U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: EAC 92 159 51162 Office: VERMONT SERVICE CENTER Date: 05 DEC 2001

IN RE: Petitioner
Beneficiary: [redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Weimann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center initially approved the nonimmigrant visa petition. Upon further review, the director determined that the beneficiary was not clearly eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of his intent to revoke approval of the petition. A subsequent appeal was dismissed on August 15, 1994. On motion to reopen and reconsider, the Associate Commissioner for Examinations, affirmed the decision to revoke the approval of the petition, in a decision dated March 9, 1995. On a second motion to reopen and reconsider, the Associate Commissioner for Examinations, in a decision dated May 31, 1996, withdrew in part and affirmed in part his decision dated March 9, 1995. On a third motion to reopen and reconsider, the Associate Commissioner again affirmed the Service's previous decisions to deny the petition in his decision dated September 24, 1998. On a fourth motion to reopen and reconsider, the Associate Commissioner again affirmed the Service's previous decisions to deny the petition and rejected the motion, all in a decision dated October 23, 1998. The matter is now before the Associate Commissioner for Examinations on a fifth motion to reopen and reconsider. The motion will again be rejected.

The petitioner engages in the business of marketing and placement of manpower services in the United States, Japan and Malaysia. It seeks to employ the beneficiary temporarily in the United States as its president and general manager. The director, when revoking the approved petition, determined that the petitioner had not established that a qualifying relationship existed between the petitioning entity and the beneficiary's foreign employer.

On appeal, counsel stated that a brief and/or additional evidence in support of the appeal would be forwarded to the Administrative Appeals Office on or before April 1, 1994. As of April 1, 1994, the Service had not received a response from the petitioner concerning the matter. Consequently, the record was considered complete.

The Associate Commissioner dismissed the appeal because the record did not demonstrate that the United States and foreign entities were qualifying organizations. The Associate Commissioner also found, beyond the decision of the director, the petitioner had not demonstrated that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On the first motion, counsel stated that on March 21, 1994, the appeal brief was forwarded to the Associate Commissioner by certified mail. Counsel re-submitted the appeal brief for reconsideration. Counsel asserted that the beneficiary met the eligibility requirements to qualify for L-1 classification. The Associate Commissioner found that the evidence provided did not demonstrate a qualifying relationship between the United States and foreign organizations or that the beneficiary had been and would be employed in a primarily managerial or executive capacity.

On the second motion, counsel again asserted that the beneficiary met the eligibility requirements to qualify for L-1 classification and submitted additional evidence. The Associate Commissioner found existence of a qualifying relationship yet denied L-1 status because the petitioner had not established that the beneficiary had been or would be employed primarily in a qualifying managerial or executive capacity.

On the third motion, counsel submitted additional evidence to demonstrate that the beneficiary had been and would be employed primarily in a qualifying executive or managerial capacity. The Associate Commissioner found that the material provided was not sufficient to establish that the beneficiary had been and would be primarily involved in duties that were executive and managerial and affirmed his previous decision dated May 31, 1996.

On the fourth motion, counsel stated that the duties of the beneficiary were primarily executive and managerial. Counsel pointed out that the petitioner was a small organization but that the beneficiary did direct the management of the petitioner and that he managed an essential function of the company. The Associate Commissioner found that the counsel was merely re-submitting previously submitted documentation and restating previous information. The Associate Commissioner affirmed his previous decision of January 12, 2000 and rejected the motion.

Counsel, on fifth motion, submits the following "new" evidence:

> Certification from the beneficiary's outside accountant detailing the beneficiary's responsibilities as manager and president;
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> A copy of the petitioner's financial statements for the year ending September 30, 1999;
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> Letters from clients allegedly to confirm that the beneficiary had been performing the marketing function of the company and had been directing and overseeing the operations of the U.S. company and the foreign company;
>
> A letter from the petitioner's bank allegedly to demonstrate that the beneficiary was performing an essential function of the company by ensuring the continued growth of the company; and,
>
> Other letters and agreements allegedly to demonstrate that the beneficiary was managing an essential function of the company and was overseeing the operation of the foreign company.

Counsel also cites unpublished decisions apparently to bolster

assertions that a sole employee could be classified as a manager or executive.

In review, the letter submitted by the beneficiary's accountant essentially re-states the regulatory definition of manager and does not provide any "new" information about the beneficiary's day-to-day duties. The 1998 and 1999 financial statements were previously available and could have been discovered and presented on the previous motion. These documents cannot be considered "new" under 8 CFR 103.5(a)(2). The letters from the petitioner's clients, the bank statements and the placement agreements only indicate that the beneficiary is continuing to perform the necessary day-to-day functions of the company in an effort to continue its operation. The record does not establish that a majority of the beneficiary's duties have been or will be directing the management of the organization.

Counsel's cite to unpublished decisions has no merit. Counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to those in the unpublished decisions. Moreover, unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. 103.3(c).

In addition, motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. INS v. Doherty, 502 U.S. 314, 323 (1992)(citing INS v. Abudu, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." INS v. Abudu, 485 U.S. at 110. With the current motion, the movant has not met that burden.

Furthermore, 8 CFR 103.5(a)(2) states, in pertinent part:

> A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Although counsel has submitted a motion entitled "Motion to Reopen and Reconsider," counsel does not submit any document that would meet the requirements of a motion to reconsider. Counsel does not state any reasons for reconsideration nor cite any precedent decisions in support of a motion to reconsider. Counsel does not argue that the previous decisions were based on an incorrect application of law or Service policy.

Finally, it should be noted for the record that, unless the Service directs otherwise, the filing of a motion to reopen or reconsider does not stay the execution of any decision in a case

or extend a previously set departure date. 8 CFR 103.5(a)(1)(iv).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. 8 CFR 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the previous decisions of the director and the Associate Commissioner will not be disturbed.

ORDER: The motion is dismissed.