[illegible] to prevent [illegible] invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FEB 28 2005

FILE: WAC 01 240 50219 Office: CALIFORNIA 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)

ON 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, California 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.

A U.S. entity was established in 1998 as a joint venture restaurant and import and export business. The petitioner claims that it is a continuation of the original joint venture. The petitioner seeks to extend its authorization to employ the beneficiary temporarily in the United States as its vice president.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part:

> (2) Requirements for motion to reopen. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence.
>
> (3) Requirements for motion to reconsider. 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.
>
> (4) Processing motions in proceedings before the Service. A motion that does not meet applicable requirements shall be dismissed.

The director determined that the petitioner had failed to establish that a qualifying relationship existed between the U.S. and foreign entities at the time the petition was filed. The director noted that neither a joint venture (50-50 ownership) nor an affiliate relationship existed between the petitioner (P.B. Thai Café) and the foreign entity (PM Orchid S.A.R.). The director found that the percentages of ownership varied and that there was a lack of affiliation between the petitioner, the newly established restaurant and the foreign entity. The AAO affirmed these determinations on appeal.

On motion, counsel notes that the joint venture agreement was entered into for the purpose of establishing and operating the Lotus Thai Cuisine restaurant and thereafter expanding to an import and export business. Counsel states that the original restaurant business, along with its name- Lotus Thai Cuisine - was sold in October of 1999. Counsel further contends that two of the three original partners to the joint venture returned to Thailand from the United States, abandoning their plan to establish an import and export business. Counsel asserts that a new location was eventually found by the beneficiary, who established the P.B. Thai Café. Counsel claims that the new restaurant is a part of the joint venture entered into by S.A.R. Partners and PM Orchid Company, LTD, located in Bangkok, Thailand, and therefore retains a qualifying relationship with the foreign entity. Counsel contends that the letter dated November 8, 2001, from the PM Orchid Company, LTD, located in Bangkok, Thailand substantiates the continued existence of the joint venture and the authority of the beneficiary to manage the current restaurant. Counsel also claims that the proceeds from the sale of the Lotus Thai Cuisine and funding from the foreign entity are used to sustain the P.B. Thai Café.

On motion, counsel submits a copy of Articles of Organization for PM Orchid Company, USA, LLC dated March 31, 2003; a statement, which purports to establish that PM Orchid Company, LTD. owns

90 percent of the LLC company's shares of stock, and that the beneficiary owns the other 10 percent of shares of stock in the company; a list of property owned by the new company; and a business plan for the newly formed LLC.

In review of the record, counsel has not stated any plausible reasons for reconsideration, nor does she furnish any new facts to be provided in the reopened proceeding. Evidence pertaining to the incorporation of PM Orchid Company, USA, LLC dated March 31, 2003, cannot be considered on motion. Although this evidence is considered "new" evidence, it was not in existence at the time the petition for extension of status was filed. Thus, it cannot be considered for purposes of establishing whether or not a qualifying relationship existed between the petitioner and the foreign entity at the time the petition was filed. 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. *See Matter of Michelin Tire Corp.,* 17 I&N Dec. 248, 249 (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 (Comm. 1998).

A review of the evidence submitted on motion reveals no fact or facts that could be considered "new" pursuant to the regulation at 8 C.F.R. § 103.5(a)(2). The AAO's interpretation of the business relationship existing between the petitioner and the foreign entity at the time the petition was filed has not been effectively challenged. The evidence shows that a joint venture was entered into for the sole purpose of operating a restaurant and eventually expanding into the import and export business. The evidence also shows that the beneficiary and two other partners entered into a general partnership in an effort to effectuate the joint venture in the United States. The record demonstrates that two of the three partners abandoned the partnership, returning to their native country. The record also demonstrates that the restaurant, which was the purpose behind the joint venture, was sold, along with its name; and that the partners abandoned any thoughts of expanding into an import and export business. The record shows that one partner remained in the United States and eventually opened up a new restaurant.

Counsel claims that the beneficiary received funding, and permission to open the new restaurant, from the foreign entity. In the instant case, there has been no objective documentary evidence produced to substantiate counsel's claims. The statements of counsel on motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya,* 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503 (BIA 1980). There has been no evidence submitted to establish that the general partnership continued to operate as such after all partnership assets (the original restaurant) had been sold. There has been no evidence submitted to establish that the "joint venture" was created for any other purpose than the creation and operation of the initial restaurant. There has been no evidence to show that the other two partners of the general partnership acquiesced to or empowered the beneficiary to carryout any business transactions on their behalf. The petitioner has failed to submit Articles of Incorporation, amendments to the partnership agreement, or amendments to the joint venture agreement that would demonstrate an ongoing relationship between the petitioner and the foreign entity. On motion, there has been no evidence submitted that reveals any facts that can be considered "new."

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).

Motions for the reopening and reconsideration 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. 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.