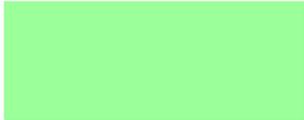


(b)(6)

U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Service  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave. N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



DATE: **MAY 07 2013**

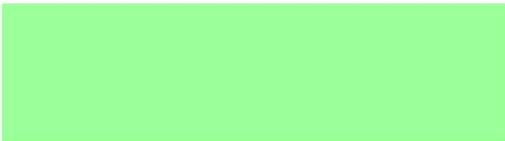
OFFICE: TEXAS SERVICE CENTER

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:



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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

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 petitioner subsequently filed a motion to reopen and reconsider, which is now before the AAO. The motion will be dismissed.

The petitioner is a Texas corporation and seeks to employ the beneficiary as its 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 concluding that the petitioner failed to establish that the beneficiary was employed abroad or that he would be employed in the United States in a qualifying managerial or executive capacity. Additionally, relying on the common law definition of the term "employee," the director concluded that the petitioner and the beneficiary do not have an employer-employee relationship.

The petitioner appealed the denial disputing the first two of the director's findings. The AAO dismissed the appeal, concluding that the petitioner failed to provide adequate supporting evidence in the form of detailed job descriptions and relevant organizational charts establishing that the beneficiary was employed abroad and would be employed in the United States in a managerial or executive capacity. The AAO also pointed to an inconsistency between the information provided by the petitioner in its Form I-140 and that which was conveyed in the organizational chart the petitioner submitted in support of the Form I-140. Finally, the AAO determined that because the petitioner failed to address the issue of an employer-employee relationship on appeal, the petitioner effectively conceded the adverse finding, which served as the third ground for dismissing the appeal.

On motion, counsel asserts that the petitioner's prior failure to provide relevant information pertaining to the beneficiary's employment abroad was the direct result of ineffective assistance of counsel, an issue, which counsel claims the AAO failed to address. Counsel states that all relevant documents establishing the existence of the foreign entity have been submitted and further expresses the petitioner's willingness to provide additional evidence should this matter be reopened and "the Petition is afforded one more opportunity." Lastly, counsel states that the petitioner has no ties with [REDACTED] alleging that documents pertaining to this entity were erroneously submitted by the petitioner's prior counsel.

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.<sup>1</sup>

In the instant case, instead of offering new evidence to support the motion, counsel indicates that the petitioner would provide "any requested evidence" should the AAO grant the motion. Based on the

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<sup>1</sup> 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).

regulation pertaining to a motion to reopen, the AAO cannot grant the motion based on a promise to submit evidence in the future. Rather, the petitioner is required to provide previously unavailable evidence in order to establish a proper basis for reopening this matter. It appears that counsel seeks to have the petitioner provide (and the AAO consider) previously requested evidence to cure prior deficiencies noted in the AAO's decision dismissing the appeal. It does not appear that counsel intends for the petitioner to submit previously unavailable evidence; nor is there any indication that previously unavailable evidence actually exists.

With regard to counsel's claim that the petitioner was the victim of ineffective counsel, the AAO notes that any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

There is no evidence that the petitioner meets the three-pronged test to establish that any prior inadequacies in the petitioner's submissions should be excused due to ineffective assistance of counsel.

In sum, the petitioner has failed to provide any new facts or documents to warrant the granting of a motion to reopen. Therefore, the petitioner's motion to reopen will be dismissed.

Next, turning to the 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 case, 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. 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.