



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **OCT 04 2013**

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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,

Ron Rosenberg
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), which dismissed the appeal. The matter came before the AAO on two subsequent motions to reopen, both of which the AAO dismissed. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be dismissed.

The petitioner is a California corporation that seeks to employ the beneficiary as its vice 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 in a managerial or executive capacity.

The petitioner filed an appeal disputing the denial. The AAO dismissed the appeal, affirming the director's finding, and added the following three findings beyond the director's decision: (1) the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity in her proposed position with the U.S. entity; (2) the petitioner failed to establish that it had been doing business for at least one year prior to filing the Form I-140; and (3) the petitioner failed to establish that the foreign entity continued to do business abroad, thus precluding an affirmative finding that the petitioner continues to be a "multinational" organization.

The petitioner proceeded to file to successive motions - the first in response to the dismissal of the appeal and the second in response to the dismissal of the first motion - each supported by an identical supplemental brief and nearly identical supporting document. Both briefs included job descriptions of the beneficiary's direct subordinates as well as an additional percentage breakdown that pertained to the beneficiary's employment with the foreign entity. Counsel also contended that the foreign entity continues to do business and that the petitioner had been doing business for the requisite one-year period prior to filing the Form I-140. Counsel offered non-binding and non-precedent decisions in support of her assertions and asked the AAO to consider the following documents as new evidence:

1. Copies of the foreign entity's and the petitioner's previously submitted organizational charts.
2. Foreign documents pertaining to the educational credentials of the foreign entity's and the petitioner's employees.
3. The petitioner's 2009 and 2010 tax returns as well as the petitioner's quarterly sales and use tax history for all four quarters in 2011.
4. Photocopied images of what appear to be the exterior and interior of the petitioner's business premises.
5. The petitioner's business lease commencing on June 18, 2011.
6. The petitioner's fictitious name renewal document showing that it commenced using the name ' [REDACTED] ' on July 23, 2003.
7. The petitioner's bank statements from July through December 2011.

8. The foreign entity's tax assessment document for the 2011-2012 tax year.
9. A statement dated September 23, 2009 from the foreign entity's CEO attesting to the beneficiary's employment abroad from 1997 through May 2002. The statement included a general discussion of the beneficiary's overseas employment.
10. Foreign documents pertaining to the beneficiary's education.

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.¹

In the decision that pertained to the second motion, the AAO pointed out that it had previously addressed the petitioner's submissions and brief in the decision pertaining to the first motion. The AAO concluded that only the petitioner's tax returns, bank statements, and business lease and the foreign entity's tax assessment could be deemed as truly unavailable. However, the AAO rejected these previously unavailable documents based on case law precedent, which determined that the petitioner must establish eligibility based on facts and circumstances that existed at the time of filing, not based on a new set of facts that came about after the petition was filed. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In both of its prior decisions the AAO properly declined to consider facts and/or circumstances that had not materialized until after the filing of the petition, finding such documents to be irrelevant to the question of whether the petitioner had established its eligibility at the time of filing. The AAO further found that several of the documents that had been previously submitted on appeal (Nos. 1 and 9) also do not qualify as previously unavailable documents. The AAO pointed out that such documents were considered when they were originally submitted on appeal.

With regard to the remainder of the documents, including photographs of the interior and exterior of the petitioner's business premises, the fictitious name renewal document, and the foreign documents that pertain to the beneficiary's educational credentials, the AAO concluded that such documents were previously available and thus could have been submitted prior to the petitioner's first motion.

On current motion, which was filed by a different attorney from the same firm, counsel offers the same brief and supporting documents for a third time, despite the fact that the AAO dismissed the petitioner's two previously filed motions based on the conclusion that neither the brief nor the supporting documents were sufficient to meet the requirements for a motion to reopen.

In light of the above, the petitioner's motion to reopen will be dismissed.

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 (3rd Ed., 2008) (emphasis in original).

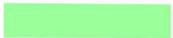
Notwithstanding the identical contents of the supporting evidence, the petitioner's current counsel marked Part 2 of the instant Form I-290B to indicate that the instant filing is a combined motion to reopen and reconsider. Therefore, the AAO will now consider the petitioner's submissions under 8 C.F.R. § 103.5(a)(3), which states the criteria for a motion to reconsider.

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 U.S. Citizenship and Immigration (USCIS) policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new or previously unavailable evidence. *See Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991).

A motion to reconsider cannot be used to raise a legal argument that could have been raised earlier in the proceedings. *See Matter of Medrano*, 20 I&N Dec. 216, 220 (BIA 1990, 1991). Rather, the "additional legal arguments" that may be raised in a motion to reconsider should flow from new law or a *de novo* legal determination reached in its decision that could not have been addressed by the party. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). Further, a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. *Id.* Instead, the moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *Id.* at 60.

In the present matter, the petitioner has presented a brief and supporting evidence that are virtually identical in content to the petitioner's prior submissions, which had been considered and addressed when originally submitted. Even though the petitioner is represented by different counsel, the current motion offers no new arguments or in any way addresses or acknowledges the AAO's prior adverse findings, including the adverse finding issued in the latest decision dated July 23, 2013, where the AAO discussed the petitioner's change in ownership, concluding that the redistribution of the petitioner's stock significantly altered the ownership scheme such that the petitioner and its former foreign affiliate can no longer be deemed as having similar ownership and control—the two elements that are crucial in order for the petitioner and the foreign entity to be deemed as having a qualifying relationship. *See Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Assoc. Comm. 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

In light of the above adverse findings, the instant 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.



(b)(6)

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). Here, the petitioner has not sustained that burden.

ORDER: The motion is dismissed.