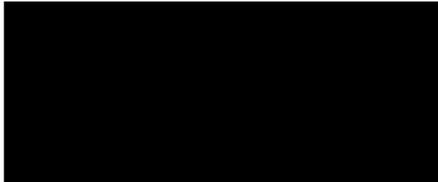




U.S. Citizenship
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Services

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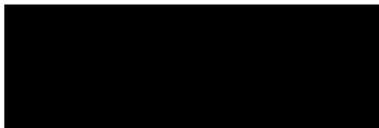
Date: **APR 05 2007**

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)

ON BEHALF OF PETITIONER:



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 on November 19, 2002. On December 20, 2002, counsel for the petitioner simultaneously filed an appeal as well as a motion to reopen and/or reconsider. On April 4, 2003, the director granted the motion but again denied the petition. On September 10, 2003, the Administrative Appeals Office (AAO) dismissed the petitioner's appeal, and the petitioner filed a motion to reconsider the AAO's decision on or about October 9, 2003. The AAO granted the petitioner's motion, and upheld its previous decision on June 16, 2005.

Upon review of the record, it is noted that on May 6, 2003, the petitioner also filed a motion to reconsider the service center's decision of April 4, 2003, which was not reviewed or ruled upon at the time of filing since the record of proceeding was being reviewed on appeal by the AAO at that time. Therefore, while the April 4, 2003 decision was rendered by the service center and not the AAO, the AAO was the office which rendered the last decision in this matter on June 16, 2005. Therefore, the authority to review the petitioner's motion of May 6, 2003 rests with the AAO. *See* 8 C.F.R. §103.5(a)(1)(ii). The motion will be dismissed.

The petitioner is a manufacturer's representative and wholesale retail business. It seeks to extend the employment of the beneficiary temporarily in the United States as its chief executive officer. The director determined that the petitioner had not established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

In support of the motion, counsel submits the following documents:

1. Service Center Denial dated November 19, 2002;
2. Notice of Appeal/Motion to Reconsider dated December 19, 2002;
3. Motion to Reopen/Reconsider dated January 16, 2003;
4. Motion to Reopen/Reconsider dated January 24, 2003;
5. Brief in Support of Motion to Reopen or Reconsider dated January 16, 2003;
6. Petitioner's letter dated January 13, 2003;
7. Copies of I-129 forms filed on or about April 23, 1999, May 18, 2000 and May 8, 2000, with supporting letters from the petitioner;
8. Request for Evidence dated August 1, 2002;
9. Petitioner's response to the Request for Evidence dated October 22, 2002.

In his letter of support accompanying the motion, dated May 6, 2003, counsel states that the January 16, 2003 brief and letter were not considered by the director when rendering the April 4, 2003 decision, and relies on this omission as the basis for the motion. A review of the record indicates that the director did not consider the evidence submitted in support of this motion since [REDACTED] was not the attorney of record at the time the motion was filed.

In the May 6, 2003 letter now before the AAO for consideration, counsel merely provides a list of exhibits and urges reconsideration of all evidence previously submitted. Counsel submits no additional evidence to address the grounds of the director's denial and the findings of the AAO. Counsel for the petitioner does not provide any new facts to be considered 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 for the petitioner has submitted copies of documentation previously submitted into the record, indicating that in October 2003, counsel submitted a properly executed Form G-28 and brief in support of the September 10, 2003 denial by the AAO. As a result, the petitioner through counsel had the opportunity to submit additional evidence to the AAO since the filing of the May 6, 2003 motion.

As argument in the May 6, 2003 motion, counsel merely states: "The reviewer faulted petitioner for failure to submit evidence that had not in fact been requested and misconstrued evidence that petitioner did submit." 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), especially considering that an updated brief was filed with the AAO and ruled upon in the June 15, 2005 decision. All evidence submitted in the motion currently before the AAO was previously available and could have been discovered or presented in the previous proceeding.

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.

Furthermore, 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. Although counsel contends that the basis for reconsideration is the director's omission of the January 16, 2003 documentation in rendering its April 4, 2003 decision, this documentation was rightfully excluded since counsel had not yet entered his appearance in this matter. However, since counsel was afforded an opportunity to present new evidence, which was considered by the AAO and analyzed in its decision of June 15, 2005, this point is now moot.

Finally, it should be noted for the record that, unless Citizenship and Immigration Services (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

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).

applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.