

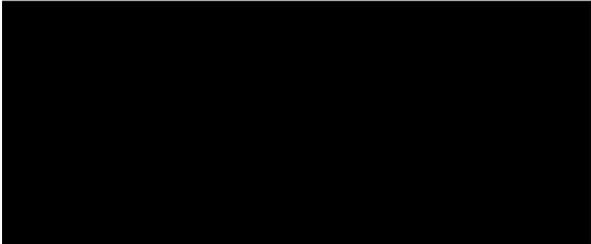


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U.S. Department of Justice
Immigration and Naturalization Service

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



File: EAC 99 007 51843 Office: VERMONT SERVICE CENTER Date: 07 JAN 2002

IN RE: Petitioner
Beneficiary:



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:

SELF-REPRESENTED

Public Copy

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 nonimmigrant visa petition was denied by the Director, Vermont Service Center. The Associate Commissioner for Examinations rejected the appeal as untimely filed. The Associate Commissioner also noted that the appeal contained no new facts or clear reason for reconsideration and thus the appeal could not be treated as a motion to reopen or reconsider. The matter is now before the Associate Commissioner on a motion to reopen and motion to reconsider. The motion will be dismissed.

The petitioner seeks authorization to continue the employment of the beneficiary as an intracompany transferee pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L). The director determined that the petitioner had failed to demonstrate that the beneficiary had been functioning and would continue to function in a primarily managerial or executive capacity.

On motion, the petitioner indicates that it is submitting new documentary evidence and affidavits to support the motion to reopen.

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

On motion, the petitioner submits the Service Form I-9 for 12 employees and the Internal Revenue Service Form 941 for the quarter ending December 31, 1999. The petitioner also provides a slightly different description of its organizational structure. The petitioner states that it has a president, the beneficiary of this petition, a vice president, a marketing and sales manager and nine sales representatives. This differs from the earlier description of the organizational structure that included a president, vice-president, marketing and sales manager, a bookkeeper, a secretary and five sales persons. The petitioner also lists the duties and responsibilities of the beneficiary and includes the statement "our company also has four salesmen working on commission, therefore, there is absolutely no need for the executive and manager to do any non-qualifying duties."

A review of the evidence that the petitioner submits on motion reveals no fact that could be considered "new" under 8 CFR 103.5(a)(2). The evidence the petitioner submits was previously available and could have been discovered or presented in the previous proceeding. The information regarding the employment of twelve individuals rather than ten as previously noted by the petitioner does not add an element that must be considered new. The addition of the two employees occurred in 1998 before the filing of the petition.

In addition, the petitioner's statement only adds to the confusion surrounding the number of the petitioner's employees and the positions they hold. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988).

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. The motion to reopen will be dismissed.

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.