

U.S. Department of Homeland Security
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Washington, DC 20536



U.S. Citizenship
and Immigration
Services

[Handwritten signature]



FILE: EAC 97 190 53714 Office: VERMONT SERVICE CENTER Date: **APR 28 2004**

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:

SELF-REPRESENTED

INSTRUCTIONS:

PUBLIC COPY

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

This is the decision of the Administrative Appeals Office 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.

[Handwritten signature]
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based nonimmigrant visa petition was denied by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed the subsequently filed appeal and affirmed the director's decision to deny the petition. A subsequent motion to reopen and reconsider was granted by the AAO, and the previous decision by the AAO was affirmed. A second, third, fourth, and fifth motion were also dismissed by the AAO. The matter is again before the AAO on a sixth motion. The motion will be dismissed.

The petitioner claims to be an import and export company. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had not established that the beneficiary had been or would be employed in the United States in a primarily managerial or executive capacity.

On motion, the petitioner submits additional evidence to address the grounds of the director's denial and the findings of the AAO. The petitioner has not stated any plausible reasons for reconsideration, nor does the petitioner furnish any new facts to be provided in the reopened proceeding.

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 found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.¹

On sixth motion, the petitioner states that the business has expanded and is realizing a profit. The petitioner submits business documents for the period December 2001 to September 2002, consisting of orders, invoices, and other evidence of doing business.

A review of the evidence that the petitioner submits on motion reveals no fact that could be considered "new" pursuant to the regulation at 8 C.F.R. § 103.5(a)(2). All documents submitted on motion to reopen and reconsider were not in existence at the time the initial petition in this case was filed. Furthermore, the documentary evidence submitted on motion is not relevant to the issue of whether the beneficiary's duties have been or will be primarily managerial or executive in nature. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Citizenship and Immigration Services (CIS) cannot consider facts that come into being only subsequent to the filing of a petition. *See Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998). As the petitioner was previously put on notice and provided with a reasonable opportunity to provide the required evidence, the evidence submitted on motion will not be considered "new" and will not be considered a proper basis for a motion to reopen.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as 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

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).

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 CIS 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 C.F.R. § 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 C.F.R. § 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 AAO will not be disturbed.

ORDER: The motion is dismissed.