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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

b7

[redacted]

FILE: EAC 03 165 50593 Office: VERMONT SERVICE CENTER Date: JUL 07 2008

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:

SELF-REPRESENTED

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, Vermont Service Center, denied the petition for a nonimmigrant visa. The Administrative Appeals Office (AAO) summarily dismissed the petitioner's appeal. The AAO subsequently granted the petitioner's motion to reopen and affirmed its previous decision to dismiss the appeal. Subsequently, the petitioner appealed the AAO's decision, and the AAO rejected the appeal as improperly filed. The matter is now before the AAO on a motion to be reopen. The motion will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its vice-president 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 New Jersey that claims to be a wholesaler and dealer of general merchandise. The petitioner states that it is a subsidiary of M.R. Utensils, located in Ahmedabad, India. The beneficiary was initially granted a one-year period in L-1A classification in order 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 February 24, 2004, concluding that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity under the extended petition. The AAO dismissed the petitioner's appeal and affirmed its decision on a subsequent motion to reopen, in a decision dated May 17, 2007. The petitioner subsequently filed an appeal on June 14, 2007. The AAO rejected the appeal, noting that the AAO does not exercise appellate jurisdiction over AAO decisions. In its decision dated December 4, 2007, the AAO reviewed the petitioner's appeal, and found that the appeal did not meet the requirements of a motion to reopen or reconsider.

The petitioner filed the instant motion to reopen on January 4, 2008. On motion, the petitioner emphasizes that the nonimmigrant petition was filed "to enable the beneficiary to continue to carry on the business of the petitioner company undertaking the same duties/job functions earlier entrusted to her, carried on as such AND which were approved by USCIS as managerial." The petitioner states that the approval of the initial petition on behalf of the beneficiary "confirmed due fulfilment [sic] of the statutory and regulatory requirements." The petitioner contends that the denial of the petition constituted an abuse of discretion, arguing that an "adverse determination quite opposite and contrary to the previous determination without good or sufficient cause cannot be acceptable as rational or reasonable." The petitioner submits a brief, but no new evidence, in support of the motion.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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.[1]

The petitioner's statement contains no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2), nor is it properly supported by affidavits or documentary evidence as required by the regulations.

Furthermore, 8 C.F.R. § 103.5(a)(3) 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.

The petitioner argues that the denial of the request to extend the beneficiary's L-1A status constitutes a violation of Citizenship and Immigration Services (CIS) policy and an abuse of discretion because CIS previously approved a petition filed on the beneficiary's behalf for the same position. It must be emphasized that prior approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Further, the petitioner's prior petition to which counsel refers was a petition to allow the beneficiary to enter the United States to open a new office. Thus, that petition was governed by the regulations pertaining to new offices. *See* 8 C.F.R. § 214.2(l)(3)(v). The present petition is a request for an extension of the beneficiary's status after completing a one-year period to open a new office. Thus, the present petition is governed by a different set of regulations pertaining specifically to new office extensions. *See* 8 C.F.R. § 214.2(l)(14)(ii).

A 2004 interoffice memorandum to CIS Service Center Directors and Regional Directors regarding the significance of prior CIS approvals specifically states that, while deference should be given to the prior adjudicators in matters relating to an extension of nonimmigrant petition validity involving the same parties and the same underlying facts, such policy does not apply to nonimmigrant petitions "where the initial approval is granted to allow the petitioner and/or beneficiary to effectuate a tentative or prospective business plan or otherwise prospectively satisfy the requirements for the visa classification." L-1 "new office" petition extensions are specifically included in this class of nonimmigrant petitions. *See* Memorandum of William R. Yates, Associate Director for Operations, USCIS, to Service Center Directors, et al, *The Significance of a Prior CIS Approval on a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity* HQOPRD 72/11.3 (April 23, 2004).

As different law and evidentiary requirements apply to the present petition, the director has a duty to carefully review the petitioner's representations and documentation to determine if eligibility has been established. Contrary to the petitioner's suggestion, the fact that a prior petition was approved on behalf of the beneficiary

---

[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).

does not serve as *prima facie* evidence that eligibility has been established in the present proceeding. Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by CIS regulation, that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational and/or it does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petition was denied because the U.S. company, one year after the approval of the new office petition, had not reached the point where it could employ the beneficiary in a predominantly managerial or executive position.

On motion, the petitioner does not address the AAO's prior 14-page decision in which the merits of the petitioner's arguments and evidence were discussed in great detail, and the AAO concurred with the director's determination that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. Thus, the motion fails to establish that the director's decision was incorrect based on the evidence of record at the time of the initial decision, as required by 8 C.F.R. § 103.5(a)(3).

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 regulation at 8 C.F.R. § 103.5(a)(4) states, in pertinent part, that a motion that does not meet applicable requirements shall be dismissed. Here, the petitioner's motion does not meet the requirements for a motion to reopen or a motion to reconsider as set forth at 8 C.F.R. § 103.5.

In visa petition proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden. 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.