U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 02 247 50732 Office: CALIFORNIA SERVICE CENTER Date: JAN 27 2006

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 Director, California Service Center, denied the petition for a nonimmigrant visa. 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. The motion will be dismissed.

The petitioner seeks to employ the beneficiary temporarily in the United States as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L). The petitioner is a corporation organized in the State of California that is engaged in the import, export and wholesale of industrial supplies. The petitioner claims that it is the subsidiary of Juteng Real Estate Development, located in Tianjin, China, and seeks to employ the beneficiary as its president.

The director denied the petition concluding that the beneficiary did not possess one continuous year of full-time employment with a qualifying organization abroad within the three years preceding the filing of the petition. The AAO affirmed this determination on appeal, and further concluded that the petitioner had not established: (1) that the beneficiary would be employed in a managerial or executive capacity in the United States; (2) that the beneficiary would be employed in the United States for a temporary period and transferred to an entity abroad upon completion of his assignment; or (3) that the petitioner has a qualifying relationship with the foreign entity.

The petitioner filed a motion to reopen on October 27, 2004. On motion, counsel for the petitioner submits the following statement on Form I-290A:

> The petitioner will provide new facts in the reopened proceeding to overcome the grounds provided by the Service for denial of the petition. First, the beneficiary has been employed in a full-time capacity for the foreign parent company for at least one year within the previous three years. The formal payroll records and the degree of control that the foreign parent company has over the beneficiary are sufficient to determine he is really a de facto employee of the company. Second, the beneficiary will be employed by the U.S. entity in a primarily executive or managerial capacity as defined at section 101(a)(44) of the Immigration and Nationality Act ("INA"). While staffing levels of the business are not crucial in determining whether or not an individual is acting in an executive or managerial capacity, it is nevertheless a factor in such a determination. However, the INA specifically states that if staffing levels are used as a factor, the reasonable needs of the organization, component or function in light of the overall purpose and stage of development of the organization, component or function must be taken into account. The petitioning company has reached such a stage of organizational development and is of such complexity that it can be realistically concluded that the individual seeking transfer will be primarily engaged in executive or managerial duties.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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."

Counsel's statement suggests that the petitioner intended to submit "new facts" in support of the motion to reopen a later date. However, no affidavits or other evidence were submitted with the Form I-290A. The AAO notes that, although the regulation at 8 C.F.R. § 103.3(a)(2)(vii) allows a petitioner additional time to submit a brief or evidence to the AAO in connection with an appeal, no such provision applies to a motion to reopen or reconsider. The additional evidence must comprise the motion. *See* 8 C.F.R. §§ 103.5(a)(2) and (3).

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]

Counsel's brief statement contains no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2), nor is it supported by affidavits or documentary evidence as required by the regulations. The unsupported statements of counsel on appeal or in a 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). The petitioner has not met the requirements for filing 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 100. With the current motion, the movant has not met that burden.

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.

Counsel for the petitioner does not submit any evidence that would meet the requirements of a motion to reconsider. Counsel does not state any reasons for reconsideration nor cite any precedent decisions in support of a motion to reconsider. Again, the unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, *supra*; *Matter of Ramirez-Sanchez*, *supra*. The AAO will not grant a motion to reconsider based on counsel's brief statement.

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).

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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).

In visa petition proceedings, the burden of proof 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.