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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Service  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave. N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

DATE:

**JUL 23 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 (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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

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 subsequently came before the AAO on motion to reopen, which the AAO dismissed. The matter is now before the AAO on a second 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 abroad in a managerial or executive capacity.

The petitioner appealed the denial disputing the denial. The AAO dismissed the appeal affirming the director's finding and making three additional findings beyond the director's decision. The AAO concluded that the petitioner failed to establish that: (1) the beneficiary would be employed in a qualifying managerial or executive capacity in her proposed position with the U.S. entity; (2) it had been doing business for at least one year prior to filing the Form I-140; and that (3) the foreign entity continued to do business abroad, thus precluding an affirmative finding that the petitioner continues to fit the definition of a multinational organization.

On motion to reopen, counsel attempted to overcome the grounds for the AAO's decision, offering a supplemental brief containing job descriptions of the beneficiary's direct subordinates as well as an additional percentage breakdown that pertained to the beneficiary's employment with the foreign entity. Counsel also contended 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 offered non-binding and non-precedent decisions in support of her assertions and asked 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.<sup>1</sup>

In the instant matter, the AAO addressed the petitioner's submissions and brief in the decision pertaining to the previously filed motion. The AAO concluded that only the petitioner's tax returns, bank statements, and business lease and the foreign entity's tax assessment be deemed as truly unavailable. However, the AAO rejected these previously unavailable documents based on case law precedent, which determined that 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). The AAO properly declined to consider facts and/or circumstances that had not materialized until after the filing of the petition, finding such documents to be irrelevant in the instant proceeding. The AAO further found documents that had been previously submitted on appeal (Nos. 1 and 9) also do not qualify as previously unavailable documents. The AAO pointed out that such documents had been submitted previously on appeal and had already been considered.

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 first motion.

On current motion, counsel offers a brief and a collection of documents that are all identical in content to the petitioner's earlier submissions. The only additional document that is submitted with the current motion is the AAO's dismissal of the petitioner's first motion to reopen. Applying a similar analysis to the petitioner's current brief and supporting documents, the AAO finds that the petitioner has failed to meet the requirements specified at 8 C.F.R. § 103.5(a)(2).

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.

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<sup>1</sup> 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).

Lastly, the AAO observes the petitioner's failure to address an additional adverse finding, which was made based on an analysis of the petitioner's 2010 corporate tax return. Namely, the AAO determined that the tax return brought to light new information, which indicates that the petitioner's ownership breakdown had 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.

As properly pointed out in the AAO's prior decision, 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, the AAO affirms its prior finding concluding that 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 with the beneficiary's foreign employer.

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

*NON-PRECEDENT DECISION*

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(3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional ground of ineligibility, the appeal and subsequent motion to reopen were 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, 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.