**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: MAR 0 4 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 denied by the Director, Nebraska Service Center. The petitioner appealed the matter to the Administrative Appeals Office (AAO) where 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 North Carolina corporation engaged in the business of international trade. It seeks to employ the beneficiary as its vice president. Accordingly, the petitioner endeavors 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 two grounds of ineligibility concluding that the petitioner failed to establish that: 1) the beneficiary was employed abroad in a qualifying managerial or executive capacity and 2) the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

The petitioner appealed the denial disputing the director's findings. In a decision dated February 15, 2012, the AAO dismissed the appeal affirming the director's adverse conclusions. The AAO found that the petitioner offered deficient job descriptions, which failed to describe the beneficiary's foreign and proposed employment using specific tasks and time allocations. The AAO also questioned whether the petitioner was adequately staffed at the time the petition was filed such that it would have been able to relieve the beneficiary from having to allocate his time primarily to the performance of the petitioner's non-qualifying operational tasks.

Additionally, the AAO determined, beyond the decision of the director, that the petitioner submitted insufficient documentation concerning its claimed parent-subsidiary relationship with the beneficiary's employer abroad.

On motion, counsel submits a brief asserting that the beneficiary is head of the petitioning entity and that as such "his primary duties are inherently managerial or executive in nature" and that "to interpret otherwise would mean that there is on [*sic*] one leading the company." This assertion indicates that counsel identifies the beneficiary's leadership position as being synonymous with being employed in a qualifying managerial or executive capacity.

Additionally, in an effort to address several of the AAO's adverse findings, counsel offers the following supplemental documents: 1) an hourly breakdown of the duties and responsibilities that the beneficiary performs on a weekly basis; 2) a letter dated March 7, 2012 from the petitioner's accountant containing the petitioner's ownership breakdown; and 3) a duplicate of a previously submitted letter containing a description of the beneficiary's employment abroad.

Turning first to the petitioner's 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]

In the present matter, the petitioner provides the hourly breakdown and statement from its accountant in support of the motion. However, the AAO finds that neither document fits the above regulatory requirement. With regard to the hourly breakdown, the AAO notes that this information was originally requested by the director in a request for evidence issued prior to the original decision. The petitioner failed to submit the requested information and the AAO later pointed out the deficiency in its February 15, 2012 decision. The AAO also notified the petitioner that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Therefore, as such evidence was clearly available at the time of the original request, the AAO will not consider the previously requested evidence when it is submitted for the first time on appeal or on motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

Similarly, the statement from the petitioner's CPA cannot be deemed as evidence that was previously unavailable and thus will not be considered as part of the petitioner's motion to reopen. Accordingly, the evidence submitted does not meet the requirements of a motion to reopen and the motion must therefore be dismissed.

Next, turning to the petitioner's motion to reconsider, 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.

In the instant matter, counsel does not cite any legal precedent or applicable law that would indicate an error on the part of the AAO in dismissing the petitioner's appeal. The AAO further notes that counsel's assumption that the petitioner's leadership position is synonymous with being employed in a managerial or executive capacity is incorrect. As noted in the AAO's prior decision, there are numerous factors that are considered in order to determine whether the petitioner meets the evidentiary burden of establishing that the beneficiary would be employed in a qualifying managerial or executive capacity as those terms are defined at section 101(a)(44) of the Act. USCIS reviews the totality of the record when examining the petitioner's claim. The relevant factors include the beneficiary's job description, the petitioner's organizational structure, the job duties of the beneficiary's subordinates, the presence of other employees to relieve the beneficiary from having to primarily perform operational tasks, the nature of the petitioner's business, and any other that may impact the beneficiary's role within the organization. Thus, while the beneficiary's leadership role is clearly one factor that the AAO considers, the qualifying nature of the proposed employment does not hinge on whether the beneficiary assumes the lead or senior position within a given entity.

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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).

Regardless, as noted above, counsel failed to cite any legal precedent or applicable law in support of the motion to reconsider. 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.

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.