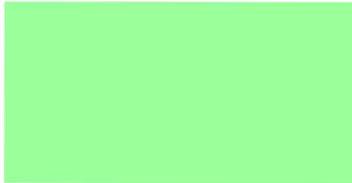


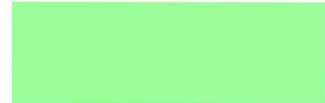


U.S. Citizenship  
and Immigration  
Services

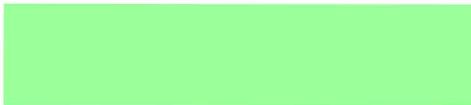
(b)(6)



DATE: **SEP 09 2013** OFFICE: TEXAS SERVICE CENTER



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 preference visa petition was denied by the Director, Texas Service Center. The petitioner subsequently filed a motion to reopen and reconsider, which the director dismissed. The petitioner filed an appeal with the Administrative Appeals Office (AAO). The appeal was dismissed resulting in the filing of 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 AAO will dismiss this motion.

The petitioner is a healthcare and IT staffing services provider that seeks to employ the beneficiary as its director of international recruitment and immigration. 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 and the petitioner's subsequently filed motion to reopen concluding that the petitioner failed to establish that the beneficiary's proposed employment with the U.S. entity would be within a qualifying managerial or executive capacity or that the initial job opportunity was a legitimate job offer. Although the director granted the petitioner's subsequently filed motion, he affirmed his prior decision denying the petition.

The petitioner appealed the director's decision and the appeal was dismissed in a decision dated June 19, 2012. The AAO determined that the petitioner failed to provide sufficient evidence to establish that the beneficiary's time spent performing tasks within a qualifying managerial or executive capacity would exceed the time spent performing non-qualifying operational tasks. The AAO observed that the petitioner made material changes to the Form I-140 by significantly altering the beneficiary's job duties when responding the director's request for evidence (RFE). The AAO noted that the petitioner failed to provide evidence to show that the petitioner has offices in the countries that it listed in the organizational chart. Finally, the AAO concluded, beyond the decision of the director, that the petitioner did not establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity because it failed to provide sufficient evidence of the job duties the beneficiary performed during his employment abroad.

On motion, the petitioner disputed the AAO's decision and attempted to explain why such findings were incorrect. The petitioner also cited to a Massachusetts criminal court case and provided additional documents in support of the motion.

The AAO determined that the petitioner provided documents that were not new or previously unavailable. With regard to the petitioner's citation of the Massachusetts criminal court case, the AAO found that the petitioner failed to establish that the case was relevant to the matter at hand.

In support of the current motion, the petitioner provides another brief denying that material changes were made to the original petition, despite the AAO's earlier finding. The petitioner asserts that the AAO failed to consider the totality of the evidence which included a supplemental list of job duties and an organizational chart. The petitioner further contends that the director should have issued a request for evidence (RFE) or a notice of intent to deny (NOID) prior to denying the petition and the fact that neither notice was issued should have been taken into account when the matter was being reviewed on appeal.

In sum, the petitioner did not provide any new or previously unavailable evidence in support of a motion to reopen, nor did the petitioner support the motion to reconsider by citing pertinent precedent decisions to establish that the AAO's decision was based on an incorrect application of law or Service policy. In fact, contrary to the petitioner's assertion, the regulation at 8 C.F.R. § 103.2(b)(8)(iii), which addresses the issuance of RFEs and NOIDs, states that the director "may" in his discretion issue an RFE or NOID or, he/she may deny the petition based on the determination that the petitioner has failed to establish eligibility. The regulations do not require the director to issue an RFE or NOID in order to allow the petitioner the opportunity to overcome any adverse findings prior to issuing a final notice of denial.

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.<sup>1</sup>

As indicated above, the petitioner has not provided new or previously unavailable evidence for the AAO to consider. Therefore, the petitioner does not meet the requirements of a motion to reopen.

Finally, with regard to a motion to reconsider, the petitioner must state the reasons for reconsideration and support the motion with 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 or on prior motion and seek reconsideration by generally alleging error in the prior decision. *Id.*

As previously indicated, the petitioner has not provided adequate evidence to support its motion to reopen or its motion to reconsider. Accordingly, 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.

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<sup>1</sup> 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).

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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, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

**ORDER:** The motion is dismissed.