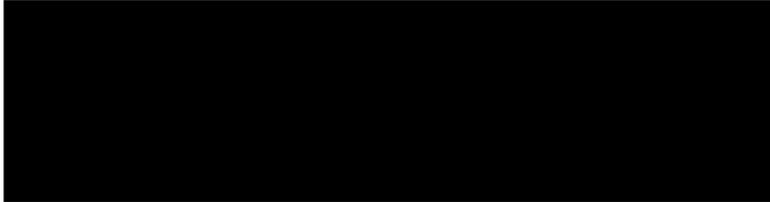


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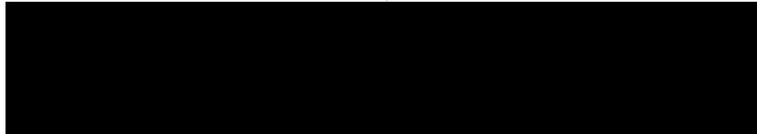
FILE: WAC 03 162 50514 Office: CALIFORNIA SERVICE CENTER Date: **NOV 13 2006**

IN RE: Petitioner:  
Beneficiary:



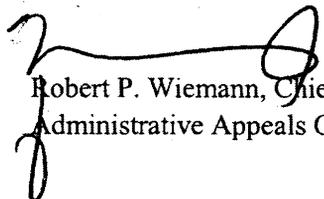
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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, Chief  
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 and reconsider. 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 claims to be a computer education service provider. The petitioner states that it is an affiliate of Innovative Training Works, Inc., located in the Philippines. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition on August 29, 2003, concluding that the petitioner failed to establish that the beneficiary would be employed in primarily managerial or executive capacity under the extended petition. The petitioner subsequently filed an appeal. In a decision dated May 11, 2005, the AAO affirmed the director's decision, and further concluded that the petitioner had not established that the U.S. entity had been doing business for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B).

The petitioner filed the instant motion to reopen and reconsider on June 20, 2005.<sup>1</sup> On motion, counsel for the petitioner provides a brief statement on Form I-290B, in which he provides an overview of the petitioner's business activities and the beneficiary's duties, and asserts that as of June 2005, the petitioning company has five employees and year-to-date revenues of \$250,000. Counsel further states: "Evidence of the same will be produced pursuant to regulation within 30 days. The above information was not available at the time this matter was submitted and is material to the determination of eligibility for the benefit sought."

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<sup>1</sup> The regulation at 8 C.F.R. § 103.5(a)(1)(i) requires that any motion to reopen or reconsider an action by Citizenship and Immigration Services (CIS) be filed within 30 days of the decision that the motion seeks to reopen or reconsider, except that failure to file before this period expires may be excused in the discretion of CIS where it is demonstrated that the delay was reasonable and was beyond the control of the petitioner.

In accordance with 8 C.F.R. § 103.2(a)(7)(i), an application received in a Citizenship and Immigration Services (CIS) office shall be stamped to show the time and date of actual receipt, if it is properly signed, executed and accompanied by the correct fee. For calculating the date of filing, the motion shall be regarded as properly filed on the date that it is so stamped by the service center. It is noted that the AAO properly gave notice to the petitioner that it had 30 days to file the motion, and advised the petitioner that the motion, with the appropriate filing fee, must be filed with the office that originally decided the case, as required by 8 C.F.R. § 103.5(a)(iii). In the present matter, according to the date stamp on the motion, the motion was received by the director on June 20, 2005, forty days after the AAO's decision was issued. It appears that the motion was improperly submitted to the AAO on June 10, 2005, and was subsequently returned to counsel with notice that the motion must be filed with the California Service Center. Therefore, in addition to not meeting the requirements of a motion to reopen or a motion to reconsider, the AAO finds that the instant motion was untimely filed.

On July 11, 2005, counsel for the petitioner submitted a brief and additional evidence consisting of: (1) a sale and purchase contract pertaining to the petitioner's claimed purchase of the assets of an unrelated company with six employees effective on November 1, 2003, six months subsequent to the filing of the instant petition; and (2) the petitioner's California Form DE-6, Quarterly Wage and Withholding Report, for the first quarter of 2005, which identifies six employees.

The AAO notes that, contrary to counsel's assertions, the petitioner was not afforded 30 additional days in which to supplement its motion to reopen and reconsider with additional documentation. 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). Therefore, in this case, the petitioner's motion consists solely of a Form I-290B containing a statement from counsel and no supporting brief or evidence. The brief and evidence submitted by counsel 30 days subsequent to the filing of motion need not and will not be considered.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

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>2</sup>

Counsel's brief statement contains no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2), nor was it properly supported by timely-filed 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). Furthermore, counsel seeks to rely upon the petitioner's 2005 staffing levels, business activities, and financial status to establish the beneficiary's eligibility for the benefit sought. Even if properly supported with documentary evidence, counsel's arguments regarding the petitioner's and beneficiary's eligibility as of 2005 are not relevant, as the instant petition was filed in May 2003. Any new evidence submitted in support of a motion to reopen 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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<sup>2</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).

Furthermore, counsel has not acknowledged, nor submitted evidence to rebut, the AAO's determination that the petitioner had failed to establish that the petitioner was doing business in the United States in a regular, systematic and continuous manner as of May 2003.

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).

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.