion to reopen or reconsider and dismissed the motion in accordance with 8 C.F.R. § 103.5(a)(4) on June 14, 2010. Notwithstanding the AAO's determination that the petitioner failed to meet the requirements of a motion, the AAO's decision included a thorough discussion of counsel's arguments with respect to the issue of whether the beneficiary would be employed in the United States in a managerial or executive capacity.

The petitioner has filed a second combined motion to reopen and reconsider which is now before the AAO. Counsel for the petitioner contends: (1) that the AAO erred in requiring the petitioner to respond to grounds of denial that would require the submission of new evidence; (2) that the AAO erred in finding the petitioner's

¹ It should be noted that, according to the Texas Comptroller of Public Accounts, the petitioner forfeited its corporate privileges in Texas on January 6, 2006 due to its failure to satisfy all state tax requirements. In addition, the petitioner's corporate privileges were not reinstated until May 22, 2007, a date subsequent to the filing of the instant immigrant petition seeking to permanently employ the beneficiary in the United States. The binding precedent decision, *Matter of Thornhill*, 18 I&N Dec. 34 (Comm. 1981), holds that a petitioner whose status is impermanent, or otherwise "not settled," is not competent to offer permanent employment to an alien, if that offer would serve as the basis for issuance of an immigrant visa.

prior motion to reopen and reconsider did not meet the requirements of a motion; and (3) that the AAO erred in concluding that the beneficiary would not be employed in a primarily executive or managerial capacity or that the beneficiary will manage an essential function.

The scope of the AAO's review in a motion proceeding is limited pursuant to 8 C.F.R. § 103.5(a)(2), which describes the scope of review for a motion to reopen, and 8 C.F.R. § 103.5(a)(3), which describes the scope of review for a motion to reconsider.

The regulations at 8 C.F.R. § 103.5(a)(2) provide, 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.²

The petitioner's motion consists of a brief from counsel, and is thus not supported by affidavits or other documentary evidence. Furthermore, counsel presents no facts in her brief that could be considered "new" or that could not have been presented in the prior proceeding. Therefore, the AAO finds that the motion does not meet the requirements of a motion to reopen.

The regulation at 8 C.F.R. § 103.5(a)(3) states:

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 USCIS 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.

Counsel asserts that the AAO's decision to dismiss the petitioner's motion to reopen or reconsider was incorrect because: (1) the AAO erred by requiring the petitioner to respond to new grounds for denial that would have required the submission of new evidence; (2) the AAO erred in concluding that the petitioner did not meet the requirements of a motion to reopen or motion to reconsider; and (3) the AAO erred by concluding that the beneficiary would not be employed in a primarily executive or managerial capacity. The AAO will grant the petitioner's motion to reconsider and discuss these arguments separately.

I. New grounds for denial not raised in the director's Request for Evidence or initial adverse decision

Counsel contends that the AAO unfairly and erroneously expected the petitioner to respond to the three new and separate grounds of denial included in the AAO's appellate decision dated December 9, 2009. The AAO affirmed the director's determination that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity and further concluded: (1) that the petitioner failed to establish that the beneficiary was employed abroad during the relevant time period or

² 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).

that she was employed by the foreign entity in a qualifying managerial or executive capacity; (2) that the petitioner failed to demonstrate that it had the ability to pay the beneficiary's proffered wage at the time of filing; and (3) that the petitioner's forfeited legal existence precluded the petitioner from being deemed a "United States employer," thereby rendering the petitioner ineligible to offer the beneficiary permanent employment in the United States at the time the petition was filed.

Counsel's argument is two-fold. First, counsel asserts that the denial of the petition on new grounds, without giving the petitioner an opportunity to address the deficiencies in the evidence, violated USCIS policy and "well established due process rights." Counsel relies on a 2005 USCIS memorandum from William R. Yates, Associate Director of Operations, in support of her position that agency policy is to issue a request for additional evidence or a notice of intent to deny if the evidence submitted in support of a petition raises underlying questions regarding eligibility.³

Second, counsel contends that the petitioner is prohibited from addressing these new grounds for denial, claiming that "the AAO does not take into account the fact that appeals are limited to what is contained in the record." Counsel asserts that the AAO applied "circular reasoning" by simultaneously requiring that the petitioner establish that the decision was incorrect based on the evidence of record at the time of the initial decision, and requiring that the petitioner submit new evidence to address the additional grounds for denial in the AAO's December 9, 2009 decision.

In setting forth these arguments, counsel overlooks the fact that an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 3d Cir. 2004 (noting that the AAO conducts appellate review on a *de novo* basis). The AAO clearly stated in its decision dated December 9, 2009 that it was exercising this *de novo* authority in identifying three additional grounds for the denial.

The 2005 Yates memorandum to which counsel refers is addressed to district directors, regional directors, and service center directors, and does not apply to AAO in the exercise of its *de novo* appellate review. Counsel's argument that USCIS policy prohibits the AAO from identifying additional grounds for denial of petition without issuing a request for evidence is not persuasive. *See also* 8 C.F.R. § 103.2(b)(8)(ii); 72 F.R. 19100 (April 17, 2007).

Lastly, counsel claims that the AAO's denial of the petition based on three additional grounds without first issuing a request for evidence violates the petitioner's due process rights. Counsel does not further elaborate as to how the denial of the petition violates such rights. Although counsel argues that the petitioner's rights to procedural due process were violated, they have not shown that any violation of the regulations resulted in "substantial prejudice" to them. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). The petitioner has fallen far short of meeting this standard. A review of the record and the adverse decision

³ See Memorandum of William R. Yates, Assoc. Dir. of Operations, USCIS, *Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)*(February 16, 2005).

indicates that the director properly applied the statute and regulations to the petitioner's case, and that the AAO acted within the scope of its authority when it denied the petition on additional grounds not identified by the director. The petitioner failed to meet its burden of proof and the denial was the proper result under the regulations. Accordingly, the petitioner's claim is without merit.

Furthermore, even if the petitioner established that the AAO should have requested evidence before denying the petition on additional grounds beyond the director's decision, it is not clear what remedy would be appropriate beyond the motion process itself. Contrary to counsel's assertions, there are circumstances in which new evidence may be submitted and accepted during appellate and motion proceedings, and such circumstances are present in this case. Where a visa petition is denied based on a deficiency of proof and the petitioner was not put on notice of the deficiency and given a reasonable opportunity to provide it before denial, USCIS will consider evidence submitted for the first time on appeal or motion. *Cf. Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The petitioner clearly did not avail itself of this opportunity in the prior motion proceeding as it failed to even acknowledge the three additional grounds for denial identified in the AAO's decision.

Counsel briefly addresses two of these three additional grounds for denial in her brief on motion, noting that the petitioner could have submitted evidence to further document the beneficiary's prior employment with a qualifying foreign entity in a qualifying capacity, and the petitioner's valid status as a corporation and U.S. employer as of the date the petition was filed, if only it had been given an opportunity to respond to a request for evidence addressing these issues. Counsel acknowledges that the petitioner's corporate status was forfeited on January 6, 2006 due to the negligence of an accountant, but contends that the status was reinstated that same day. Counsel asserts that the petitioner makes no concessions as to the AAO's conclusions regarding these three additional grounds for denial. As noted above, the instant motion consists of a legal brief only, and does not contain documentation such as corporate records from the Texas Secretary of State, to corroborate the counsel's claims regarding the date of reinstatement.

As discussed above, where the petitioner seeks to address and overcome grounds for denial that go beyond the director's initial decision, the appropriate forum is the motion process itself. *See generally* 8 C.F.R. § 103.5. Despite filing two motions, the petitioner has not submitted any additional documentary evidence to address the AAO's adverse findings with respect to the beneficiary's foreign employment in a qualifying capacity, the petitioner's ability to pay the proffered wages to the beneficiary as of the date of filing, or the petitioner's corporate status as of the date of filing. Counsel's assertion that the petitioner could produce evidence to overcome such findings is not sufficient and cannot be accepted in lieu of the actual evidence that was determined by the AAO to be lacking.⁴ The unsupported statements of counsel on appeal or in a motion

⁴ For example, counsel asserts that the petitioner demonstrated that the beneficiary was a 50 percent shareholder and director of the foreign entity since 1994 and managed a number of employees as director of the Director of Marketing and Sales Department. However, the beneficiary herself indicated on a Form G-325A Biographic Information, signed under penalty of perjury on December 13, 2004, that she had not been employed in the last five years. This Form G-325A was submitted in support of the beneficiary's prior Form I-485, Application to Adjust Status. In support of the Form I-485 that was concurrently filed with the instant petition in November 2006, the beneficiary also submitted a second Form G-325A, in which she indicated

are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Finally, the AAO notes that there is not legal bar to prevent the petitioner from re-filing a new petition. If a petitioner were to file a new petition, it is in the petitioner's best interest for the AAO to note additional deficiencies so that they might be addressed and remedied in a future proceeding.

Based on the foregoing, the AAO concludes that this office did not err in its original decision when it identified three grounds for denial not identified in the director's initial decision, nor did it err in dismissing the petitioner's subsequent motion, in part, because the petitioner failed to address these independent and alternative grounds for denial.

As the petitioner has not submitted any documentary evidence to address these grounds for denial, the AAO will affirm its prior conclusions, specifically: (1) that the petitioner failed to establish that the beneficiary was employed by a qualifying foreign entity in a primarily managerial or executive capacity during the requisite time period; (2) that the petitioner failed to establish that it had the ability to pay the proffered wages to the beneficiary as of the date the petition was filed, and (3) that the petitioner's forfeited legal existence precluded the petitioner from being deemed a United States employer eligible to offer the beneficiary permanent employment in the United States.

II. The petitioner's prior combined motion to reopen and reconsider

Counsel asserts that its prior motion stated the reasons for reconsideration and was supported by pertinent precedent decisions in accordance with the requirements for a motion to reconsider at 8 C.F.R. § 103.5(a)(3). Counsel contends that "[t]he AAO refused to consider this for several reasons ranging from the precedents being unpublished to the Petitioner not providing a copy of every single case referenced." Counsel states that the AAO's "refusal to even consider the law purported by the Respondents was an abuse of discretion and a disregard for judicial precedent." Counsel further asserts that, even if the unpublished cases are not "mandatory law," they are "persuasive authority that warrants consideration, especially when the facts are applicable to the issue at hand."

under penalty of perjury that she was employed by [REDACTED] in Karachi, Pakistan from June 1994 until June 2004.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Upon review, we note while the AAO dismissed the petitioner's motion to reconsider, in part, for this reason, the decision nevertheless included an in-depth discussion of counsel's two major substantive claims. First, counsel claimed that the AAO erred in focusing on the beneficiary's job duties rather than her position as a function manager. The AAO explained that focusing on the beneficiary's job duties is consistent with the regulations, noting that 8 C.F.R. 204.5(j)(5) expressly requires the petitioner to provide a detailed description of the beneficiary's proposed employment. Despite her objections to the AAO's analysis of the beneficiary's job duties, counsel herself cited to case law which establishes that the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co. Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989).

The AAO also acknowledged that it did not focus on the beneficiary's "position as a function manager" in its initial decision for the sole reason that the petitioner never claimed prior to the dismissal of the appeal that the beneficiary would be employed as a function manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. Whenever a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner did not articulate a claim that the beneficiary is a function manager, identify the essential function she is claimed to manage, the amount of time she would allocate to managing the essential function, or provide evidence that the beneficiary's duties are primarily managerial. Furthermore, prior to the dismissal of the appeal, the petitioner was clearly attempting to establish that the beneficiary is a personnel manager who primarily supervises and controls the work of other supervisory, professional or managerial employees, as evidenced by the organizational charts in the record depicting the beneficiary's supervision of a hierarchy employees. The petitioner put forth the argument that the beneficiary is a function manager only after the AAO determined that the petitioner failed to submit documentation to corroborate the information conveyed in its organizational charts. The AAO noted that a claim that the beneficiary is a function manager may relieve the petitioner from having to establish that the beneficiary supervises a subordinate staff comprised of professionals, managers or supervisors, but does not release the petitioner from providing an adequately detailed description of the beneficiary's day-to-day duties, information regarding the proportion of time she allocates to managerial duties, and corroborating information to establish that the company employs sufficient staff to relieve the beneficiary from having to perform the daily operational tasks associated with the petitioner's everyday function. All of these deficiencies were discussed at length in the AAO's decision dated December 9, 2009. As the petitioner provided no additional clarification or documentation to address these points on motion, the AAO concluded that the beneficiary does not qualify as a function manager.

Based on the foregoing, counsel's assertion that the AAO "refused to consider" the motion to reconsider is not accurate.

With respect to the AAO decision to dismiss the motion, the AAO clearly explained why the unpublished AAO decisions cited by counsel are not "precedent decisions" and discussed why the petitioner's reliance on a district court case, *Mars Jewelers, Inc. vs. INS*, 702 F. Supp. 1570 (N.D. Ga 1988), was misplaced. See 8 C.F.R. § 103.3(c) (noting that only designated precedent decision are binding on USCIS employees). The AAO also correctly advised the petitioner that is not required to assume the burden of reviewing the record and decision of each unpublished matter to verify the validity of counsel's claims that those matters were approved based on similar facts.

Counsel cited numerous unpublished AAO decisions to stand for the proposition that managers need not supervise a large number of employees or a large enterprise, and included examples of cases in which even a sole employee was found to be serving in a qualifying managerial or executive capacity. The AAO clearly acknowledged these propositions and agreed that the petitioner is not required to employ a large staff in order to establish that it can support a managerial or executive employee. However, the AAO provided legal authority for its position that the petitioner's organizational hierarchy is one factor that may be considered when determining whether an individual beneficiary is employed in a managerial or executive capacity.

Furthermore, as discussed above, the petitioner's prior motion addressed only one out of four grounds for denial of the petition and was properly dismissed for this reason. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

III. The beneficiary's employment in a primarily managerial or executive capacity or as a function manager

Counsel asserts that the petitioner cited relevant precedent case law establishing that Congress, in the 1990 Immigration and Nationality Act, "intended to restore the more liberal treatment of the executive and managerial categories." Counsel contends that the AAO erroneously stated that the petitioner relied on pre-IMMACT 90 cases to support its motion to reconsider.

Upon review, the AAO notes that counsel cited to both pre-1990 and post-1990 decisions in its previous motion. The AAO did not determine that all cases cited by counsel were based on pre-IMMACT 90 regulations. Rather the AAO concluded that the neither the unpublished decisions nor the pre-IMMACT 90 decisions qualify as "pertinent precedent decisions" for the purposes of satisfying the requirements to file a motion to reconsider pursuant to 8 C.F.R. § 103.5(a)(3). Nevertheless, the AAO's decision addressed the substantive issues raised by counsel and supported by the non-precedent case law, including whether the beneficiary qualified as a function manager and whether the AAO's decision placed undue emphasis on the size of the U.S. company or the number of staff supervised by the beneficiary.

Counsel further states that "the petitioner brought [sic] to the AAO's attention that the 1990 Act to the INA . . . bars decisions on the executive capacity of the beneficiary from being made exclusively on the basis of the number of employees supervised by the beneficiary."

Counsel's argument is not persuasive as neither the director's decision nor the AAO's decision was made exclusively, or even primarily, on the basis of the number of employees supervised by the beneficiary or the size of the organization. The director's initial adverse decision did not address the size of the company or its organizational structure, but rather was based solely on the petitioner's failure to establish that the beneficiary's actual duties would be managerial or executive in nature. In dismissing the appeal, the AAO determined that the petitioner failed to provide a detailed description of the beneficiary's duties sufficient to establish what she actually does on a day-to-day basis, failed to establish the proportion of time the beneficiary would spend performing qualifying tasks versus non-qualifying ones, and failed to submit evidence to corroborate the employment of the employees and contractors identified in its organizational chart as of the date of filing.

For example, the petitioner indicated that it had nine regular staff employees as of November 2006 when the petition was filed, but the petitioning company issued only five IRS Forms W-2 in 2006. The AAO was concerned not with the number of employees in the company or the number of employees supervised by the beneficiary, but rather with the petitioner's apparent inability to document the claimed number of employees and organizational structure as of the date of filing. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The AAO further noted that many of the beneficiary's proposed responsibilities appeared to be performed on behalf of a separate legal entity, [REDACTED] and the [REDACTED] franchise that company operates, and as such could not be considered qualifying duties performed on behalf of the petitioning company.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. Due to the deficiencies outlined above, and discussed at length in the AAO's prior decision, the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. Although the petitioner has filed two motions, the petitioner has failed to acknowledge most of the petition's defects regarding the beneficiary's claimed employment capacity, and instead has proposed that the petitioner's descriptions of the beneficiary's duties are somehow irrelevant and that the AAO should have concluded that the beneficiary is a function manager despite the petitioner's failure to articulate such a claim.

As the AAO's adverse decision was not based on the size of the petitioning organization or the number of employees supervised by the beneficiary, counsel's claim that the decision was based on an incorrect application of law or service policy prohibiting determinations based on these factors is not persuasive. While the AAO conducts a comprehensive, *de novo* review of the entire record on appeal, a review in the case

of a motion to reconsider is strictly limited to an examination of any purported misapplication of law of USCIS policy. Accordingly, the AAO affirms its prior determination that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity, for the reasons stated in its prior decision.

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. Accordingly, the AAO will affirm its prior decision to dismiss the petitioner's appeal.

ORDER: The AAO's decisions dated June 14, 2010 and December 9, 2009 are affirmed. The petition is denied.