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

(b)(6)

[redacted]

DATE: MAY 29 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [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, Nebraska Service Center. The petitioner appealed the matter to the Administrative Appeals Office (AAO). The AAO dismissed the petitioner's appeal and its subsequent motion to reopen and reconsider. The matter is now before the AAO on a second motion to reopen and reconsider, which will also be dismissed.

The petitioner is a California corporation that 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 original denial of the petition was based on the director's conclusion that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity.

After reviewing the matter on appeal, the AAO affirmed the director's conclusion, finding that a considerable portion of the beneficiary's time would be allocated to operational tasks and that he therefore would not be primarily employed in a qualifying managerial or executive capacity. The AAO observed that various elements of the beneficiary's job description—those pertaining to his oversight of employees with managerial position titles—were not depicted in the petitioner's organizational chart. The AAO also noted that the petitioner failed to comply with the director's request for the submission of IRS Form W-2s for 2007, which could have assisted in clarifying questions about the petitioner's staffing at the time the Form I-140 was filed.

Additionally, the AAO issued two adverse conclusions beyond the director's decision, finding that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity and that the petitioner failed to provide sufficient evidence to establish that it has a qualifying relationship with the beneficiary's foreign employer.

On motion, the AAO determined that the petitioner overcame the prior adverse finding regarding the petitioner's qualifying relationship with the beneficiary's foreign employer. However, in light of the petitioner's failure to address the AAO's concerns with regard to the beneficiary's employment abroad, the AAO determined that the petitioner effectively conceded the AAO's adverse finding. With regard to certain tax documents that the petitioner submitted in support of the first motion, the AAO declined to review evidence that was previously submitted and had been reviewed in the course of issuing the decision on appeal and whose evidentiary value was extremely limited given that the 2006 tax documents do not help to establish the petitioner's eligibility as of March 30, 2007 when the Form I-140 was filed.

The AAO also rejected the petitioner's submission of 2007 IRS Form W-2s, which were provided for the purpose of establishing whom the petitioner employed at the time of filing. In light of the fact that these documents were originally requested in an RFE notice dated March 31, 2009, the AAO declined to review these documents, which should have been submitted in response to the original notice instead of being offered for the first time on motion, which the petitioner filed on December 3, 2010, approximately twenty months after the request was issued. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

On the petitioner's current motion to reopen and reconsider, counsel asserts that the AAO failed to take into account the petitioner's reasonable needs in light of its overall purpose and stage of development. Counsel points to the two major divisions—trading and consulting services—within the petitioner's organization and asserts that the beneficiary oversees the work of five professional employees who provide services to the petitioner's clients.

Additionally, counsel challenges the AAO's earlier finding that IRS Form 1099s for 2006 were irrelevant. Counsel contends that the documents were submitted because they had been previously requested by the director in the RFE and further asserts that the documents are relevant for the purpose of establishing the petitioner's ongoing business operation.

The AAO will first turn to the regulations at 8 C.F.R. § 103.5(a)(2) which 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 does not state any new facts in support of the motion. Rather, counsel attempts to return to the basis for the director's original decision and the AAO's subsequent findings when reviewing the matter on appeal. However, the AAO points out that both the original denial and the AAO's appeal decision have been previously addressed in two separate decisions. In order to meet the requirements of this motion, the petitioner must provide evidence of new facts that came into being since the AAO issued its latest decision. Merely attempting to resurface previously addressed findings in order to overcome the original ground for denial will not satisfy the requirements of a motion to reopen.

Furthermore, with regard to counsel's assertion that the 2006 tax documents are relevant for the purpose of establishing that the petitioner had been doing business for one year, the AAO points out that neither the director nor the AAO (in either of its prior decisions) made any adverse findings regarding the issue of doing business. Therefore, the AAO affirms its prior finding that the 2006 tax documents were irrelevant to the discussion at hand.

Turning now to the motion to reconsider, the regulations at 8 C.F.R. § 103.5(a)(3) state, 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 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.

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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 the present 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 motion. Instead, counsel cites *Matter of Soriano,* asserting that the director "never requested additional evidence discussed in [the] AAO's discussion." As counsel failed to expressly say which "additional evidence" the AAO discussed that had not been previously requested by the director, it would appear that the objection stems from the additional ineligibility grounds the AAO discussed in its appellate decision. In reviewing the matter, the AAO notes that it allowed the submission of and actually conducted a review of evidence that the petitioner submitted with regard to the issue of a qualifying relationship. In fact, in its decision regarding the petitioner's first motion the AAO withdrew its adverse finding regarding the issue of a qualifying relationship, implicitly acknowledging that the petitioner's first opportunity to address the adverse finding would have been in the first motion. However, the petitioner did not address the AAO's second additional adverse finding with regard to the beneficiary's employment abroad. This failure to address the finding in the prior motion would preclude the petitioner from addressing that finding at a future time. Moreover, there is no evidence that the petitioner has addressed the adverse finding regarding the beneficiary's employment abroad. It is simply unclear from the little information counsel provides on motion what further evidence the petitioner is looking to submit beyond that which has already been submitted.

In light of the above, the petitioner's 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.

Lastly, the motion shall be dismissed for failing to meet an applicable requirement. The regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Because the instant motion did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

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.