



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE:

SEP 25 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 preference visa petition was denied by the Director, Texas Service Center. The petitioner appealed the matter to the Administrative Appeals Office (AAO). The appeal was dismissed resulting in the petitioner's 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 motion will be dismissed.

The petitioner is a Florida corporation that seeks to employ the beneficiary as its executive. 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 reviewed the petitioner's submissions and determined that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive position for at least one out of the three years prior to his entry to the United States as a nonimmigrant to work for the petitioning employer. 8 C.F.R. § 204.5(j)(3)(i)(B). The second ground for denial was based on the common law definition of the term "employee." Namely, the director concluded that the petitioner failed to establish that it and the beneficiary would have an employer-employee relationship. Given the two adverse findings, the director issued a decision dated August 18, 2009 denying the petitioner's Form I-140.

The petitioner subsequently filed an appeal disputing the director's findings. The AAO dismissed the appeal, rejecting the petitioner's reliance on the *Adjudicator's Field Manual* (AFM). The AAO determined that reliance on the AFM was misplaced, and clarified that the AFM is an internal tool that is intended for use by USCIS employees in the course of their reviews of petitioners' respective records. The AAO stated that the AFM is not to be used as a substitute for statutory or regulatory provisions and noted that the AFM does not have the effect of binding precedent.

The AAO concluded that the petitioner failed to properly address the issue of the beneficiary's employment abroad, which served as the main basis for denial. The AAO declined to address the issue that dealt with the common law definition of "employee," concluding that there was no need to address the common law issue when there was a clear statutory basis for dismissing the appeal.

In support of the first motion, counsel submitted a brief asserting that the AAO dismissed the appeal based on "an incorrect factual basis, and incorrect misrepresentation of the full decision." Counsel inexplicably contended that the AAO failed to address the issue of a qualifying relationship, despite the fact that this issue was not a basis for the director's denial, and proceeded to restate portions of the director's discussion regarding the common law definition of the term "employee," making references to regulations that pertain to the L-1 nonimmigrant petition for intracompany transferees.

The AAO dismissed the petitioner's motion, concluding that counsel did not introduce any new facts or evidence in support of a motion to reopen. With regard to the motion to reconsider, the AAO determined that the precedent case law that counsel cited in his supporting brief did not establish that the AAO's decision on appeal was based on an incorrect application of law or Service policy pursuant to 8 C.F.R. § 103.5(a)(3).

In support of the current motion to reopen and reconsider, counsel submits another brief in which he again raises the issue of employer-employee relationship between the petitioner and the beneficiary and cites precedent case law that addresses only the common law issue. Counsel again fails to address the beneficiary's employment abroad, despite the fact that the AAO's finding on appeal was based primarily on this issue. Counsel asks the AAO to consider what he deems as new evidence, which consists of the foreign entity's balance sheet for 2012, the petitioner's quarterly tax returns and employer's reports for 2012 and 2013, the petitioner's federal tax return for 2011, and a federal tax return for [REDACTED] for 2012.

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 case, the petitioner's motion to reopen is primarily based on documents that are entirely irrelevant to the issue of the beneficiary's employment capacity abroad, which is the primary basis for denial. Moreover, a number of the documents were available at the time the petitioner filed its prior motion.

Next, with regard to the petitioner's motion to reconsider, it is noted that in order to meet the regulatory requirements the petitioner must state the reasons for reconsideration and support the motion by submitting 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 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 the present matter, the current motion is supported by the same legal argument counsel previously raised in the support of the prior motion. Despite the AAO's determination finding the legal argument insufficient to meet the requirements of a motion to reconsider, counsel disregards the AAO's finding and proceeds to address

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).

only the common law issue that the AAO declined to address in its original decision dismissing the appeal. Counsel has 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. The motion to reconsider will be dismissed.

In light of the above findings, 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, the petitioner has not sustained that burden.

ORDER: The motion is dismissed.