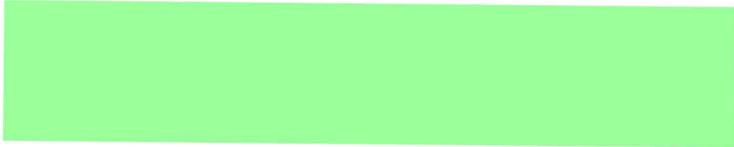




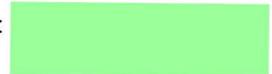
U.S. Citizenship  
and Immigration  
Services

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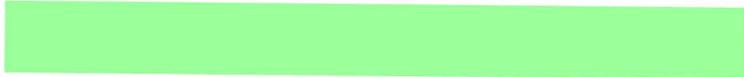


DATE: **SEP 12 2013** OFFICE: NEBRASKA SERVICE CENTER

FILE:

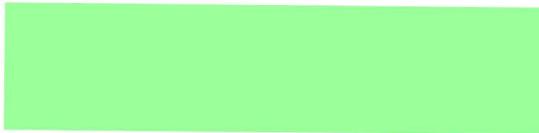


IN RE: Petitioner:  
Beneficiary:



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 preference visa petition was denied by the Director, Nebraska Service Center. The petitioner appealed the matter to the Administrative Appeals Office (AAO). The appeal was dismissed. The matter is now before the AAO on motion to reopen and reconsider. The motion will also be dismissed.

The petitioner is a limited liability company organized in the State of Maryland. 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 based on the determination that the petitioner failed to establish that the beneficiary would be employed with the U.S. entity in a qualifying managerial or executive capacity.

The petitioner appealed the denial disputing the director's decision. In a decision dated May 16, 2013, the AAO dismissed the appeal, affirming the director's determination. The AAO emphasized the petitioner's failure to provide an adequate job description in response to the director's specific request for this evidence. The AAO observed that the petitioner merely added a percentage breakdown to a previously existing job description, despite the fact that the job description had been reviewed and deemed to be deficient.

The petitioner now files a motion claiming that prior counsel was responsible for the petitioner's failure to submit sufficient evidence regarding the beneficiary's proposed U.S. employment. However, the record shows that the instant motion was untimely filed and therefore must be dismissed on that basis.

The regulation at 8 C.F.R. § 103.5(a)(1) states the following in pertinent part:

- (i) Any motion to reconsider an action by the Service filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before the Service filed by an applicant or petitioner, must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires, may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner.

In the present matter, the record shows that despite the petitioner's initial attempt to file the motion on June 13, 2013, U.S. Citizenship and Immigration Services (USCIS) rejected the filing, indicating that the Form I-290B, Notice of Appeal or Motion, was not submitted with the proper signature of the individual who prepared the form. The petitioner then resubmitted the Form I-290B with the proper signature. However, the properly executed motion was not received until June 26, 2013, or 41 days after the AAO's decision was issued.

Although the above regulation indicates that an untimely filed motion to reopen may be excused if the delay was reasonable and beyond the control of the petitioner, the same provisions do not apply to a motion to reconsider. Furthermore, there is no indication in the instant record that the untimeliness of the motion was

the result of circumstances that were beyond the petitioner's control. Therefore, the motion must be dismissed due to its untimely filing.

The AAO further notes that even if the motion had been timely filed, it would nevertheless be dismissed based on the petitioner's failure to meet the motion requirements.

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>

In the present matter, the motion is supported entirely by a job description, which was created in response to the AAO's decision, and sales and shipping invoices, all of which are dated after the filing of the petition and do not reflect facts or circumstances that existed when the petition was filed. The 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, any evidence of events that had not materialized when the petition was filed is irrelevant in the instant proceeding. Regardless, none of the evidence submitted in support of the motion can be deemed as new or previously unavailable. Therefore, the petitioner's submissions do not meet the requirements of a motion to reopen.

Finally, 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 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.

In the instant case, counsel does not cite any legal precedent or applicable law that would indicate an error on the part of the AAO in dismissing the petitioner's appeal.

In light of the above, the motion to reopen and reconsider, if timely filed, would have been 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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*NON-PRECEDENT DECISION*

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Regardless, the instant motion will be dismissed due to its untimely filing.

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.