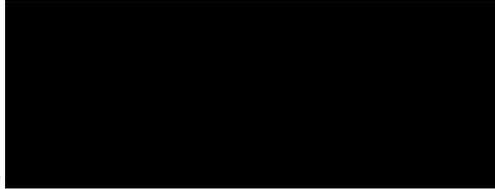




U.S. Citizenship
and Immigration
Services



File: WAC 01 136 58360 Office: CALIFORNIA SERVICE CENTER Date: **OCT 25 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)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

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.


Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to
prevent unwarranted
invasion of personal privacy

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DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition and a subsequent appeal was summarily dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motion will be dismissed.

The petitioner is an organization incorporated in the State of California in January 1999. It claims it operates a bakery.¹ It seeks to extend the temporary employment of the beneficiary as its business development manager. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner claims that it is a wholly owned subsidiary of Allmik Bakeries, CC, located in Fish Hoek, South Africa.

The director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity. The AAO affirmed the director's decision and concluded that the petitioner had failed to establish that it had been doing business for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii).

On motion, counsel for the petitioner asserts that: (1) the AAO did not address his contentions on appeal; (2) a statement submitted by the petitioner's chief executive officer on motion set forth the petitioner's position; and, (3) oral argument was required to adequately present the petitioner's position.

The August 14, 2003 unsworn statement submitted by the petitioner's chief financial officer² indicates that: (1) the petitioner's initial counsel poorly presented this matter to Citizenship and Immigration Services (CIS); (2) the petitioner more than qualifies as an executive or manager because, in part, she has provided the majority of funding for the petitioner's endeavors and that without her presence the petitioner would not be able to survive; (3) the petitioner had no knowledge of the requirements of 8 C.F.R. § 214.2(l)(14)(ii) when it filed the extension petition; and, (4) CIS did not deny the initial L-1A intracompany transferee petition based on the same facts.

In this matter, counsel has not provided new facts supported by affidavits or other documentary evidence. A motion to reopen must provide new facts and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). First, counsel does not identify any contentions that the AAO failed to address on appeal. A review of the record reveals that the AAO specifically considered the petitioner's job description for the beneficiary's position and determined that the job description, although general in part, showed that the beneficiary would be performing tasks necessary to provide the petitioner's services. An employee who primarily performs the tasks necessary to produce a product or to 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).

¹ An officer of the company indicates in an August 14, 2003 statement submitted with the motion to reopen and reconsider, that the petitioner closed its clothing store in 2001.

██████████ the individual signing the August 14, 2003 statement, signs the document as the chief financial officer and refers to the beneficiary as the chief executive officer. A review of the record shows that James Goldie held the position of chief executive officer as of May 2001.

Second, counsel's submission of the chief financial officer's August 14, 2003 unsworn statement is not an affidavit. An affidavit is a document sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations, who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (7th Ed., West 1999). Neither does the statement, in lieu of having been signed before an officer authorized to administer oaths or affirmations, contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. Such unsworn statements made in support of a motion are not evidence and thus, as is the case with the arguments of counsel, are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Moreover, based on the plain meaning of "new," a new fact is evidence that was not available and could not have been discovered or presented in the previous proceeding. In this matter, even if the August 14, 2003 statement was in the proper form, the petitioner does not provide any new facts for consideration.

The petitioner's statement that its initial attorney did not properly present the petition, although a new claim, is not a new fact. The AAO notes that the petitioner's current counsel also submitted the petitioner's appeal. Further, any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The record does not contain evidence that the petitioner has taken the above actions to establish the alleged ineffective representation.

The petitioner's statement that it needs the beneficiary, because she provides the petitioner's funding and it will not survive without her, is not a new fact. Moreover, such a claim underscores the petitioner's lack of independent viability. The petitioner's claim that it failed to understand the pertinent regulations, again although a new claim, is not a new fact. Further, failing to understand and comply with the regulations governing this visa classification is not a basis to reopen or reconsider the previous decision.

The petitioner's claim that the initial one-year approval requires the approval of this extension petition emphasizes the petitioner's failure to comprehend the applicable regulations, and again is not a new fact. The initial approval was based on the petitioner's qualification under the regulations governing a "new office." The appropriate analysis for a new office is whether the U.S. entity, within one year of approval of the petition, would support the beneficiary in a primarily managerial or executive capacity. This analysis does not apply to an extension petition for a U.S. entity established for more than one year. As the petitioner has been attempting to operate for over one year, the petitioner is obligated to employ the beneficiary in a primarily managerial or executive position when the petition is filed. *See* 8 C.F.R. § 214.2(1)(3)(ii). The prior approval of the new office petition does not demand the approval of a subsequent extension petition; rather,

the review of an extension petition for a previously new office, is an opportunity to evaluate the petitioner's current operations to determine if the beneficiary is engaged in a primarily managerial or executive position. As the AAO previously determined, the petitioner has not established this basic element of eligibility.

Finally, the AAO notes that the regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, CIS has the sole authority to grant or deny a request for oral argument and will grant oral argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. In fact, counsel set forth no specific reasons why oral argument should be held. The written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

The AAO observes that counsel's motion is entitled "Motion to Reopen and Reconsider." The regulations at 8 C.F.R. § 103.5(a)(2) state, 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.

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 CIS policy. Other than the title of the motion, counsel does not assert that a motion to reconsider should be considered as an alternative to the motion to reopen. Assuming, *arguendo*, that the petitioner intended to file a motion to reconsider, the petitioner's motion will be dismissed.

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).

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. 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.