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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: APR 0 2 2013 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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting 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. The matter is now before the AAO on motion to reopen. The motion will be dismissed.

The petitioner is a California corporation that seeks to employ the beneficiary as its vice 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 denied the petition concluding that the petitioner failed to establish that the beneficiary was employed in a managerial or executive capacity.

The petitioner appealed the denial disputing the denial. The AAO dismissed the appeal affirming the director's original conclusion—that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity—and making three additional findings beyond the director's decision. First, the AAO concluded that the petitioner provided a deficient job description and organizational chart pertaining to the beneficiary's proposed employment with the petitioning entity, thus failing to establish that the beneficiary would be employed in a qualifying managerial or executive capacity in her proposed position. Second, the AAO concluded that the petitioner failed to provide evidence showing that the petitioner met the initial filing requirement specified at 8 C.F.R. § 204.5(j)(3)(i)(D), which requires the petitioner to establish that it had been doing business for at least one year prior to filing the Form I-140. And third, the AAO found that the petitioner failed to provide evidence of its continued business activity abroad, thus precluding an affirmative finding that the petitioner continues to fit the definition of a multinational organization.

On motion to reopen, counsel attempts to overcome the grounds for the AAO's decision, offering a supplemental brief which contains an additional percentage breakdown pertaining to the beneficiary's employment with the foreign entity as well as job descriptions of the beneficiary's direct subordinates. Counsel also contends that the foreign entity continues to do business and that the petitioner had been doing business for the requisite one-year period prior to filing the Form I-140. Counsel offers non-binding and non-precedent decisions in support of her assertions and asks the AAO to consider the following documents as new evidence:

1. Copies of the foreign entity's and the petitioner's previously submitted organizational charts.

2. Foreign documents pertaining to the educational credentials of the foreign entity's and the petitioner's employees.

3. The petitioner's 2009 and 2010 tax returns as well as the petitioner's quarterly sales and use tax history for all four quarters in 2011.

4. Photocopied images of what appear to be the exterior and interior of the petitioner's business premises.

5. The petitioner's business lease commencing on June 18, 2011.

6. The petitioner's fictitious name renewal document showing that it commenced using the name [redacted] on July 23, 2003.

7. The petitioner's bank statements from July through December 2011.

8. The foreign entity's tax assessment document for the 2011-2012 tax year.

9. A statement dated September 23, 2009 from the foreign entity's CEO attesting to the beneficiary's employment abroad from 1997 through May 2002. The statement included a general discussion of the beneficiary's overseas employment.

10. Foreign documents pertaining to the beneficiary's education.

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 matter, the only documents submitted to support counsel's motion that can be deemed as truly unavailable are documents that had not yet been created when the petition was filed. Such documents include the petitioner's tax returns, bank statements, and business lease as well as the foreign entity's tax assessment. However, 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. 1971). Therefore, the petitioner's focus on facts and/or circumstances that had not materialized until after the filing of the petition are irrelevant in the instant proceeding and will not be considered in determining the petitioner's eligibility. The AAO further notes that the petitioner's submission of documents that had been previously submitted on appeal (Nos. 1 and 9) also fails to qualify as previously unavailable documents. In fact, the documents that had been submitted previously on appeal were considered by the AAO prior to issuing its decision. Such documents were found insufficient to meet the regulatory requirements and will not be considered for a second time on motion.

The remainder of the documents, including photographs of the interior and exterior of the petitioner's business premises, the fictitious name renewal document, and the foreign documents that pertain to the beneficiary's educational credentials, were previously available and thus could have been submitted prior to the petitioner's motion.

In light of the above, 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.

Additionally, the AAO notes that even if the petitioner had provided sufficient documents to meet the requirements of a motion to reopen, the petitioner's submission of its 2010 corporate tax return has brought to

[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 II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

light new information, which indicates that the petitioner's ownership breakdown has been altered such that it no longer has a qualifying relationship with the beneficiary's foreign employer. Namely, Schedule K-1 of the petitioner's 2010 corporate tax return, which lists the filing entity's shareholders and the percentage of shares held, indicated the following share distribution for the petitioner: 30% shares allocated to [redacted] 20% shares allocated to [redacted], and another 20% shares allocated to [redacted] The tax return did not indicate how the remaining 30% of the petitioner's shares were distributed.

The share distribution shown in the 2010 tax return is significantly different from the distribution scheme that was originally claimed by the petitioner and as shown in the petitioner's 2009 tax return, which indicated that [redacted] each owned an equal 50% of the petitioner's stock. As the petitioner originally claimed, and was able to document, that it has an affiliate relationship with the beneficiary's foreign employer by virtue of both companies being equally owned by [redacted] the alteration of this ownership scheme within the petitioning entity, as shown in the petitioner's 2010 tax return, indicates that the two entities are no longer similarly owned and controlled. Rather than being owned by only two individuals—[redacted]—who continued to share equal ownership of the foreign entity, these individuals now have a combined 40% interest in the petitioning entity, which is now shown to have at least three owners, none of whom has majority ownership.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Assoc. Comm. 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In the present matter, the petitioner has provided evidence, which establishes that the beneficiary's foreign and U.S. employers are no longer similarly owned and controlled and that the qualifying relationship that the two entities once shared has been severed due to the petitioner's recent change in ownership. Although the AAO recognizes that the changes in the petitioner's ownership occurred after the petition was filed, the petitioner's burden to establish and maintain eligibility is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984). Therefore, the petitioner's new ownership scheme, while not in place at the time of filing, indicates that the qualifying relationship that existed at the time of filing no longer exists. Therefore, in addition to the grounds for denial that were cited previously in the AAO's decision, the petitioner is also ineligible based on its lack of a qualifying relationship.

As previously stated in the AAO's decision, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional ground of ineligibility, the appeal was properly dismissed and the Form I-140 was properly denied.

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.