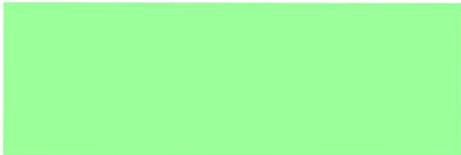


(b)(6)

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



U.S. Citizenship
and Immigration
Services

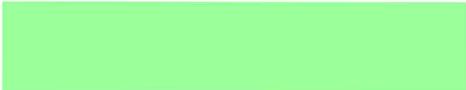


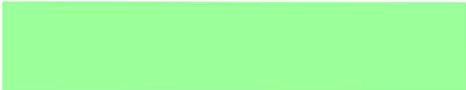
DATE: **NOV 29 2013**

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:



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,

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

 Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal and the petitioner's subsequently filed motion to reopen and motion to reconsider. The matter is now before the AAO on a second motion to reopen and a motion to reconsider. The motion will be dismissed; the director's and the AAO's decisions will remain undisturbed.¹

The petitioner is a Florida limited liability company that seeks to employ the beneficiary as the "functional manager" of an automotive body repair shop. Accordingly, the petitioner endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director denied the petition based on the following grounds: (1) the petitioner failed to establish that the beneficiary was employed abroad in a managerial or executive capacity; (2) the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity; and, (3) the petitioner failed to establish that it has been doing business for one year prior to filing the petition. In a decision dated September 19, 2011, the AAO dismissed the appeal affirming all three grounds for denial.

On October 18, 2011, counsel for the petitioner filed a combined motion to reconsider and motion to reopen. On the Form I-1290B, Notice of Appeal or Motion, counsel requested an "extension of 30 days to file our Brief because of the need to obtain affidavits and documents from a distant source, the founder and owner of the petitioner, who is currently in Trinidad." Counsel also stated that "new facts are available regarding the personnel employed by the petitioner" and emphasized that "this information is central to the motion to reopen." The petitioner did not submit any new evidence pertaining to its personnel. Counsel relied on *Matter of Obaigbena*, 19 I&N Dec. 553 (BIA 1988) in support of his request for an extension of time to submit a brief.

The AAO dismissed the motion to reopen and reconsider since a petitioner is not permitted additional time to submit a brief or additional evidence to the AAO in connection with a motion. As stated in the AAO's decision, an affected party has 30 days from the date of an adverse decision to file a motion to reopen or reconsider. *See* 8 C.F.R. § 103.5(a)(1)(i). If the adverse decision was served by mail, an additional three days are added to the proscribed period.

¹ The AAO notes that it previously reviewed the beneficiary's initial Form I-140 immigrant visa petition [redacted] on appeal. In the original petition, the petitioner represented itself as an importer and exporter of automobile products and not as an automotive body repair shop. The petitioner subsequently indicated a change in its business operations in the United States, noting that it would operate as a sign painting business and would provide management to a purportedly related auto body business.

The petitioner sought to employ the beneficiary as its marketing director. The AAO concluded that that the petitioner failed to establish: 1) that the beneficiary would be primarily employed in a managerial or executive position, or 2) the existence of the requisite qualifying relationship between the foreign and United States entities at the time of filing. The AAO dismissed the appeal on September 25, 2007.

8 C.F.R. § 103.5a(b). Any motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

In its decision, the AAO emphasized that, although the regulation at 8 C.F.R. § 103.3(a)(2)(vii) states that a petitioner may be permitted additional time to submit a brief or additional evidence to the AAO in connection with an appeal, no such provision applies to a motion to reopen or reconsider.

On April 5, 2013, counsel for the petitioner filed a second motion to reopen and reconsider. On the Form I-290B, counsel for the petitioner stated, in part, the following:

The Service denied the Motion to Reconsider without regard to *Matter of Obaigbena*, 19 I & N 553 (1988), a precedent decision which must be followed by the Service and which was summarily ignored in the denial dated March 7, 2013. This denial amounts to an abuse of discretion because it is contrary to law.

On appeal, counsel cites *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988), to stand for the proposition that a "motion to reconsider may be supported by a request for extension of time." Counsel further states that "if the Service is not going to honor *Obaigbena*, a precedent decision, the Service should explain in its response why it will not follow *Obaigbena*." Counsel also stated that "*Matter of Obaigbena* held that a petitioner must be afforded a reasonable opportunity to rebut the derogatory evidence cited in a notice of intention to deny his visa petition and to present evidence in his behalf before the district director's decision is rendered."

It is noted that the case cited by counsel relates to the submission of a response to a notice of intent to deny, and not to the submission of supporting evidence in support of a motion to reopen and reconsider. The case cited by counsel is distinguishable based on the applicable regulations, and counsel's reliance on *Matter of Obaigbena* is misplaced. USCIS regulations do not permit a petitioner to submit a brief within 30 days of filing a motion. The instructions to Form I-290B expressly state: "Although a petitioner may be permitted additional time to submit a brief and/or additional evidence to support an appeal, no such provision applies to motions. Any additional evidence must be submitted with the motion."

The regulation at 8 C.F.R. § 103.2(a)(1) provides:

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 C.F.R chapter 1 to the contrary, and such instructions are incorporated into the regulations requiring its submission.

Therefore, the AAO's decision to dismiss the motion based on the petitioner's failure to submit a brief and/or evidence with the motion was in accordance with the regulations governing motions. The motion was properly dismissed as it did not meet the requirements of a motion to reopen or reconsider. 8 C.F.R. § 103.5(a)(4).

The regulations 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." Furthermore, the regulation at 8 C.F.R. § 103.5(a)(2), governing motions to reconsider, 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 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.

Upon review of the record, even if counsel had timely submitted a brief and evidence in support of the previous motion, the motion would have been dismissed for failing to meet the requirements of a motion to reopen or a motion to reconsider. The untimely submitted "new" evidence consisted solely of brief affidavits from the beneficiary and [REDACTED] which summarized the beneficiary's duties with the petitioner and the foreign entity. The affidavits did not contain any information that could be deemed "new," nor did they address the specific deficiencies which were discussed at length in the AAO's decision dated September 19, 2011.

In his untimely filed brief in support of the prior motion to reconsider, counsel asserted that the AAO's decision discussed the petitioner's staffing levels but failed to take into account the reasonable needs of the organization, in compliance with section 101(a)(44)(C) of the Act. Counsel also cited Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. First, the AAO notes that counsel furnished no evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp.*, where the Fifth Circuit Court of Appeals decided in favor of the legacy Immigration and Naturalization Service (INS), or *Mars Jewelers, Inc.*, where the district court found in favor of the plaintiff. With respect to *Mars Jewelers*, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

In both *National Hand Tool Corp.* and *Mars Jewelers, Inc.*, the courts emphasized that the former INS should not place undue emphasis on the size of a petitioner's business operations in its review of an alien's claimed managerial or executive capacity. USCIS has interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. However, consistent with both the statute and the holding of *National Hand Tool Corp.*, the it is the petitioner's burden to establish that the beneficiary's position consists of primarily managerial or executive duties and that the petitioner will have sufficient personnel to relieve the beneficiary from performing operational and/or administrative tasks. The AAO's holding was based on the conclusion that the beneficiary

would not be primarily performing managerial duties; the decision did not rest on the size of the petitioning entity.

Further, the AAO's decision did in fact take into account the reasonable needs of the petitioning organization and cited to section 101(a)(44)(C) of the Act. The AAO discussed the beneficiary's claimed job duties in detail and found that the record reflected that, even if the petitioner had submitted evidence to support its claim that the company utilized the services of contract laborers, the petitioner indicated that the beneficiary's duties would include bookkeeping, providing estimates, purchasing parts and materials, accepting customer orders, handling deliveries, completing refinishing jobs and repainting cars. Therefore, while the AAO acknowledged that the beneficiary possesses the requisite level of authority, the petitioner did not have a reasonable need for the beneficiary, as the sole employee of an automotive repair shop, to perform primarily managerial duties given its overall purpose and stage of development.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden" of proof. *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden.

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).

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 sustained that burden. 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.