

U.S. Department of Homeland Security  
20 Massachusetts Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services



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FILE: LIN 00 179 51938 Office: NEBRASKA SERVICE CENTER Date:

APR 01 2005

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:



OFFICIAL COPY

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

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**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reopen and reconsider. The motion is dismissed and the previous decision of the director and the AAO will be affirmed and the petition will be denied.

The petitioner was established in 1996 and claims to be in the business of distributing household products. 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 failed to establish that the beneficiary had been or would be employed by the U.S. entity in a primarily managerial or executive capacity. The director stated that the petitioner described the beneficiary's duties as, "being responsible for the executive/managerial direction of all operations and the supervision of the sales manager." The director further stated that the organizational chart submitted by the petitioner indicated that the U.S. entity employed the beneficiary, a manager, and three other employees, and that the beneficiary was "responsible for overseeing all bookings and official office duties." The director also stated that the petitioner indicated on the chart that the manager supervised the three other employees and that the manager traveled with the three employees demonstrating various products at home and trade shows. The director noted that the petitioner had failed to submit a comprehensive description of the beneficiary's duties. The director also noted that the petitioner had not submitted any evidence to show that the beneficiary had or would have managerial control of a function, department, subdivision or component of the organization. The director further noted that the petitioner's evidence was not persuasive in establishing that the beneficiary would be managing a subordinate staff of professional, managerial, or supervisory personnel who would relieve the beneficiary from performing non-qualifying duties. The director concluded by stating that it appeared from the record that the beneficiary has been and would continue to primarily perform the day-to-day activities of the operation necessary to maintain the U.S. entity's business.

The AAO affirmed these determinations on appeal, and also noted that the organizational chart indicated that the sales manager and three subordinates "travel from state to state demonstrating [the petitioner's] various products at Home and Trade Shows." The AAO further noted that the petitioner had failed to show that there were any employees available to relieve the beneficiary from performing non-qualifying duties while the sales manager and other three employees traveled from state to state displaying the petitioner's product. The AAO also denied the petition based upon the conflicting information and numerous inconsistencies contained in the record regarding the U.S. entity's place of business.

On motion, counsel submits a brief and additional evidence to address the grounds of the director's denial and the findings of the AAO. 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.<sup>1</sup>

On motion, the petitioner submits a copy of a revised organizational chart depicting the U.S. entity's organizational hierarchy, an affidavit from [REDACTED] and a letter from [REDACTED] who states that the beneficiary's position is executive and managerial in nature. The petitioner resubmits two separate affidavits from the president [REDACTED] and other letters of recommendation on behalf of the beneficiary as additional evidence to address the grounds of the director's denial and the findings of the AAO. Counsel asserts on motion that the evidence submitted, "clearly and conclusively establishes [the beneficiary] has overall responsibility for the establishment and conduct for [the U.S. entity.]" Contrary to counsel's

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<sup>1</sup> 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).

assertions, the evidence submitted on motion contains inconsistent accounts of the number of employees employed by the petitioner. Further, none of the evidence submitted on motion addresses the issue of the U.S. entity's staffing levels at the time the petition was filed, nor does any of the evidence provide detailed, consistent job descriptions for all employees.

A review of the evidence that the petitioner submits on motion reveals no fact that could be considered "new" pursuant to the regulation at 8 C.F.R. § 103.5(a)(2). The fact that petitioner admits to the beneficiary performing non-qualifying duties such as marketing and selling the petitioner's products coincides with the director's denial and the AAO's findings. Further, a revised organizational chart, eliminating the initial description of the employees' activities, will not be considered by the AAO on motion as "new" evidence. In the instant matter, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). In addition, the petitioner has failed to adequately address the issue concerning the numerous inconsistencies and conflicting information regarding the petitioner's place of business.

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.

Beyond the decision of the director and the previous findings of the AAO, a remaining issue in this proceeding is whether the petition for extension of stay by the beneficiary was timely filed pursuant to 8 C.F.R. § 214.2(l)(14)(i). There is no evidence to show that the beneficiary was in lawful status at the time the petition was filed. In the instant matter, it is noted that the petition for extension of the beneficiary's temporary stay in the United States as the entity's Chief Executive Officer was filed on June 6, 2000. The petitioner submitted a copy of the Approval Notice, which afforded the beneficiary L-1A status from May 27, 1998 to May 26, 2000. The regulation states: "A petition extension may be filed only if the validity of the original petition has not expired." Furthermore, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). For this additional reason, the petition may be denied.

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.

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**ORDER:** The motion is dismissed.