

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

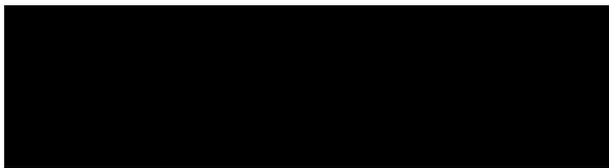
U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D 7



FILE: SRC 02 089 52463 Office: TEXAS SERVICE CENTER Date: JUN 06 2005

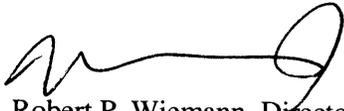
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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)

ON BEHALF OF PETITIONER:
[Redacted]

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 nonimmigrant visa petition was denied by the Director, Texas Service Center. A subsequent appeal was summarily dismissed by the Administrative Appeals Office (AAO). The matter is again before the AAO on a motion to reopen. The motion will be dismissed.

According to the evidence contained in the record, the petitioner claims to be an investment, trade, and retail operations business. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director denied the petition after determining that the petitioner had failed to submit sufficient evidence to establish that: (1) a qualifying relationship existed between the U.S. and foreign entities; (2) the U.S. entity and the foreign entity had been doing business; and (3) the beneficiary has been or would be employed by the U.S. entity in a primarily managerial or executive capacity.

The director's decision is dated July 29, 2002. Counsel for the petitioner filed a notice of appeal, dated August 29, 2002, and in the notice requested 30 days in which to file a brief and evidence in support of the appeal. On appeal, counsel stated that evidence had been previously submitted disproving each finding of the director. On November 21, 2003, the AAO summarily dismissed the appeal, noting that over 14 months had elapsed since counsel initially requested an additional 30 days in which to file a brief and evidence. The AAO also noted that counsel had failed to identify specifically an erroneous conclusion of law or statement of fact.

On motion, counsel submits a brief and additional evidence and requests that the beneficiary be granted nonimmigrant L-1a or E-2 status. There is no provision allowing a change in the classification sought by a petitioner after the petition has been denied. The beneficiary could not change status in any case, as he is not maintaining nonimmigrant status as required by 8 C.F.R. § 248.1.

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 motion, counsel addresses the grounds of the director's denial and relies upon evidence submitted by the petitioner that was either requested by the director in her request for evidence, dated March 11, 2002, or was not in existence at the time the petition was filed or at the time the decision to deny the petition was made. For example, on motion the petitioner submitted a copy of a Certificate of Incorporation, dated September 17, 2003. The petitioner also submitted a copy of an Assumed Name Certificate, dated October 27, 2003, a commercial lease agreement, dated October 24, 2003, bank statements reflecting transactions during 2003, business invoices dated November and December of 2003, and corporate tax records dated 2001.

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). Further, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A

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).

petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). In addition, the petitioner has failed to adequately address the issues raised by the director. Accordingly, 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 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.