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



U.S. Citizenship
and Immigration
Services

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FILE: LIN 99 007 52885 Office: NEBRASKA SERVICE CENTER Date: JUN 30 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:



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 employment-based nonimmigrant visa petition was denied by the Director, Nebraska 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 motion to reconsider was granted by the AAO, and the previous decision by the AAO was thereafter affirmed. The matter is again before the AAO on a second motion. The motion will be dismissed.

The petitioner claims to be in the business of marketing and selling artistic gift products in the United States. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its business manager. The director determined that the petitioner had not submitted sufficient evidence to establish that the beneficiary had been or would be employed in a primarily managerial or executive capacity. The Associate Commissioner affirmed the director's decision and made an additional finding that the petitioner had not submitted sufficient evidence to demonstrate that the U.S. entity was doing business.

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 motion, counsel states that the beneficiary is employed by the U.S. entity not only in a managerial capacity, but also in an executive capacity, and that the entity is doing business. As argument, counsel states that the beneficiary's duties, as explained in the initial petition submitted November 7, 1998, are executive in nature and that CIS has not disputed this issue. The petitioner submits a copy of a lease agreement dated October 1, 2001; copies of corporate income tax returns for 2000 and 2001; and copies of purchase orders and invoices dated 2000 and 2001 as evidence of doing business.

The 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. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (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 (Assoc. 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 a proper basis for a motion to reopen.

CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed

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).

by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial in nature. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. In the instant matter, the petitioner claims on motion that the beneficiary is employed in an executive capacity. However, the position descriptions submitted by the petitioner in support of the petition; in response to the director's request for additional evidence; and on appeal do not describe duties performed by a person possessing or seeking executive capacity classification. The petitioner cannot attempt to make such a change on motion in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi, supra.*

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, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.