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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street NW
Washington, DC 20536



FILE: WAC 00 059 51907 Office: CALIFORNIA SERVICE CENTER

Date: DEC 23 2003

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)

ON BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that 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)(ii).

If you have new or additional information that 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 Citizenship and Immigration Services (CIS) 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center denied the nonimmigrant visa petition (L-1A). On appeal, the Administrative Appeals Office (AAO) affirmed the denial. Subsequently, the petitioner filed a motion with the AAO to reopen and reconsider. The AAO will dismiss the motion to reopen and reconsider.

The petitioner, Bondsun Pacific Import Export, Inc., operates sporting goods stores in California. On December 23, 1999, the U.S. entity petitioned to extend the beneficiary's classification as a nonimmigrant intracompany transferee (L-1A) for three years. In 1999, the petitioner sought to employ the beneficiary as the U.S. entity's "Director of China Liaison/Sales Department" at an annual salary of \$18,000. The director determined, however, that the position's duties were neither managerial nor executive. The motion states that the petitioner now seeks to employ the beneficiary as the U.S. entity's chief operating officer and vice president of new business development at an annual salary of \$20,000. The petitioner claims that the chief operating officer and vice president position is both executive and managerial. The petitioner submits new evidence to support this claim.

The regulation at 8 C.F.R. § 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 evidence that was unavailable and could not have been discovered or presented in the previous proceeding.

However, CIS may not approve a visa petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Moreover, CIS will adjudicate the appeal based only on the record proceedings before the director. See, *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). Thus, when read together, 8 C.F.R. § 103.5(a)(2) and the precedent cases above limit new evidence to documentation which existed, but could not be discovered or presented, at the time the director rendered the initial decision.

In this instance, the petitioner submitted descriptions of the beneficiary's new job which began in June 2002, an updated Form

I-129,¹ a 2001 U.S. Corporation Income Tax Return, a June 2002 board of directors resolution, a lease agreement, and copies of photographs with a motion to reopen and reconsider. When the director rendered his decision on February 11, 2000, the evidence submitted with the motion did not exist; therefore, the evidence submitted on motion does not qualify as new. The AAO must, as a result, dismiss the motion to reopen. The petitioner may, nonetheless, file a new petition with the director for consideration of the evidence submitted with the motion.

The AAO now turns to question of whether to grant the motion to reconsider. In relevant part, 8 C.F.R. § 103.5(a)(3) states:

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 [CIS] 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 the motion states reasons for reconsideration, the motion presents no precedent decisions to support those reasons; therefore, the petitioner has failed to establish any incorrectly applied law or CIS policy. Moreover, the motion to reconsider makes no arguments why the original denial was incorrect based on the evidence of record at the time of the initial decision; instead, the motion focuses only on the beneficiary's new position. Consequently, the AAO must dismiss the motion to reconsider.

The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion that does not meet the applicable requirements shall be dismissed. 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." *Abudu*, 485 U.S. at 110.

¹ The petitioner did not, however, submit the Form I-129 to a service center. As explained, *infra*, the petitioner must submit the evidence associated with the motion to reopen and reconsider to the director with a new petition.

Even if the motion to reopen and reconsider were granted, the AAO would affirm the dismissal of the appeal. To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

Under 8 C.F.R. § 214.2(1)(3), an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

On motion, the petitioner summarized the beneficiary's job duties as of June 2002:

Investigate and analyze opportunities for expanding retail sporting goods business in Northern California; Advise the President and Board of Directors regarding expansion opportunities; Supervise and meet regularly with outside accountant regarding company's financial performance; Review and approve all financial statements, payroll and tax returns; Ensure company complies with legal corporate requirements; Plan and execute yearly budget for ongoing operations and expansion plans; Hires, trains, evaluates and supervises store managers; Develop corporate policies regarding training, compensation, hiring and marketing.

The petitioner provides similar characterizations of the claimed new duties on the updated Form I-129 and in a June 25, 2002 letter.

The beneficiary's job descriptions are vague and they fail to convey an understanding of the beneficiary's proposed daily duties. In particular, the petitioner did not state the percentages of time the beneficiary would spend on each of her new duties. Moreover, the petitioner did not elaborate on the content of each the beneficiary's proposed duties. For example, it is unclear what tasks are part of "[p]lan[ing] and execut[ing] the] yearly budget for ongoing operations and expansion plans." The failure to submit adequate supporting documentary evidence does not meet the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Furthermore, the AAO notes that one of the beneficiary's duties will be "[i]nvestigat[ing] and analyz[ing] opportunities for expanding retail sporting goods business in Northern California." In other words, the petitioner admits that the beneficiary's time will, in part, be spent performing marketing duties. Marketing duties, by definition, qualify as performing tasks necessary to provide a service or produce a product. An employee who primarily performs the tasks necessary to produce a product or provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In sum, the proposed duties cannot demonstrate that the beneficiary would qualify as a manager or executive.

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. The petitioner has not sustained that burden.

ORDER: The motion is dismissed.