identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B4

[redacted]

FILE: [redacted] OFFICE: NEBRASKA SERVICE CENTER Date: NOV 02 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner appealed the matter to the Administrative Appeals Office (AAO), where the appeal was dismissed. The matter is now before the AAO on motion to reopen. The motion will be dismissed.

The petitioner is a Florida corporation engaged in the business of offering language-based education programs. The petitioner seeks to employ the beneficiary as its "language director/owner." Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition on the grounds that: (1) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity in the United States; and (2) the petitioner failed to establish that it has a qualifying relationship with the foreign entity that employed the beneficiary abroad.

The petitioner appealed the director's decision. The AAO dismissed the appeal, noting that in responding to the director's RFE, the petitioner failed to provide crucial documents that are necessary to gauge the availability of a support staff and whether the beneficiary would be relieved from having to primarily perform the non-qualifying, daily operational tasks of the business. Therefore, the AAO concluded that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The AAO also found that the petitioner failed to submit sufficient evidence to demonstrate that the petitioner and the beneficiary's employer abroad have the required common ownership and control. Beyond the decision of the director, the AAO also found that, insofar as the regulation at 8 C.F.R. § 204.5(j)(5) requires the petitioner to establish that the beneficiary will be "employed" as an "employee" of the United States operation, the petitioner has failed to do so. *See, e.g., Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 449-450 (2003). Additionally, the AAO found the petitioner has failed to show that the beneficiary was employed abroad in a qualifying managerial or executive capacity per 8 C.F.R. § 204.5(j)(3)(i)(B), or that the petitioner is a "multinational" entity, as defined at 8 C.F.R. § 204.5(j)(2).

On motion to reopen, the petitioner asserts that all required information in connection with the petition has been submitted previously. At the same time, the petitioner submits additional evidence, which the petitioner claims was "omitted unintentionally in the previous presentations." Specifically, the evidence submitted on motion includes: (1) a partnership agreement dated March 27, 1992, in Spanish with English translation, documenting the formation of the foreign entity; (2) an undated letter from an attorney in Buenos Aires describing the assignment of the beneficiary to the U.S. branch of the business by the foreign entity's board of directors; (3) an undated organizational chart for the U.S. company; and (4) the U.S. company's IRS Forms W-3 and W-2 for the year 2008.

The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that 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, the petitioner has failed to state any new fact that would be provided in the reopened proceeding. In fact, the petitioner maintains that it "ha[s] presented in the last two presentations all the documentations concerning [the beneficiary's] activity in the country." Further, a review of the additional evidence submitted on motion reveals no relevant documentation that could be considered "new" pursuant to 8 C.F.R. § 103.5(a)(2).

In the instant matter, the director's RFE issued in August 2007 clearly requested that the petitioner provide "evidence to establish the qualifying corporate interrelationship between the United States business entity and the foreign business entity which employs or employed the alien." The director also specifically requested an organizational chart depicting the beneficiary's position within the U.S. company. A motion is not meant to allow the petitioner an additional opportunity to correct deficiencies that it previously failed to correct or to provide information that it should have previously provided. Rather, as indicated above, the purpose of a motion to reopen is to provide the petitioner an opportunity to supplement the record with evidence that was previously unavailable. As the petition was filed in April 2007, evidence from 1992 documenting the foreign entity's formation and an organizational chart, whose purpose is to depict the petitioner's hierarchy at the time of filing, cannot be deemed documents that were "previously unavailable." Therefore, the evidence submitted on motion fails to meet the requirements of a motion to reopen under 8 C.F.R. § 103.5(a)(2).

Further, the AAO notes that the record contains a copy of a letter identical in content to the attorney letter submitted on motion, the only difference being the dates of translation. As such, that letter clearly does not qualify as "new" evidence.

Finally, documentation relating to wages paid to the petitioner's employees in 2008 is not relevant to this proceeding, insofar as it does not establish the petitioner's eligibility at the time the petition was filed. The petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In light of the foregoing, the AAO concludes that the requirements of a motion to reopen have not been met and, therefore, the motion will be dismissed.

The AAO notes that the petitioner did not indicate on the Form I-290B that the petitioner is filing a combined motion to reopen and motion to reconsider, although the petitioner states that "it has been very partialized evaluation of the elements brought for their consideration for what I believe this opportunity will be conducted in a more integral way *[sic]*." Even if this statement is to be

---

[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).

interpreted as a request for reconsideration of the petition, the petitioner has failed to meet the requirements of a motion to reconsider.

The regulations at 8 C.F.R. § 103.5(a)(3) state, 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.

The petitioner has failed to assert that the AAO's decision was based on an incorrect application of law or Service policy, nor does the petitioner cite to any pertinent precedent decisions that would indicate such to be the case. As such, the petitioner has also failed to fulfill the requirements of a motion to reconsider.

Accordingly, the motion will be dismissed pursuant to with 8 C.F.R. § 103.5(a)(4), which states, in pertinent part, that a motion that does not meet applicable requirements shall be dismissed.

As a final note, the proper filing of a motion to reopen and/or reconsider does not stay the AAO's prior decision to dismiss an appeal or extend a beneficiary's previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

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" of proof. *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the previous decision of the AAO will not be disturbed.

ORDER: The motion is dismissed.