U.S. Department of Homeland Security
U. S. Citizenship and Immigration Servic
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: AUG 2 9 2013 Office: CALIFORNIA SERVICE CENTER [redacted]

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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa, and the Administrative Appeals Office (AAO) dismissed the petitioner's appeal. The matter is now again before the AAO on a combined motion to reopen and reconsider. The AAO will dismiss the motion.

The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's status 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 California corporation established in 2008, states it is engaged in the importing and exporting of precious jewelry. It claims to be a wholly owned subsidiary of The petitioner seeks to continue to employ the beneficiary as its executive manager.

The director denied the petition, concluding that the petitioner failed to establish that it had a qualifying relationship with its claimed parent company in India. The director reasoned that the petitioner had not provided evidence, as specifically requested by the director in her request for evidence (RFE), necessary to establish that the foreign entity had paid for its claimed stock ownership and controlling interest in the petitioning company.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. The AAO dismissed the petitioner's appeal and affirmed the director's finding that the petitioner had not established a qualifying relationship with the foreign entity. The AAO emphasized that the petitioner had failed to submit a complete response to the RFE, and specifically failed to provide: (1) minutes of the petitioner's shareholder meetings to support the stock transactions, (2) a stock ledger showing the issuance of stock in the petitioner to the foreign employer, (3) evidence to establish that consideration was paid by the foreign employer for stock in the petitioner, and (4) a detailed list of owners in the foreign employer. As such, the AAO did not accept this evidence when the petitioner submitted it for the first time on appeal.

Additionally, the AAO concluded that petitioner failed to establish that the foreign entity continued to do business as a qualifying organization in India. The AAO observed that the foreign employer was described as a sole proprietorship wholly owned by the beneficiary, and noted that the beneficiary's prolonged presence in the United States raised questions as to whether the foreign employer was still doing business as required by the regulations.

Lastly, the AAO found, beyond the decision of the director, that the petitioner had not established that it would employ the beneficiary in a qualifying managerial or executive capacity. The AAO noted that the petitioner provided a vague position description for the beneficiary that included many non-qualifying operational duties and did not specify the amount of time the beneficiary spent on non-qualifying and qualifying tasks. Further, the AAO observed that the petitioner materially changed the beneficiary's duties in response to the director's RFE. The AAO also pointed to material discrepancies in the petitioner's submitted employer tax return documentation that suggested the petitioner did not have sufficient operational employees to relieve the beneficiary from performing non-qualifying tasks.

The petitioner now files a motion to reopen and reconsider the AAO's decision.

On motion, counsel states that the failure to submit evidence of a qualifying relationship with the director was based on an """oversight" by the petitioner's previous counsel. Counsel asserts that evidence of a qualifying relationship should be accepted by the AAO based upon its *de novo* review authority and through the exercise of sound discretion. Counsel states that if the additional evidence is accepted, the petitioner will have established with a preponderance of the evidence that the foreign employer owns 100% of the petitioner, thereby establishing them as parent and subsidiary. Counsel does not submit additional evidence or arguments relevant to the AAO's conclusion that the petitioner had not established the beneficiary would act in a managerial or executive capacity in the United States. Counsel asserts that if the decision is reopened that the petitioner would submit more detailed evidence relevant to the beneficiary's proposed managerial or executive capacity in the United States.

The AAO's review in this matter is limited to the narrow issue of whether the petitioner has presented and documented new facts or documented sufficient reasons, supported by pertinent precedent decisions, to warrant the re-opening or reconsideration of the AAO's decision to dismiss the petitioner's previous appeal.

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.

First, the AAO notes that the petitioner has not submitted any new evidence, but submits evidence it already had an opportunity to provide to the director.[1] In the RFE, the director specifically asked the petitioner to submit, *inter alia*: (1) minutes of the petitioner shareholder meetings confirming the offered ownership of stock in the petitioner; (2) a stock ledger showing the issuance of stock in the petitioner to the foreign employer; (3) evidence to establish that consideration was paid by the foreign employer for stock in the petitioner; and (4) a detailed list of owners of the petitioner and the foreign employer. As noted in the director's decision, and the previous AAO decision, the regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

---

[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).

Where, as here, a petitioner was put on notice of a deficiency in the evidence and given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal, or now on motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.*

However, counsel contends that the evidence previously submitted on appeal should now be considered by the AAO based upon its *de novo* authority and consistent with the exercise of sound discretion. The AAO does not find this assertion of counsel convincing. That said, the AAO does concur that the AAO holds *de novo* authority on appeals. The AAO reviews each appeal on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). Further, the submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). However, the AAO can and does preclude evidence submitted for the first time on appeal if it determines that the petitioner was previously given an opportunity to provide the evidence and failed to do so. Here, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and attempted to submit it on appeal. Therefore, the evidence was properly excluded. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

The AAO has already provided a full *de novo* review of the record in this case, and determined that the petitioner did not submit sufficient evidence of a qualifying relationship between the foreign employer and petitioner. As noted, this decision was based, in part, upon the conclusion that the additional evidence of a qualifying relationship submitted on appeal, including a stock transfer ledger and minutes of a petitioner shareholder meeting, would not be accepted on appeal since this evidence was not provided in response to the director's direct request. The petitioner offers no new explanations or assertions as to why this evidence was not submitted in response to the director's RFE, but again only states that this was an "oversight" by former counsel. Without a viable explanation as to why this evidence was not previously submitted by the petitioner, the AAO will not consider the aforementioned evidence as new and sufficient to reopen the matter.

Further, the AAO also notes that the petitioner has submitted no evidence to overcome the other findings made in its decision dated January 17, 2013. The AAO determined that, even if the petitioner had established the claimed qualifying relationship between the petitioner and the foreign entity, the record did not contain evidence to establish that the foreign sole proprietorship continues to do business as a qualifying organization in India. In order to be deemed a qualifying organization, a foreign employer must be shown, along with the petitioner, to be doing business as defined by the regulations. *See* 8 C.F.R. § 214.2(l)(1)(ii)(G). The term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R.

§ 214.2(l)(1)(ii)(H). However, the petitioner has not submitted any new evidence on motion relevant to the foreign employer's ongoing business operations.[2]

Counsel acknowledges the AAO's additional finding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive finding. However, the petitioner provides no evidence relevant to this issue but rather states that it will supplement the record with additional evidence of the beneficiary's duties and employment capacity if the matter is reopened. Although the regulation at 8 C.F.R. § 103.3(a)(2)(vii) states that a petitioner may be permitted additional time to submit a brief or additional 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). As such, the petitioner has submitted no new evidence pertaining to the AAO's findings that the petitioner failed to establish: (1) that the foreign employer continues to do business as a qualifying organization abroad; or (2) that it will employ the beneficiary in a qualifying managerial or executive capacity.

In conclusion, the petitioner has offered no statements or evidence which could be considered "new" facts for the purposes of a motion to reopen. For the reasons discussed above, the instant motion does not meet the regulatory requirements for a motion to reopen. 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." Therefore, the petitioner's motion to reopen will be dismissed.

The AAO will now determine whether the instant motion meets the requirements for a motion to reconsider. 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.

This regulation is supplemented by the instructions on the Form I-290B, Notice of Appeal or Motion, by operation of the rule at 8 C.F.R. § 103.2(a)(1) that all submissions must comply with the instructions that

---

[2] Counsel asserts that the AAO mistakenly treated the foreign employer as a corporation and not as a sole proprietor. First, the AAO finds no evidence to suggest that the foreign employer was considered a corporation in error. In fact, the AAO found that the foreign employer's status as a sole proprietorship, and his physical presence in the United States, casted doubt on whether the foreign employer was still doing business as required by the regulations. Further, counsel fails to articulate the relevancy of this supposed misclassification, even if such error were made. Whether the foreign entity is a corporation or sole proprietorship, the fact remains that the petitioner failed to submit sufficient evidence of its qualifying relationship with the foreign employer in response to the director's RFE.

appear on any form prescribed for those submissions.[3] With regard to motions for reconsideration, Part 3 of the Form I-290B submitted by the petitioner states: "Motion to Reconsider: The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions."

On motion, counsel does not cite pertinent law as necessary to support the motion to reconsider. Counsel cites a Supreme Court decision, *Kappos v. Hyatt*, No.10-1219 (U.S. April 18, 2011), to stand for the premise that the AAO may consider evidence submitted on motion that the petitioner previously failed to submit in response to a relevant RFE. Counsel states that "the question [of whether to accept evidence on motion] is largely a matter of decree and there is no precise formula which gives a ready answer." First, the AAO does not agree that the referenced Supreme Court case is pertinent to the instant case, as it involves the Federal Rules of Evidence and Federal Civil Rules of Procedure and their application in federal district court. Further, the AAO's authority to reject evidence on appeal and motion is well established when the petitioner fails to submit evidence in response to a director's specific request. Again, when a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal or motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). As previously noted, the petitioner has also not submitted viable reasons why this evidence was not previously submitted to overcome the dictates of the aforementioned precedent cases. In sum, the petitioner has not provided sufficient citations to pertinent law to support a motion to reconsider.

However, even if the additional evidence of a qualifying relationship were considered, the petitioner still fails to produce sufficient evidence to establish that the foreign employer paid $50,000 to the petitioner for the 200 shares of stock in the petitioner. As previously noted by the director and the AAO in its previous decision, ownership is a critical element of this visa classification and the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Again, the petitioner offers no explanation as to why evidence of the asserted $50,000 paid to the petitioner for the foreign employer's interest was not provided. Counsel merely states that evidence of consideration is irrelevant since the foreign employer has been shown to wholly own the petitioner. However, the AAO does not find this argument persuasive, as the petitioner has continually failed to submit adequate evidence to support the asserted foreign employer ownership in the petitioner.

---

[3] The regulation at 8 C.F.R. § 103.2(a)(1) states in pertinent part :

> [E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission.

Lastly, counsel has not stated any reasons for the reconsideration of the AAO's previous findings that the record was insufficient to establish that the foreign employer was doing business as required by the regulations or that the petitioner had not established the beneficiary would act in a managerial or executive capacity. In fact, counsel states that it will submit further evidence of the beneficiary's managerial or executive capacity in the United States if the case is reopened, but provides no precedent or law to support this assertion. As noted previously, the regulations provide that all evidence relevant to a motion should be submitted in support of the motion. *See generally* 8 C.F.R. § 103.5(a)(2).

Upon review, the petitioner has not stated sufficient reasons for reconsideration or directed the AAO to any pertinent statute, regulation, or precedent decision that would establish that the AAO's decision was based on an incorrect application of law or USCIS policy. For this reason, the motion to reconsider will be dismissed.

Motions for the reopening or reconsideration 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. *See 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.

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).

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met. As discussed herein, the motions to reopen and reconsider will be dismissed.

ORDER: The motions to reopen and reconsider are dismissed.