

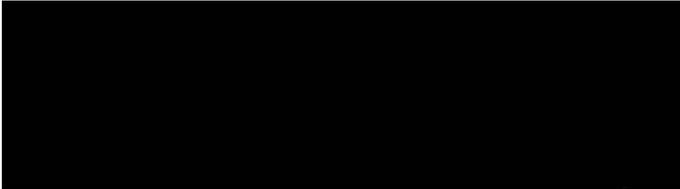
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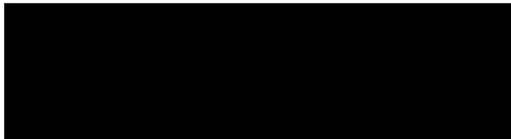
D7



FILE: SRC-02-250-51275 OFFICE: TEXAS SERVICE CENTER

DATE: JUL 14 2006

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:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The non-immigrant visa petition was denied by the Director, Texas Service Center. 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 extend the employment of the beneficiary as president and general manager under the L-1A nonimmigrant intracompany transferee program pursuant to § 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 under the laws of the state of Florida, and is engaged in providing custom framed pictures and artwork. The petitioner claims that it is a subsidiary of Sistemas Profesionales LTDA, located in Bogota, Colombia. The beneficiary was initially granted a period of stay of one year to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

On motion, counsel¹ submits additional evidence to address the grounds of the director's denial and the findings of the AAO. Counsel for the petitioner does not state any reasons for reconsideration, nor does counsel furnish any new facts to be provided in the reopened proceeding. Instead, counsel relies on an ineffective assistance of counsel assertion as justifying the motion to reopen and reconsider.

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.²

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). Unfortunately for the petitioner in this instance, the company or individual that filed the initial petition for extension was not an accredited attorney or representative. The AAO is thus unable to consider the motion to reopen or reconsider based on ineffective assistance of counsel claim.

¹ Neither the petitioner nor counsel submitted an Entry of Appearance as Attorney or Representative (Form G-28) in this matter. Absent a properly executed Form G-28, counsel's representation of the petitioner may not be recognized, and any assertions made by counsel in this proceeding will not be considered. See 8 C.F.R. § 103.2(a)(3).

² 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).

In addition, a review of the evidence that the petitioner submits on motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2). See "new" as defined in n.1, *supra*. All evidence submitted was previously available and could have been discovered or presented in the previous proceeding. A petitioner has the burden of proving eligibility for the benefit sought, but evidence submitted on motion will not be considered "new" and will not be considered a proper basis for a motion to reopen unless it meets the definition for new.

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 and 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 factual error. 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.³ Assuming, *arguendo*, that the petitioner intended to file a motion to reconsider, the petitioner's motion 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.

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.