



U.S. Citizenship
and Immigration
Services

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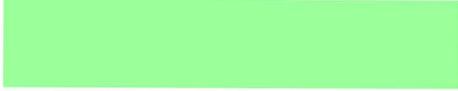


DATE: OFFICE: NEBRASKA SERVICE CENTER FILE:

SEP 23 2013



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 and the petitioner filed a second appeal with the AAO. The second appeal was rejected as improperly filed. The matter is now before the AAO on motion to reopen and reconsider. The motion will be dismissed.

The petitioner is a limited liability company organized in the State of Florida. It seeks to employ the beneficiary as its director of operations. 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 would be employed in a managerial or executive capacity.

The petitioner appealed the denial disputing the director's findings. The AAO dismissed the appeal stating that the petitioner provided a deficient job description and failed to determine that it was adequately staffed to relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying tasks.

The petitioner then proceeded to file a second appeal attempting to address the grounds for denial for a second time. Accordingly, the AAO rejected the second appeal, deeming it as improperly filed based on the AAO's lack of jurisdiction to consider appeals of its own decisions. 8 C.F.R. § 103.1(f)(3)(iii). The AAO further determined that even if the petitioner had properly filed a motion to reopen and/or reconsider the decision dismissing the appeal, the motion would have been dismissed, nevertheless, because the petitioner failed to meet the criteria delineated at 8 C.F.R. § 103.5(a)(2), which pertains to the motion to reopen, or the criteria discussed at 8 C.F.R. § 103.5(a)(3), which pertains to a motion to reconsider. See 8 C.F.R. § 103.5(a)(4).

The petitioner now files a motion to reopen and reconsider seeking to address the January 10, 2011 decision in which the AAO addressed the merits of the director's decision and dismissed the appeal based upon adverse findings with regard to the petitioner's eligibility.

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

As previously indicated, the petitioner does not bring to light any new facts nor introduce any evidence that was previously unavailable. Therefore, the petitioner's supporting statement does not meet the requirements of a motion to reopen.

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).

Next, the AAO will address the requirements 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 prior 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 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).

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 this case, counsel failed to support his motion with any precedent decisions or other comparable evidence to establish that the AAO’s decision was based on an incorrect application of law or USCIS policy. In fact, counsel’s supporting statement is limited to arguments that could have been raised earlier in these proceedings. Therefore, the petitioner’s supporting statement does not meet the requirements of a motion to reconsider.

Accordingly, the petitioner’s 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, 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.