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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: NOV 25 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: SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on September 6, 2012, the AAO dismissed the appeal. The petitioner subsequently filed a motion to reopen and reconsider the AAO's dismissal of the appeal. The AAO dismissed both motions and the matter is now before the AAO on a second motion to reopen and reconsider. The motion will be dismissed.

The petitioner is a Delaware corporation operating as a jewelry and art dealer. It seeks to employ the beneficiary as its president and general manager. 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.

On March 3, 2011, the director denied the petition on three alternative grounds, concluding that the petitioner failed to establish: (1) that it would employ the beneficiary in a qualifying managerial or executive capacity; (2) that the petitioner has a qualifying relationship with the beneficiary's foreign employer; and (3) that it has the ability to pay the beneficiary's proffered wage. On April 4, 2011, the petitioner appealed the denial disputing the director's findings. On September 6, 2012, the AAO dismissed the appeal. The AAO provided a thorough analysis of the evidence and determined that the record of proceeding contained insufficient evidence to establish eligibility for the benefit sought under the applicable statutory and regulatory provisions.

On October 5, 2012, the petitioner filed a motion to reopen and a motion to reconsider the AAO's decision. On June 29, 2013, the AAO dismissed the motion as the petitioner failed to submit any new evidence or cite any legal precedent or applicable law that would indicate an error on the part of the AAO in dismissing the petitioner's appeal.

On August 8, 2013, the petitioner filed the instant motion to reopen and motion to reconsider the AAO's decision of June 29, 2013. The petitioner presents a brief and additional evidence on motion.

First, turning to the motion to reopen, the regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "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 new facts submitted on motion must be material and previously unavailable, and could not have been discovered earlier in the proceeding. *Cf.* 8 C.F.R. § 1003.23(b)(3).

The instant motion consists of a brief submitted by the petitioner, a new organizational chart for the U.S. company, and additional information on the company's new business venture. On motion, the petitioner explains that its business has expanded into the wholesale and retail distribution of an

[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 NEW COLLEGE DICTIONARY 753 (2008)(emphasis in original).

alkaline water product called The petitioner claims that this new business development is relevant to the case as it has "caused a broader and bigger scope of work for [the beneficiary] as the President of the company." The petitioner goes on to explain the beneficiary's role in the business expansion and the steps she took to take on the distribution of this product in the Philippines. Here, the petitioner is presenting new evidence in an attempt to meet the requirements of a motion to reopen. However, the petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Thus, the documentation fails to meet the requirements for a motion to reopen at 8 C.F.R. § 103.5(a)(2). Accordingly, the motion to reopen will be dismissed.

The AAO will now consider the petitioner's motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by citations to pertinent statutes, regulations, and/or precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (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. *See* 8 C.F.R. § 103.5(a)(3) (requirements for a motion to reconsider) and the instructions for motions to reconsider at Part 3 of the Form I-290B.

In the instant matter, the petitioner states that it has multiple independent contractors receiving direction from the beneficiary, and it employs a marketing and sales staff, a bookkeeper, and an administrative assistant who perform the non-managerial duties for the company. The petitioner contends that the company's size is not indicative of the beneficiary's lack of executive status and references an AAO non-precedent decision where it was found that a sole employee was an executive. The reference made by the petitioner is not relevant in this case as the AAO found that the beneficiary primarily performs non-qualifying duties and the lack of subordinate staff indicates that she does not have employees to relieve her from performing such non-qualifying duties. In this instance, the lack of employees hinders the beneficiary from performing the duties of an executive or manager. In sum, the petitioner has not submitted any evidence that would meet the requirements of a motion to reconsider.

Furthermore, a review of the record and the prior decisions indicates that the director and the AAO properly applied the statute and regulations to the petitioner's case. The petitioner's primary complaint is that the AAO dismissed the appeal and subsequent motion; however, both the director and the AAO have provided the petitioner with detailed statements regarding the requirements to establish eligibility for the benefit sought. As previously discussed, the petitioner has not met its burden of proof and the denial was the proper result under the applicable statutory and regulatory provisions. Accordingly, the petitioner's claim is without merit. Thus, the motion to reconsider must be dismissed.

It should be noted for the record that, unless USCIS directs otherwise, the filing of a motion to reopen or reconsider does not stay the execution of any decision in a case or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. Accordingly, the motions will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.