U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

FEB 23 2005

File: SRC 98 219 51013 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[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. The Administrative Appeals Office (AAO) dismissed the subsequently filed appeal and affirmed the director's decision to deny the petition. Thereafter, the petitioner filed a motion to reopen and reconsider. The AAO granted the motion, but affirmed the decision on appeal to deny the petition. The matter is now before the AAO on a second motion to reopen and motion to reconsider. The motion will be dismissed.

The petitioner is engaged in the manufacturing of plastic chairs. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its chief executive officer. The director determined that the petitioner had not established that the beneficiary had been or will be employed in a primarily managerial or executive capacity, or that the U.S. entity is doing business as a qualifying organization. The AAO affirmed these determinations on appeal, and again upon review of the petitioner's first motion to reopen and reconsider.

In connection with petitioner's second motion, counsel asserts that the AAO has "overlooked key pieces of evidence," and counsel submits a brief and the following evidence to address the grounds of the director's denial and the findings of the AAO:

Exhibits 1-3	Letters dated in May 2000 relating to the beneficiary's role with the U.S. entity
Exhibit 4	Brochure for PTM Incorporated
Exhibit 5	Lease of office premises for PTM Florida Inc.
Exhibit 6	Share certificates #1 (voided and reissued) and # 2 (cancelled) of the petitioner, and share certificate #1 of PTM East Coast, Inc.
Exhibit 7	List of shareholders of the foreign entity
Exhibit 8	Corporate tax returns of the petitioner for the years 1996, 1997 and 1998
Exhibit 9	Photographs of the premises of PTM East Coast, Inc.
Exhibit 10-12	Invoices, sale receipts and freight bills of PTM East Coast, Inc.
Exhibit 13	Employer's Quarterly Reports for the quarter ending June 30, 1997 through March 31, 2000 for PTM East Coast, Inc.
Exhibit 14	IRS Forms W-4 and invoices for temporary labor for personnel of PTM East Coast, Inc.
Exhibit 15	Affidavit of the beneficiary, dated December 29, 2000, pertaining to his temporary employment

With respect to the petitioner's motion to reopen, 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] At the same time, however, the petitioner 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).

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[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).

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). All evidence submitted on motion, to the extent they relate to the petitioner's eligibility for the benefit sought at the time the petition was filed initially, was previously available and could have been discovered or presented in the previous proceeding. In addition, it is noted that the petitioner has submitted evidence with this motion that was originally requested by the director in a request for additional evidence dated October 11, 1995. 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 "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.

With respect to the petitioner's motion to reconsider, 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 [Citizenship and Immigration Service (CIS)] 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 contends on motion that the petitioner has established that the beneficiary has been and will be employed in a primarily managerial or executive capacity. Counsel asserts that the AAO failed to take into consideration additional evidence submitted with the petitioner's first motion to reopen/reconsider, specifically the letters that counsel resubmits with the present motion as Exhibits 1-3. Counsel argues that, contrary to the AAO's opinion, such evidence demonstrates what the beneficiary has been and will be doing on a daily basis. Insofar as these letters were not part of the evidence of record before the director, the AAO does not find that the petitioner has established in the present motion that this aspect of the AAO's decision was "incorrect based on the evidence of record at the time of the initial decision."

Counsel also challenges the AAO's finding in the December 5, 2000 decision that the petitioner has failed to demonstrate that the U.S. and foreign entity are qualifying organizations engaged in the regular, systematic and continuous provision of goods and services. The AAO's finding in that instance was based upon certain inconsistencies relating to the ownership of the U.S. entity, which the petitioner failed to address. First, the AAO noted that according to the 1997 corporate tax return of the U.S. entity, all of the company's stock is owned by [redacted] the beneficiary, while the Form I-129 and the share certificates indicate that the foreign entity owns 100% of the U.S. entity. Second, the AAO noted that the petitioner has failed to adequately explain the issuance and cancellation of stock certificates #1 and #2, and the apparent reissuance of certificate #1, of the U.S. entity.

In the present motion, the petitioner has once again failed to reconcile the inconsistency regarding the ownership of the U.S. entity as disclosed in the company's tax returns as compared to other evidence of record. Further, the petitioner still has not provided sufficient evidence to establish that the foreign entity owns all of the U.S. entity's shares, and that the new share certificate #1 represents all of the issued and outstanding shares of the company, as the petitioner claimed. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.,* 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, the elements of ownership and control cannot be determined. The AAO therefore finds no error in its previous determination of this issue.

Counsel also asserts on motion that the AAO has overlooked evidence that the U.S. entity is engaged in the regular, systematic and continuous provision of goods and services. In the April 28, 2000 decision, the AAO found, "While it appears that [redacted] Inc., is a subsidiary of the U.S. entity and is doing business, the petitioner has not established that the U.S. entity is doing business through [redacted] as a qualifying organization." On motion, counsel simply resubmits evidence relating to [redacted] business, and does not provide any further explanation or evidence on motion that would establish how the U.S. entity is doing business as a qualifying organization through [redacted], or demonstrate how the AAO's decision was in error in light of applicable law or policy, or the evidence of record.

Finally, the AAO notes that while counsel asserts on motion that the beneficiary's employment in the United States is temporary, and the motion includes an affidavit from the beneficiary to that effect, counsel has identified no error in the AAO's previous conclusion that it cannot be determined based on the evidence of record whether the beneficiary's position in the U.S. is temporary, and that upon completion of his assignment, he will be transferred abroad.

Based on the foregoing, the AAO does not find that the petitioner has established that the previous decisions of the director and the AAO were based on an incorrect application of law or CIS policy, or that such decisions were incorrect based on the evidence of record at the time of the initial decision. Therefore, the petitioner has not met the applicable requirements for a motion to reconsider, and the motion to reconsider will be dismissed.

The petitioner should note 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).

Finally, it is noted for the record that the beneficiary has a denied Form I-140 (SRC 97 166 52006) filed by this petitioner and also has an approved Form I-140 (A76 472 113) that was filed on his behalf by a different

employer, Paul's Tarpaulins and Merchandise, Inc. If the approved Form I-140 is based on claims or evidence similar to that of this petition, the director would be warranted in reviewing the petition for possible revocation.

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

ORDER: The motion is dismissed.