



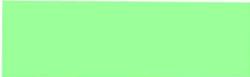
U.S. Citizenship
and Immigration
Services

(b)(6)

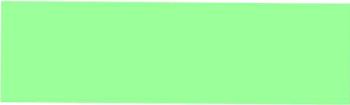


DATE: **APR 28 2014**

OFFICE: TEXAS SERVICE CENTER

FILE: 

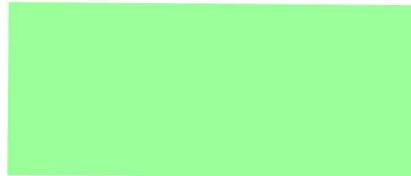
IN RE:

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:

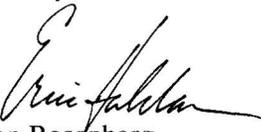


INSTRUCTIONS:

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 Administrative Appeals Office (AAO) dismissed the petitioner's subsequent appeal, and the matter is now before the AAO on motion to reopen and reconsider. The motion will be dismissed.

The petitioner filed Form I-140, Immigrant Petition for Alien Worker, 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 petitioner, a Florida corporation, claims to be a subsidiary of [REDACTED] located in Pakistan. It seeks to employ the beneficiary as its president.

In a decision dated April 3, 2013, the director denied the petition concluding that the petitioner failed to establish: (1) that it has a qualifying relationship with the foreign employer; (2) that the beneficiary would be employed in a qualifying managerial or executive capacity; (3) that the petitioner had been doing business for the previous year; and (4) that the petitioner has the ability to pay the proffered wage.

On appeal, counsel disputed the director's findings as arbitrary and not based on the evidence in the record. Despite stating on the Form I-290B, Notice of Appeal or Motion, that a brief would be submitted, the petitioner did not submit a brief or evidence in support of the appeal. The AAO found that the petitioner failed to overcome any of the director's findings and dismissed the appeal. We observed that the petitioner had failed to submit a complete response to the director's request for evidence (RFE) issued on September 4, 2012 and emphasized that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition pursuant to 8 C.F.R. § 103.2(b)(14).

The matter is now before the AAO on a motion to reopen and/or reconsider. On motion, counsel asserts that the AAO's "decision fails to consider evidence which was submitted, but apparently not included in the record at the time the original appeal was filed." Counsel asserts that the evidence submitted on motion establishes that there is a qualifying relationship between the petitioner and the beneficiary's previous foreign employer. Further, counsel asserts that the AAO's determination that the beneficiary will not be employed in a qualifying managerial or executive capacity is not based upon "substantial evidence in the record" establishing that he primarily performs managerial functions. Finally, counsel asserts that the record establishes that the petitioner has been doing business for over one year and that it has the ability to pay the beneficiary's proffered wage. The motion consists of counsel's brief statement on the Form I-290B and the following evidence:

1. The petitioner's stock certificate #4, dated October 31, 2010, issued to [REDACTED].
2. A statement from [REDACTED] who indicates that stock certificates #4 and #5 were issued on October 31, 2013 and are the petitioner's sole outstanding stock certificates.
3. Undated cancelled stock certificates #0 and #1, and an undated stock ledger, for [REDACTED] Inc., the petitioner's claimed subsidiary.
4. The petitioner's Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, for 2010, 2011, and 2012.
5. The petitioner's IRS Form W-2, Wage and Tax Statements for 2010, 2011 and 2012.

6. The petitioner's product invoices reflecting sales for 2010, 2011, and 2012.
7. Petitioner's monthly bank account statements for 2010 and 2011.
8. 2012 IRS Form 1120 for [REDACTED] Inc.
9. 2012 IRS Form W-2 statements issued by [REDACTED] Inc.
10. The foreign employer's bank statements for 2010 – 2012.
11. The foreign employer's 2012 invoice and shipping records.

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.

Here, nearly all of the evidence submitted on motion was previously requested in the director's RFE dated September 4, 2012 and should have been submitted prior to the adjudication of the petition. While counsel implies that the petitioner submitted this evidence on appeal and that it was not considered, the petitioner has not corroborated this claim. The record reflects that no brief or evidence was submitted in support of the petitioner's appeal prior to its adjudication on October 2, 2013.

Further, even if this evidence had been submitted on appeal, this office would not have reviewed it. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of previously requested evidence submitted for the first time on motion.

In this matter, the only document submitted in support of the motion that could be considered new is the petitioner's unsworn letter dated October 31, 2013. A motion to reopen must provide new facts and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). The declaration provided on motion is not an affidavit as it was not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, do they contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. Such unsworn statements made in support of a motion are not evidence and thus, as is the case with the arguments of counsel, are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The letter was intended to resolve inconsistencies regarding the petitioner's stock and establish a qualifying relationship between the foreign employer and the petitioner. Even if the letter had been sworn, it would have been inadequate to achieve its purpose. The letter was signed by the

petitioner's sales manager, [REDACTED] who asserts that stock certificates #4 and #5 represent the petitioner's only current outstanding stock. He explains that stock certificates 1, 2, and 3 were cancelled but could not be found. Further, he states that certificate #4 issued 500 shares to [REDACTED] and certificate #5 issued 500 shares to the foreign employer. Though it is unclear, the letter suggests this occurred on October 31, 2013 when an alleged shareholder meeting was held. However, those meeting minutes were not submitted and a stock ledger reflecting those changes was not submitted. Notably, [REDACTED] explicitly states that he transferred his 500 shares to [REDACTED] on October 31, 2013. However, on motion, the petitioner submitted stock certificate #4 issuing 500 shares of its stock to [REDACTED] on October 31, 2010 and not October 31, 2013. Therefore, stock certificate #4 is not new evidence and the claims made in the letter submitted in support of this motion are contradicted by the petitioner's own evidence.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover, even if the stock certificate were dated October 31, 2013 it would not meet the requirements of this petition filed August 24, 2011 since a 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'r 1971).

The petitioner also submits a copy of its IRS Form 1120 for 2012 and asserts that this evidence establishes the petitioner's ability to pay the beneficiary's proffered wage. While this document is dated May 15, 2013 and was not available prior to the filing of the petitioner's appeal, the petition must establish its ability to pay the beneficiary's wage as of August 24, 2011; the 2012 tax return is not relevant to this determination. The director requested the petitioner's IRS Form 1120 for 2011 in the RFE and the petitioner has provided it for the first time on motion, despite the fact that it predates the issuance of the RFE. As noted above, this evidence will not be considered. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner's motion to reopen 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.

Turning to the requirements for a motion to reconsider, the petitioner must state the reasons for reconsideration and support those reasons with 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 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).

In this matter, counsel asserts that the AAO's decision failed to consider evidence that was submitted but "not included in the record at the time the original appeal was filed." Counsel failed to explain this assertion or point to any evidence it believes was not considered on appeal. In addition, counsel asserts that the petitioner submitted a sufficient job description to establish that the beneficiary would be employed in a qualifying managerial capacity as defined "pursuant to INA 101(a)(44) and 8 CFR 204.5(j)(2)." Nevertheless, counsel failed to establish how the AAO's decision was erroneous and why it believes that the decision was "not based upon substantial evidence in the record." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO's determination that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity was based on the petitioner's failure to provide material evidence in response to the director's RFE, including a detailed description of the beneficiary's actual day-to-day duties, and evidence corroborating its claimed staffing levels and organizational structure as of the date of filing. In light of these findings, counsel's assertion that the petitioner's evidence was sufficient does not provide adequate grounds for reconsideration.

Further, the petitioner has not cited any statute, regulation or precedent case law establishing that the AAO's dismissal of the appeal was the result of misstated facts or incorrect application of law or USCIS policy. Therefore, the motion to 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.