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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: SEP 25 2013 OFFICE: NEBRASKA SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

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 this denial to the Administrative Appeals Office (AAO). On June 25, 2013, the AAO dismissed the appeal. The matter is now before the AAO on a motion to reopen and a motion to reconsider, in accordance with 8 C.F.R. § 103.5. The AAO will dismiss the motion.

The petitioner filed this immigrant petition seeking to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner, a California corporation established in March 2002, states that it operates an import and export business with "1-5" current employees and a gross annual income of "approx. $146,000." The petitioner is seeking to employ the beneficiary as its president/executive manager.

On February 27, 2009, the director denied the petition on two alternative grounds, concluding that the petitioner failed to establish that: (1) the beneficiary was employed abroad, or will be employed by the petitioner, in a qualifying managerial or executive capacity; and (2) the beneficiary was an "employee" of the foreign entity and will be an "employee" of the petitioner. In denying the petition, the director found that the beneficiary's detailed weekly breakdown of job duties demonstrates that the beneficiary spends the majority of his time performing non-qualifying tasks related to sales, purchasing, inventory, and other functions, along with occasional supervision of nonprofessional employees. The director noted that while the foreign entity's organizational chart indicates that there were workers or contractors in the areas of sales, transport, warehousing and accounting, the position description provided, for the beneficiary's position abroad, was essentially the same as that provided for the beneficiary's position in the U.S. company. The director determined that the description therefore indicated that he spent the majority of his time performing non-qualifying tasks related to sales, purchasing, inventory and other functions, and supervised non-professional employees. Furthermore, the director noted that the beneficiary and his wife are co-owners of the U.S. and foreign entities, and therefore the beneficiary could not be considered an employee of the foreign entity or serve as an employee of the U.S. petitioning company.

The petitioner subsequently filed an appeal to the AAO. On appeal, counsel for the petitioner asserted that the service erred in its findings and that the petitioner has established that the beneficiary is and will be employed in both a managerial and an executive capacity. Counsel contended that the position description provided establishes that the beneficiary will be employed in a qualifying managerial or executive capacity. The petitioner submitted a duplicate copy of the beneficiary's daily breakdown of duties and indicated that the evidence establishes that the beneficiary spends 53.3%, of his time on executive duties and 46.7% of his time on managerial duties. Counsel asserted that the position descriptions provided for the beneficiary and the foreign entity's other employees establish that he performed primarily managerial and executive duties and that the foreign entity had sufficient staff to relieve him from involvement in non-qualifying tasks. Counsel further asserted that the U.S. petitioner is incorporated and the beneficiary is an employee of the corporation.

On June 25, 2013, the AAO dismissed the appeal and affirmed the director's decision to deny the petition, concluding that the petitioner failed to establish that the beneficiary was employed abroad, or will be employed by the petitioner, in a qualifying managerial or executive capacity. In its decision, the AAO

thoroughly addressed counsel's objections to the denial of the petition in a 13-page decision. The AAO found that, although the petitioner submitted a breakdown of the beneficiary's daily routine for one week and indicated the tasks he would be performing, the petitioner did not provide sufficient information detailing the beneficiary's duties at the U.S. company to demonstrate that these duties qualify him as a manager or as an executive. The petitioner categorized each of the beneficiary's duties as either managerial or executive and concluded that he spent 53.3% of his time on executive duties and 46.7% of his time on managerial duties; however, the AAO found that the majority of the duties listed for the beneficiary, which the petitioner indicated would account for more than half of his time, are actually non-qualifying duties. The AAO further found that the U.S. petitioning company does not have sufficient staff to relieve the beneficiary from performing non-qualifying operational duties associated with providing the petitioner's products and services. The AAO noted that the petitioner did not provide a description of the duties the beneficiary performed prior to his relocation to the U.S. or evidence of the staffing of the foreign entity for the relevant time period. The AAO also noted that the only position description provided for the beneficiary's foreign employment closely resembles the description provided for the U.S. employment and therefore, does not meet the requirements of a position in a qualifying managerial or executive capacity at the foreign entity.

As it related to the issue of the beneficiary's status as an "employee" of the foreign entity and U.S. company, the AAO withdrew the director's decision and found no need to further explore the issue of an employer-employee relationship between the beneficiary and its foreign and U.S. employers.

The petitioner subsequently filed the instant motion to reopen and motion to reconsider the AAO's decision dated June 25, 2013. On motion, counsel for the petitioner submits a brief in which she addresses the AAO's grounds for dismissing the appeal.

The regulation at 8 C.F.R. § 103.5(a)(2) states:

> 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.

The regulation at 8 C.F.R. § 103.5(a)(3) states:

> 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 Services (USCIS)] 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.

The regulation at 8 C.F.R. § 103.5(a)(4) states, in pertinent part: "A motion that does not meet applicable requirements shall be dismissed."

The instant motion consists of a "memorandum" submitted by counsel. First, counsel for the petitioner addresses the employer-employee relationship between the beneficiary and its foreign and U.S. employers. Counsel states that the AAO's decision on this issue "is not understood." In its decision, the AAO specifically stated that, "the decision of the director will be withdrawn as it relates to the beneficiary's status as an employee." As such, this issue is no longer relevant in these proceedings.

Second, counsel for the petitioner addresses the beneficiary's role in a position of a primarily managerial or executive capacity. Counsel indicates that the AAO failed to consider evidence presented on appeal, in the form of a print-out from the U.S. Department of Labor (DOL), Bureau of Labor Statistics' Occupational Outlook Handbook (OOH) outlining how executives function, in which the duties listed are very similar to those ascribed to the beneficiary. While the petitioner offers this as supporting evidence, these documents have little probative value as they were not created within the scope of the statutory definitions of managerial or executive capacity and, as such, do not help to establish that individuals who fit the generalized DOL position overview for executives or managers must necessarily fit the statutory definitions that apply to the matter at hand.

Counsel also addresses the AAO's focus on the petitioner's lack of employees and references an AAO non-precedent decision where it was found that a sole employee was an executive. The reference made by counsel if not relevant in this case as the AAO found that the beneficiary primarily performs non-qualifying duties and the lack of subordinate staff indicates that he does not have employees to relieve him from performing such non-qualifying duties. In this instance, the lack of employees hinders the beneficiary from performing the duties of an executive or manager. Counsel then mentions that the decision "makes much" of a 2007 quarterly return, when this is not the case. In its decision, the AAO's decision simply acknowledged all of the evidence presented by the petitioner to demonstrate the existence of its employees, including the referenced quarterly return.

Third, counsel for the petitioner addresses the beneficiary's employment abroad in an executive or managerial capacity and simply states that the AAO decision "uses almost identical language in evaluating the job duties of the beneficiary for the Mexican company." Counsel asserts that the work flow of items between the U.S. and Mexican corporations was extensive and clearly showed that the beneficiary was engaged in an executive position. This assertion is not accurate. In its decision, the AAO clearly stated that the petitioner did not provide information specifically for the time period the beneficiary was employed abroad; the AAO found that the petitioner submitted inconsistent information about the foreign entity's staff at the time the beneficiary was employed. The AAO further found that the only position description provided for the beneficiary's employment abroad closely resembled the position description provided for his U.S. position, and therefore the AAO did not discuss it in detail twice, but rather referenced its analysis of the description for the U.S. employment.

Finally, counsel for the petitioner addresses "errors in the AAO decision," which counsel contends suggest that the file reviewed was not the one related to this case. This assertion is not accurate. Counsel first reiterates its contention that the AAO ignored the evidence presented on appeal, such as the DOL materials.

This was discussed above and will not be re-addressed. Counsel contends that the decision contains errors related to the documentation; counsel references the U.S. organizational chart and discusses the heading of "impo/expo department." Counsel states that this heading does not appear on the U.S. organizational chart, but does appear on the foreign chart and contends that the U.S. chart submitted on appeal was not considered in the decision. This is not accurate. A review of the record clearly demonstrates that the AAO's decision was referring to the U.S. organizational chart submitted with the initial evidence and said chart clearly states "impo/expo department" as a heading. The organizational chart discussed in support of the appeal does state "import/export department" as stated by counsel. It is clear that the AAO did not err in its references to the multiple organizational charts submitted in this case.

Counsel's final issue relates to the date of the RFE. Counsel is correct in that the RFE date mentioned in the AAO decision was incorrect. However, said error is merely an oversight and does not impact the decision in this matter. Counsel contends that the use of the erroneous date suggests that the AAO was not reviewing the file related to this case, but this contention is not valid as all the facts discussed in detail in the appellate decision are relevant to the matter at hand. The fact that the AAO entered an incorrect date in error does not discredit its decision based on the facts in the record.

The AAO's review in this matter is limited to the narrow issue of whether the petitioner has presented and documented new facts or documented sufficient reasons, supported by pertinent precedent decisions, to warrant the re-opening or reconsideration of the AAO's decision issued on June 25, 2013. In the current proceeding, counsel has not adequately addressed the grounds stated for dismissal of the appeal.

In addition, the regulation at 8 C.F.R. §103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." The petitioner's motion does not contain this statement. The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion does not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. The motion will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. Accordingly, the motion will be dismissed, the proceedings will not be reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.