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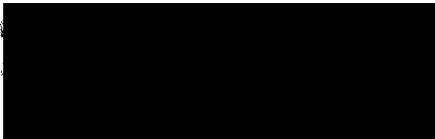
APR 07 2005

File: EAC 02 085 53819 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]  
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:



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

**DISCUSSION:** The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The Administrative Appeals Office (AAO) dismissed the subsequently filed appeal and affirmed the director's decision to deny the petition. The matter is now before the AAO on motion to reopen and motion to reconsider. The motion will be dismissed.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A 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 is a corporation organized in the Commonwealth of Virginia that is engaged in the import of oriental rugs. The petitioner seeks to employ the beneficiary as the manager of a new office in the United States.

In a decision dated March 22, 2002, the director denied the petition stating that the petitioner, as a new office, had failed to establish the following: (1) that the beneficiary had been employed for one continuous year in the three-year period preceding the filing of the petition in an executive or managerial capacity; (2) that the new U.S. office will grow to be of sufficient size to support a managerial or executive position; and (3) that sufficient physical premises to house the new office had been secured. The AAO affirmed these determinations on appeal in its decision dated October 28, 2003. In addition, the AAO concluded that the petitioner did not establish the financial ability of the foreign company to remunerate the beneficiary.

Counsel for the petitioner filed the instant motion to reopen and reconsider on November 26, 2003, requesting that he be granted 60 days to submit additional documents and arguments. Counsel claimed that additional records and evidence were being collected and forwarded by the petitioner's affiliated company in Germany. Counsel also asserts "there are issues raised in the October 28, 2003 [decision] with respect to filings and submissions which the petitioner had thought were submitted by former counsel.

On January 24, 2004, counsel for the petitioner submitted copies of invoices for rugs purchased by the petitioner from its claimed German parent company during the period October 2001 to October 2002. Counsel states "these documents establish the continuous relationship and transactions between the two companies with each other to substantiate their qualifying relationship and organization." Counsel indicated on his cover letter that the petitioner was awaiting additional documentation from overseas and would submit the documentation upon receipt. The AAO has received no additional documentation within the past 13 months.

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 demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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.<sup>1</sup>

A review of the limited evidence submitted on motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2). All of the evidence submitted was previously available and could have been discovered or presented in the previous proceedings. Therefore, the evidence submitted on motion will not be considered "new" and will not be considered a proper basis for a motion to reopen. More importantly, the evidence submitted does not rebut any of the four grounds of denial stated in the previous decisions in this matter. While the United States and foreign entities may indeed have a "continuous relationship" as claimed by counsel and supported by the submitted invoices, counsel does not address how this evidence would overcome the director's and AAO's determination that the petitioner had failed to establish: (1) that the beneficiary had been employed for one continuous year in the three-year period preceding the filing of the petition in an executive or managerial capacity; (2) that the new U.S. office will grow to be of sufficient size to support a managerial or executive position; (3) that sufficient physical premises to house the new office had been secured; and (4) that the foreign entity has the financial ability to remunerate the beneficiary.

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 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.

Furthermore, 8 C.F.R. § 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 or 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. 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

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<sup>1</sup> 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).

reopen.<sup>2</sup> Assuming, *arguendo*, that the petitioner intended to file a motion to reconsider, the petitioner's motion will be dismissed.

The AAO acknowledges counsel's claim that the petitioner mistakenly believed that its former counsel had submitted certain evidence previously requested by Citizenship and Immigration Services (CIS). It is noted for the record that 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). Although counsel claims that the petitioner's previous counsel failed to submit critical information in response to the director's request for evidence, counsel has not satisfied the three requirements set forth above. In addition, since the petitioner still has not produced the requested information nearly two years after the initial decision, the AAO must question counsel's claim that such information and other evidence is, in fact, available. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

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.

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<sup>2</sup> Based on a review of the motion, it appears that counsel for the petitioner has submitted a simple motion to reopen which is erroneously titled "Motion to Reopen and Reconsider." Counsel does not explicitly claim that there are two motions made in the alternative, nor does counsel cite to any regulation that would clarify the intended motion.