



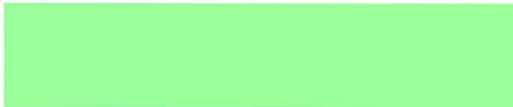
U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **APR 09 2014** 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: 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, Nebraska Service Center. The petitioner filed an appeal with the Administrative Appeals Office (AAO), where the appeal was dismissed. The petitioner then filed two consecutive motions with the AAO – one motion to reopen and reconsider and a subsequent motion to reconsider – both of which were also dismissed. The petitioner now files a motion to reopen and reconsider, which is the petitioner’s third motion before the AAO. The motion will be dismissed.

The petitioner is a Texas corporation that seeks to employ the beneficiary as its president. 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’s original decision, dated January 25, 2008, was based on two grounds of ineligibility. The director concluded that the petitioner failed to establish 1) that the beneficiary was employed abroad in a managerial or executive capacity and 2) that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

On appeal, counsel for the petitioner disputed the director’s findings, pointing to evidence of the petitioner’s organizational expansion subsequent to the filing of the Form I-140 and asserting that the beneficiary was employed abroad in a primarily managerial or executive capacity.

The AAO dismissed the appeal, concluding that the petitioner failed to overcome the director's findings. The AAO rejected the portion of the argument that focused on the petitioner's change in staffing since the date the petition was filed, pointing out that the petitioner must establish its eligibility based on the facts in existence at the time of filing. With regard to the beneficiary's position abroad, the AAO did not stray from the director’s original finding, concluding that the petitioner 1) failed to adequately describe the beneficiary's actual daily job duties and 2) did not establish that the beneficiary either supervised other supervisory, managerial, or professional employees or managed an essential function of the foreign entity.

In support of the petitioner’s first motion, counsel submitted a brief, contending that the petitioner submitted sufficient documentation to meet the regulations that govern motions to reopen and reconsider. Although the AAO disagreed with counsel’s assertion and denied the petitioner’s motion, the decision nevertheless acknowledged and addressed a number of counsel’s arguments for the purpose of clarifying the legal requirements concerning statutory eligibility for classification as an immigrant worker in the visa category of multinational manager or executive. The AAO heavily stressed the petitioner’s burden of having to establish eligibility as of the date of filing the petition, rather than at a later date based on a new set of facts that had not materialized when the petition was originally filed. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The AAO also explained that the legal standards are applied to all petitioners equally, regardless of the size of a petitioner or number of years it has been doing business. The AAO dismissed the petitioner’s motion, concluding that the petitioner’s submission of documents that applied to the time period that followed the filing of the petitioner’s Form I-140 were deemed irrelevant and could not be used to overcome either the director’s adverse findings in the original decision or the AAO’s adverse findings on appeal.

The AAO also dismissed the petitioner’s second motion, filed on August 24, 2011. In its decision dated December 19, 2012, the AAO concluded that the petitioner failed to meet the requirements of a motion to reconsider. Notwithstanding its decision to dismiss the petitioner’s motion, the AAO addressed several of the points made by the petitioner for the purpose of clarifying the law and explaining why the petitioner’s current

understanding of the law was incorrect. Namely, the AAO explained that while the petitioner is not precluded from providing new evidence on appeal, it is contrary to established precedent for the AAO to consider any evidence that pertains to facts or circumstances that did not exist at the time of filing. The AAO explained that it did not act contrary to the law when in its prior decision it rejected to consider evidence that pertained to events or circumstances that came about after the filing of the Form I-140.

Additionally, as a courtesy to the petitioner, the AAO explained the difference between the legal purpose for filing a motion versus the purpose for filing an appeal. Specifically, the AAO explained that appeals are reviewed on a *de novo* basis, thus giving the petitioner an opportunity to supplement the record with any evidence or documentation that the filing party feels may overcome the grounds for the underlying adverse decision. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). However, review criteria of a motion to reopen or a motion to reconsider is much more narrow and is limited only to evidence that falls within the specific criteria discussed at 8 C.F.R. § 103.5(a)(2) and 8 C.F.R. § 103.5(a)(3), respectively. Given the AAO's determination that the petitioner did not meet the specific criteria of either motion, the motion was dismissed.

In support of the instant motion, the petitioner has provided new evidence in the form of a 2011 corporate tax return with proof of filing, IRS Forms W-3 and W-2 for 2012, federal quarterly tax returns for 2012, state employer's quarterly reports for 2012, and a copy of counsel's brief, which the petitioner submitted previously in support of its motion to reconsider. The petitioner also submits a statement from the beneficiary, who asks the AAO to advise him as to the specific documents that served as the basis for the conclusion that he is not the "Top Executive or that [his] duties do not show that [he is] the President of [the petitioning entity]."

Turning first to the petitioner's motion to reopen, 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.

In the instant case, counsel's motion is primarily supported by a statement in which the beneficiary asks the AAO to clarify issues that have been stated and restated several times throughout the petitioner's repeated motion filings. Despite the beneficiary's repeated assertions that he is the petitioner's "top executive" and president, the AAO has been clear as to the reasons why the petitioner has been deemed ineligible for the immigration benefit sought. The AAO has explained that neither the beneficiary's position title nor his discretionary authority can serve as grounds for approving the petition when the petitioner has failed to provide adequate evidence to establish that *at the time of filing* it was capable of employing the beneficiary in a qualifying managerial or executive capacity based on the statutory definitions of these terms rather than the beneficiary's common laymen's understanding. *See* section 101(a)(44)(A) and (B) of the Act for definitions of managerial and executive capacity, respectively.

Additionally, the AAO notes that the petitioner's submission of updated tax filings will not be considered in support of the petitioner's motion. As previously stated, these documents, which capture the petitioner's corporate finances and employee payroll in 2011 and 2012, respectively, are entirely unrelated to the facts and circumstances as they applied to the petitioner when the Form I-140 was first filed in 2006. The petitioner has been advised numerous times in the AAO's prior decisions that only those documents that establish the petitioner's eligibility at the time of filing may be considered. The petitioner may not seek approval of an I-140 petition based on documents that reflect facts not in existence when the petition was first filed. *See*

Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). Regardless of the petitioner's organizational composition five or six years since the filing of a petition, it is the petitioner's organizational hierarchy at the time of filing that is relevant for the purpose of determining whether the petitioner is eligible for the immigration benefit sought herein. As noted in one of the AAO's earlier decisions, if the petitioner seeks consideration of its new or expanded organization it may file a new petition, which will then be assigned a new priority date, thus allowing the director to consider the facts and circumstances that may indicate that the petitioner is now eligible. However, in considering eligibility for the petition that was filed in 2006, the petitioner's 2011 and 2012 tax and payroll documents are not relevant, they are not new for purposes of this motion, and they will not be considered. Similarly, the resubmission of counsel's prior appellate brief is also not new. It was given due consideration at the time of its original submission and will not be submitted as part of the petitioner's current motion.

Next, turning to the petitioner's 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 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, the beneficiary's supporting statement primarily consists of points and arguments that had been previously made and addressed in the AAO's earlier decisions. Other than the decisions cited in counsel's photocopied brief, which was previously submitted and considered during the course of the petitioner's prior motion, the beneficiary's statement fails to cite any precedent decisions or other comparable evidence to establish that the AAO's decision to dismiss the appeal was based on an incorrect application of law or USCIS policy. The motion to reconsider will 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.