



U.S. Citizenship
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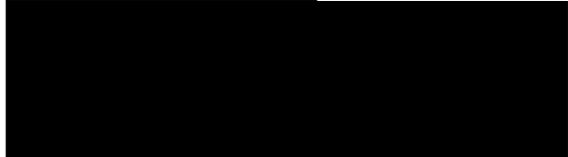
FILE:

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:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The Administrative Appeals Office (AAO) dismissed the petitioner's subsequent appeal. The matter is now before the AAO on a combined motion to reopen and motion to reconsider. The AAO will dismiss the motion.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary 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, a Florida limited liability company, intends to purchase and export luxury automobiles to Russia. It claims to be an affiliate of [REDACTED] located in Russia. The petitioner seeks to employ the beneficiary as president of its new office in the United States for a period of one year.

The director denied the petition based on three independent and alternative grounds, concluding that the petitioner did not establish: (1) that it had secured sufficient physical premises to house the new office; (2) that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity for at least one year within the three years preceding the filing of the petition; or (3) that the U.S. entity would support a managerial or executive position within one year.

The AAO dismissed the appeal on April 29, 2010. The AAO found that the petitioner had submitted sufficient evidence to establish that the foreign entity employed the beneficiary for at least one year within the three years preceding the filing of the petition. However, the AAO concurred with the director's determination on all other grounds.

The matter is now before the AAO on a combined motion to reopen and reconsider. On motion, counsel indicates that the U.S. office location has been relocated to [REDACTED] which the record shows is the beneficiary's residential home that he purchased in 2007. Counsel asserts that this space will be sufficient for the conduct of the company's business. With respect to the issue of the beneficiary's managerial or executive employment capacity abroad, counsel asserts that it is "self-evident" that the beneficiary allocated more than 50% of his time to executive duties. Counsel asserts that any discrepancies the AAO observed with respect to his foreign duties "are accounted for by the translation of his functions from the Russian language to the English language." Finally, with respect to the beneficiary's proposed employment in the United States, counsel states that the beneficiary's core duty will be "guiding the company to its central objective," and that "[l]ogically the very nature of these functions requires that he will devote more than 50% of his time to his executive/managerial position." Counsel once again attributes any discrepancies in the record to "the translation of his functions from the Russian language to the English language." The petitioner submits an amended business plan "which indicates that his duties will be primarily managerial."

The regulation at 8 C.F.R. § 103.5(a)(2) states:

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.

The regulation at 8 C.F.R. § 103.5(a)(3) states:

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 [U.S. Citizenship and Immigration Services (USCIS)] 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.

In addition, the regulation at 8 C.F.R. §103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." The petitioner's motion does not contain this statement. The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion does not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must be dismissed.

Even if the petitioner had complied with the requirements at 8 C.F.R. § 103.5(a)(1)(iii)(C), the petitioner did not submit any new evidence, nor has it established that the AAO's decision to dismiss the appeal was based on an incorrect application of law or USCIS policy. 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

With respect to the issue of whether the petitioner had acquired sufficient physical premises to house the new office, counsel claims that the U.S. company relocated from the address listed on the petition to the beneficiary's residence on some date subsequent to the AAO's dismissal of the petitioner's appeal. 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 or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Further, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Even if the petitioning company has relocated, the petitioner still bears the burden of establishing eligibility pursuant to 8 C.F.R. § 214.2(l)(3)(v)(A) as of the date of filing the petition. The petitioner has not addressed the AAO's finding that the petitioner failed to establish that it had obtained sufficient physical premises to house the new office as of April 11, 2008, nor has it submitted any additional evidence pertaining to the premises located at the address indicated on the initial petition. Evidence that the petitioner relocated at a later date is not considered "new" evidence under 8 C.F.R. § 103.5(a)(2).

The AAO also dismissed the appeal on the grounds that the petitioner failed to establish that the foreign entity employed the beneficiary in a primarily managerial or executive capacity. The AAO devoted three pages of its decision to a discussion of why the petitioner failed to meet its burden to establish that the beneficiary's duties were primarily managerial or executive in nature, and noted the following deficiencies: (1) the petitioner failed to provide a detailed description of the beneficiary's position with the foreign entity even after the director specifically requested that it do so; (2) the petitioner failed to provide a clear and consistent description of the nature of the foreign entity's business; and (3) the petitioner failed to adequately describe the number and types of employees working for the foreign entity or how they relieve the beneficiary from performing non-qualifying duties. In light of these stated deficiencies, counsel's conclusory assertion on

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 College Dictionary* 736 (2001)(emphasis in original).

motion that it is "self-evident" that the beneficiary devoted the majority of his time to executive duties is not persuasive. The unsupported statements of counsel on appeal or on 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). Counsel fails to acknowledge the specific deficiencies addressed in the AAO's decision.

Finally, the AAO dismissed the appeal based on a finding that the petitioner failed to establish that it would employ the beneficiary in a primarily managerial or executive capacity within one year of the approval of the "new office" petition. In reaching this conclusion, the AAO emphasized that the petitioner's business plan indicated that the beneficiary would be the company's sole employee at the end of the first year of operations, and that he would more likely than not be performing primarily non-qualifying administrative and operational duties associated with the purchase and export of automobiles.

On motion, counsel asserts that the beneficiary's "core duty" will be to facilitate business outside of the company while guiding the company to its central objective," and that "[l]ogically, the very nature of these functions requires that he will devote more than 50% (majority) of his time to his executive/managerial position." Again, counsel has not addressed the specific evidentiary deficiencies discussed in the AAO's decision and thus has not established that the decision was based on an incorrect application of law or USCIS policy. *See* 8 C.F.R. § 103.5(a)(3). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Further, the AAO cannot accept a business plan amended in 2010 as "new" evidence pertaining to a petition filed in 2008. The amended business plan indicates that the beneficiary would hire a secretary and up to three salespeople during the first year of operations, while the initial business plan submitted at the time of filing stated that the beneficiary would be the sole employee of the U.S. company until sometime during the second year of operations. The petitioner 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'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

The regulation at 8 C.F.R. § 103.5(a)(4) states, in pertinent part: "A motion that does not meet applicable requirements shall be dismissed." The petitioner has not met the filing requirements for a motion to reopen or reconsider.

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).

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. Accordingly, the motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.