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 2 9 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)

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 ("the director") initially approved the employment-based preference visa petition. Based on additional information and further review of the record, the director determined that the petitioner was not eligible for the benefit sought, served the petitioner with a notice of his intention to revoke (NOIR) approval, and subsequently revoked approval of the Immigrant Petition for Alien Worker (Form I-140). The Administrative Appeals Office (AAO) rejected the petitioner's timely appeal as improperly filed in accordance with 8 C.F.R. § 103.3(a)(2)(v)(A)(1). Subsequently, the petitioner filed a motion to reopen or reconsider the AAO's decision, asserting that the appeal should not have been rejected. The director dismissed the motion as untimely but, as a matter of administrative discretion, the AAO considered the merits of the petitioner's claims and granted a *de novo* review of the record on certification.[1] The AAO affirmed the director's decision revoking the petitioner's approved Form I-140 petition. The matter is now before the AAO on a motion to reopen. The motion will be dismissed.

The petitioner, a Texas corporation, operates two gift shops and seeks to employ the beneficiary as its executive director. 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.

Although the director initially approved the petitioner's Form I-140, a Department of Homeland Security, Office of Fraud Detection and National Security (FDNS) report dated September 22, 2009 provided potentially derogatory information about the continued operations of both the petitioner and the foreign entity. Additionally, in reviewing the record of proceedings, the director determined that the record as it existed at the time of approval was lacking certain required initial evidence and thus the petition should not have been approved. Accordingly, the director issued a notice of intent to revoke (NOIR) the approval of the petition on January 19, 2010.

After considering the petitioner's response to the NOIR, the director revoked approval of the petition on March 12, 2010 concluding that the petitioner failed to overcome all of the bases for revocation. Specifically, the director revoked the approval based on a finding that the petitioner failed to establish: (1) that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity; (2) that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and (3) that the petitioner and the beneficiary's foreign employer have a qualifying relationship. The director's ultimate conclusions were based primarily on the evidence of record as opposed to the findings of the FDNS report.

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[1] Like any USCIS office, the AAO may avail itself of the certification process. *See* 8 C.F.R. § 103.4(a). As a matter of administrative discretion, the AAO may certify a decision to itself for review. The AAO limits this practice to cases involving exceptional circumstances; it "is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations . . . ." *Matter of Jean,* 23 I&N Dec. 373, 380 n 9 (AG 2002). Based on procedural errors by the director in the treatment of the petitioner's motion, the present case warrants such review.

The AAO reviewed the record on certification and affirmed the director's conclusions that the petitioner failed to provide evidence to meet the eligibility requirements for the requested classification and therefore concluded that the approval of the petition was properly revoked.

On motion, the petitioner submits an unsigned and undated brief asserting that USCIS erred by revoking the approval of the petition. Specifically, the petitioner asserts that USCIS' "findings of fraud are false" while acknowledging that the AAO stated that the approval was not in fact revoked based on any finding of fraud or information found in the FDNS report. Further, the petitioner requests that the matter be reopened and submits ten exhibits, identified as Exhibit A through Exhibit J, in support of its request.

After reviewing the brief and the exhibits, the AAO finds that the petitioner's submission does not meet the requirements of a motion to reopen. The discussion below will address the requirements of a motion to reopen and explain how the supporting evidence falls short of meeting the relevant regulatory provisions.

The regulation at 8 C.F.R. § 103.5(a)(2) states, 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.[2]

In this matter, the petitioner submitted an unsigned and undated brief in support of its motion. The brief includes another duty description for the beneficiary's employment abroad and with the U.S petitioner, and additional duty descriptions for other employees. Further, the petitioner provides additional discussion about the qualifying relationship between the foreign company and the U.S. petitioner but does not address the dispositive fact that the foreign company is no longer in existence. The declarations provided on motion are not affidavits as they were not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, do they contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. Such unsworn statements made in support of a motion are not evidence and thus, as is the case with the arguments of counsel, are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

None of the petitioner's exhibits could be characterized as 'new' for the purpose of reopening this matter since all evidence submitted on motion was either available or discoverable prior to this proceeding. Some of the evidence has already been submitted and considered. Of the remaining

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[2] 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).

exhibits, the petitioner fails to explain their relevance or why they satisfy the requirements of a motion to reopen.

Specifically, exhibits A and B are copies of the beneficiary's Form I-94 documents dated June 11, 1999 and May 22, 2000 respectively. These documents are not new and the petitioner did not explain why they are relevant to this motion. Further, the petitioner submitted an unsigned and undated copy of its Policy and Procedure Manual as Exhibit C and its Employee Evaluation Form as Exhibit D but failed to explain why the documents had not been presented earlier or why they are relevant to the issue of the beneficiary's employment with the petitioner in a managerial or executive capacity. The petitioner submits three documents in support of its assertion that the beneficiary was employed abroad in a primarily managerial or executive capacity: (1) the foreign company's partnership deed dated January 1988 (Exhibit E); (2) the petitioner's letter dated May 21, 2003, which was submitted in support of a request to extend this beneficiary's L-1A visa (Exhibit F); and (3) the beneficiary's payroll records with the foreign employer for the period July 1999 through August 2000 (Exhibit G). Exhibits E and G were available and could have been presented prior to filing this petition, in response to the NOIR, or even on appeal and therefore, cannot be considered new. Furthermore, many payroll and wage documents were already submitted and considered in this matter. Exhibit F is dated after the original filing of this petition but it is a letter prepared by the petitioner and it could have been crafted at any time in support of this petition, therefore it is not new. The petitioner's 2002 organizational chart (Exhibit H), the petitioner's 2002 wage and tax statements for all employees (Exhibit I), and a joint venture agreement between the foreign company and the petitioner dated December 3, 1999 (Exhibit J) were all available or could have been discovered prior to this proceeding and therefore, they are not new and do not satisfy the requirements of a motion to reopen.

Although the petitioner did not explicitly move for reconsideration of this matter, the AAO notes that the requirements of such a motion have not been met.

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 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.

The petitioner did not cite any legal precedent or applicable law that would indicate a misapplication of law or USCIS policy part of the AAO. 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.

Furthermore, 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." 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. Therefore, 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.

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, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not sustained that burden.

ORDER: The motion is dismissed.