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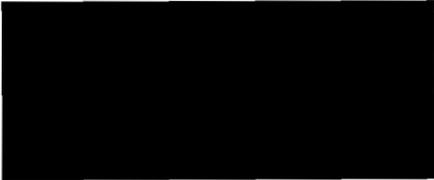


FILE: EAC 03 134 50796 Office: VERMONT SERVICE CENTER Date: DEC 08 2006

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

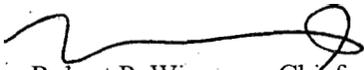
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Chief  
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 reconsider. The motion will be dismissed.

The petitioner seeks to employ beneficiary in the United States 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, a New York corporation, operates as an importer and distributor of acupuncture and related medical products and devices. The petitioner claims to be a subsidiary of [REDACTED], located in Tianjin, China. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay as its president for an additional two years.

The director denied the petition on October 1, 2003, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The petitioner subsequently filed an appeal. In a decision dated August 1, 2005, the AAO affirmed the director's decision, and further concluded that the petitioner had not established that the U.S. entity maintained a qualifying relationship with the foreign entity as required by 8 C.F.R. § 214.2(l)(14)(ii)(A).

The petitioner filed the instant motion to reopen and reconsider on August 31, 2005. On motion, counsel disputes the director's October 1, 2003 decision, but makes no specific references to the AAO's eleven-page decision dated August 1, 2005 or the findings therein with respect to the petitioner's failure to establish that the beneficiary would be employed in a primarily managerial or executive capacity. Counsel states that the director's decision "ignores the extensive record of the growing size and scope of the operations and the growing staff," and asserts that "extensive and ample evidence and information have been provided" to establish the beneficiary's employment in a managerial capacity. Counsel re-iterates the job description that was submitted by the petitioner in response to a request for evidence issued on May 8, 2003, and asserts "there is no reasonable basis whatsoever for concluding that these job duties, in a company with 5 employees and an annual revenue in excess of \$512,000.00 that this company has not established that it has a need for the services of a President who will serve in a managerial capacity."

Counsel does acknowledge the fact that "a question has been raised" regarding the petitioner's qualifying relationship with its claimed parent company. Counsel asserts that the petitioner's accountant erroneously identified the beneficiary as the sole owner of the U.S. company on the petitioner's 2002 IRS Form 1120, U.S. Corporation Income Tax Return. The petitioner submits its 2004 Form 1120 and asserts that the error has been corrected to reflect ownership by the claimed foreign parent company. The petitioner also submits the following evidence in support of the motion: (1) its Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2005; (2) its Form NYS-45, Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return for the first quarter of 2005; and (3) its Forms W-2, Wage and Tax Statement, for 2003 and 2004.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his

or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

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>

The petitioner's motion contains no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2). Counsel seeks to rely upon the petitioner's 2004 and 2005 staffing levels, business activities, and financial status to establish the beneficiary's employment in a managerial or executive capacity. However, the instant petition was filed in March 2003. Any new evidence submitted in support of a motion to reopen must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The AAO acknowledges receipt of the petitioner's 2004 federal tax return which identifies the claimed foreign parent company as the sole owner of the petitioning company. The submitted evidence cannot be considered "new." The petitioner's 2004 tax return is dated August 22, 2005, is un-signed, and is not accompanied by evidence that it has actually been filed with the Internal Revenue Service. Further, since the petitioner's 2002 income tax return indicated that the beneficiary, and not the foreign entity, in fact owns the petitioner, the appropriate method for correcting the claimed error would be for the petitioner to file an amended tax return for the 2002 tax year. The petitioner's 2004 tax return does not establish that the claimed error has been "corrected." The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Simply asserting that the reported ownership of the company was a clerical or accounting error does not qualify as independent and objective evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Furthermore, evidence that the petitioner creates after CIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice.

Finally, the AAO also found that there was insufficient evidence to establish that the foreign entity was continuing to do business in China. Neither counsel nor the petitioner addresses this issue on motion.

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 100. With the current motion, the movant has not met that burden.

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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).

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.

Counsel for the petitioner does not submit any evidence 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. With respect to the petitioner's failure to establish that the beneficiary would be employed in a primarily managerial or executive capacity, counsel does not even acknowledge, much less attempt to overcome, the deficiencies discussed at length in the AAO's decision. Counsel's reliance on a position description which has already been determined to be inadequate by both the director and the AAO, without more, is not sufficient to warrant reconsideration of this matter. As noted above, the petitioner's 2004 and 2005 staffing levels and financial status are not relevant to a determination as to whether the beneficiary was employed in a qualifying capacity at the time the instant petition was filed.

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).

In visa petition proceedings, the burden of proof 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.