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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: OCT 2 8 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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition. The petitioner appealed the matter to the Administrative Appeals Office (AAO). The appeal was dismissed. The petitioner subsequently filed a motion to reopen and reconsider, which the AAO also dismissed. The matter is now before the AAO on a second motion to reopen and reconsider. The motion will be dismissed.

The petitioner is a Texas organization that seeks to employ the beneficiary as its president and chief executive officer (CEO). The petitioner seeks 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 based on the determination that the petitioner had failed to establish that it had been doing business in the United States for one full year prior to filing this petition as required by 8 C.F.R. § 204.5(j)(3)(i)(D). On appeal, counsel asserted that the service center erroneously deemed the petitioner as a new office without taking into account the fact that the petitioner has an ownership interest in an entity that had been operating since 2005.

On May 17, 2011, the AAO dismissed the petitioner's appeal concluding that while the petitioning entity purchased an existing business that predated the petitioner itself, the record was devoid of evidence establishing that the petitioner replaced or absorbed the rights and obligations of its predecessor. The AAO pointed out it would have been factually impossible for the petitioner to have been doing business as of January 29, 2008, i.e., one year prior to the filing of the instant Form I-140, given that the petitioner was incorporated on September 4, 2008. Even if the petitioner had been able to establish that it was engaged in the "the regular, systematic, and continuous" course of business since the date of its incorporation, it could not have been doing business one year prior to the filing date of the petition. *See* 8 C.F.R. § 204.5(j)(3)(i)(D).

Additionally, the AAO concluded, beyond the director's decision, that the job descriptions the petitioner submitted in support of the petition with regard to the beneficiary's foreign and proposed employment were overly vague and failed to disclose the specific job duties the beneficiary performed abroad and those he would perform in his proposed position with the U.S. entity. The AAO determined that the petitioner did not provide sufficient relevant information pertaining to the beneficiary's foreign and proposed employment and concluded that the petitioner failed to establish that the beneficiary had been employed abroad, and would be employed in the United States, in a qualifying managerial or executive capacity.

On motion, counsel provided a brief in which he raised statements he had made in support of the appeal with regard to the doing business filing requirement at 8 C.F.R. § 204.5(j)(3)(i)(D). Counsel also addressed the issue of the petitioner's qualifying relationship with the beneficiary's foreign employer, which was not raised either by the director in the original decision or by the AAO on appeal. Counsel also disputed the AAO's findings with regard to the beneficiary's foreign and proposed employment and provided vague job duties that were similar to those provided in the January 21, 2009 statement submitted originally in support of the petition. Although counsel claimed that a business plan, an organizational chart, and a list of positions and duties was presented as part of

Exhibit 3 in support of the first motion, the petitioner's supplemental documents were not actually labeled to indicate which submission represented "Exhibit 3" and of the three documents counsel claimed as part of Exhibit 3, only a business plan was provided to support the motion. Other supplemental documents included the petitioner's stock certificate and share transfer ledger, the minutes of a reorganizational meeting that took place on September 4, 2008, a copy of the petitioner's 2009 tax return, and the petitioner's state employer's quarterly reports for the second, third, and fourth quarters of 2010 and for the first quarter of 2011.

The AAO reviewed the above-referenced documents and determined that the petitioner failed not meet the requirements of a motion to reopen or a motion to reconsider.

In support of the current motion, counsel provides a brief that is identical in content to the brief that he provided earlier in support of the petitioner's prior motion. The petitioner also provides additional supporting evidence in the form of a 2011 corporate tax return, employer's quarterly reports from 2012 and the first quarter of 2013, the petitioner's beer retailer's off premise license issued on December 8, 2011, a similar license issued on June 1, 2012 regarding tobacco retail, and various invoices showing purchased made by the petitioner in 2013.

Turning first to the motion to reopen, 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 instant matter, the motion is primarily supported by documents that reflect circumstances and events that took place after the petition was filed. However, a 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. 1971). Therefore, evidence of events that had not materialized at the time the petition was filed are irrelevant in the instant proceeding and do not meet the requirements of a motion to reopen.

Next, turning to the requirements for a motion to reconsider, 8 C.F.R. § 103.5(a)(3) states that the motion 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 Services (USCIS) policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider contests the correctness of the prior 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).

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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).

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 or on prior motion and seek reconsideration by generally alleging error in the prior decision(s). *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.

Counsel failed to support his motion with any precedent decisions or other comparable evidence to establish that the decision was based on an incorrect application of law or USCIS policy. Rather, counsel reiterated the points made previously in the appellate brief and in support of the earlier motion and addressed an issue - that of the petitioner's qualifying relationship with the beneficiary's foreign employer – which is irrelevant to the instant proceeding given that neither the director nor the AAO issued an adverse finding with regard to that issue.

In light of the deficiencies described above, the 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.

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, that burden has not been met.

ORDER: The motion is dismissed.