U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
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: NOV 14 2013 Office: VERMONT SERVICE CENTER FILE: [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, Vermont Service Center, denied the petition for a nonimmigrant visa, and the Administrative Appeals Office (AAO) dismissed the petitioner's appeal. The petitioner subsequently filed a combined motion to reopen and reconsider, which was dismissed by the AAO. The matter is again now before the AAO on a motion to reopen and reconsider. The AAO will grant the motion to reopen in order to consider new evidence. The AAO's previous decisions will be affirmed and the petition will remain denied.

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 limited liability company, organized in the State of Texas. It states that it is engaged in investing in the food, hospitality, and retail industries. The beneficiary was previously granted one year as an L-1A nonimmigrant intracompany transferee in order to open a new office in the United States, and was subsequently granted a two-year extension of status. The petitioner seeks to extend the beneficiary's employment in the United States for three additional years.[1]

The director denied the petition, concluding that the petitioner failed to establish: (1) that it will employ the beneficiary in a qualifying managerial or executive capacity; (2) that the U.S. company is doing business; and (3) that the United States and foreign entities have a qualifying relationship.

The petitioner subsequently filed an appeal. The AAO dismissed the petitioner's appeal and affirmed the director's decision with respect to all three grounds for denial.

The petitioner subsequently filed a motion to reopen and reconsider. The petitioner contested the AAO's decision on several grounds. First, counsel asserted that the petitioner suffered irreparable harm due to ineffective assistance on the part of the petitioner's former counsel who filed the petitioner's first extension in March 2009, noting that counsel had failed to file travel documentation for the beneficiary which prevented the closing of an essential business deal. Additionally, counsel stated that the petitioner's limited operations and failure to conduct business were due to forces beyond the petitioner's reasonable control such as the complexity of completing the purchase of business franchises in the United States, the recent world economic downturn, and political instability in Pakistan. Counsel also maintained that the beneficiary should be able to recapture time spent in Pakistan during the previous extension from April 2010 through December 2010, or eight months and seven days. Counsel contended that the beneficiary's inability to return in a more timely fashion was due to delays on the part of the U.S. Consulate in Pakistan. Further, counsel asserted that the petitioner had established that the beneficiary would be employed in a managerial or executive capacity.

The AAO dismissed the motion to reopen and the motion to reconsider on May 14, 2013. The AAO found that the petitioner provided inadequate evidence to support its claim of ineffective assistance of counsel. Further, the AAO concluded that the loss of a prospective business deal, even if found to be directly caused by ineffective assistance of counsel, was irrelevant to establishing that the petitioner has been doing business in the United States. The AAO concluded that the beneficiary was not entitled to recapture time lost while in

[1] The petitioner requests to extend the beneficiary's status for an additional three years. However, pursuant to 8 C.F.R. § 214.2(l)(15)(ii), an extension of stay may only be authorized in increments of up to two years.

Pakistan during the validity of the previously approved L-1A petition, but could potentially recapture time spent abroad towards the petitioner's maximum seven year period of stay as an L-1A intercompany transferee. In other words, the AAO noted that there were no regulatory or statutory provisions that would allow for reissuance of an approval notice for a prior petition for the purpose of recapturing days spent outside the United States during the validity of that specific petition. Lastly, the AAO concluded that the petitioner had not submitted new evidence or pertinent arguments to warrant the reopening or reconsideration of the AAO's previous conclusion that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity.

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

On motion, the petitioner submits the response of the petitioner's former counsel, to a complaint filed by the beneficiary against Ms. with the Office of Bar Counsel, District of Columbia Court of Appeals. The petitioner also submits the beneficiary's response to Ms. along with an updated business plan. In her brief, counsel objects to the AAO's determination that the petitioner failed to establish that it was doing business or that it would employ the beneficiary in a qualifying managerial or executive capacity.

The purpose of a motion to reopen or motion to reconsider is different from the purpose of an appeal. While the AAO conducts a comprehensive, *de novo* review of the entire record on appeal, 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.

The AAO concludes that the petitioner has submitted sufficient evidence to reopen the matter, but will affirm its previous decision. As noted above, a motion to reopen requires the submission of new evidence.[1] Since the response letters of Ms. and the beneficiary's subsequent response were not previously available, the AAO will grant the motion to reopen in order to consider this new evidence.

The current motion to reopen is wholly based upon the new evidence related to the petitioner's misconduct complaint against former counsel Ms. However, the alleged actions of Ms. are of little relevance to the current matter. The AAO's review is limited to the instant nonimmigrant petition. In the current matter, the petitioner retained new counsel who filed the petitioner's Form I-129 Petition for a Nonimmigrant Worker, responded to two separate Requests for Evidence, and subsequently filed the petitioner's appeal of the director's denial. The petitioner has not specifically articulated how Ms. claimed withholding of documentation impacted the current proceeding; for instance, by detailing what evidence, if any, was withheld and not subsequently submitted by later counsel.

Additionally, the petitioner has not established with sufficient evidence that Ms. failed to file travel documentation for the beneficiary in December 2009, and that such was the material cause of the petitioner's failure to complete a business deal with Snapple to sell their product in Pakistan. In fact, the petitioner submitted e-mails which suggest that the referenced business deal was still very speculative, and has not established with the newly submitted evidence that the petitioner's claimed trip would have definitively closed this business deal. The petitioner has also not articulated how the failure to close the Snapple deal impacts the petitioner's current operations and its failure to establish eligibility under the current petition. The petitioner is required to do business in a regular, systematic, and continuous fashion and to have operations sufficient to support the beneficiary's managerial or executive position in order to be eligible for the requested extension. The AAO acknowledges the uncertainty and risk related to business dealings, particularly in unstable parts of the world, including deals lost due to factors beyond the reasonable control of a company or individual. However, in making a determination of eligibility, USCIS' analysis is limited to a review of the current record and the petitioner's actual business operations as of the date of filing the request for an extension of the petition.

On motion, the petitioner has not submitted any new evidence intended to establish that it has been or is currently doing business in the United States. Although the circumstances of the relationship between Ms. and the beneficiary are unfortunate, the facts presented in the submitted letters are not relevant to the petitioner's eligibility for the requested extension and do not directly address the grounds for denial of the petition and dismissal of the petitioner's appeal. The petitioner was already afforded one year as a new office, as defined by the regulations, but has not established that after over five years of operation that it has established continuous business operations in the United States. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). In fact, the letters submitted on motion support the AAO's previous conclusions that the petitioner is not conducting business as necessary to be a qualifying organization or that it has sufficient operations to support the beneficiary in an executive or managerial capacity.

For instance, counsel's brief merely asserts that the petitioner still intends to do business both in the United States and abroad, not that it has been doing business or is currently doing business. Further, both letters submitted on motion reflect that the petitioner is not conducting any actual business in the United States. The petitioner states directly that its potential franchise deals with are no longer a possibility, despite being previously submitted as critical to the petitioner's business. Additionally, Ms. states that the petitioner never concluded any business deals with and that this was an underlying reason for her reluctance to file a Form I-140 Immigrant Petition for the beneficiary.

Further, the petitioner again cites causes "beyond its reasonable control," such as the economic downturn and the complexities of franchise deals, factor which prevented the company from carrying out its business plans. The L-1A nonimmigrant visa is not an entrepreneurial visa classification that would allow an alien a prolonged stay in the United States in a non-managerial or non-executive capacity to start up a new business. The regulations allow for a one-year period for a U.S. petitioner to commence doing business and develop to the point that it will support a managerial or executive position. By allowing multiple petitions under the

more lenient standard, USCIS would in effect allow foreign entities to create under-funded, under-staffed or even inactive companies in the United States, with the expectation that they could receive multiple extensions of their L-1 status without primarily engaging in managerial or executive duties. Indeed, this appears to be the petitioner's intention under the current extension petition. As such, potential business deals or those closed after the director's decision are irrelevant to establishing the beneficiary's eligibility. Indeed, the petitioner submits an updated business plan on appeal, but no evidence of its current or former business activities. The AAO notes that it was the petitioner's burden to submit sufficient evidence of its operations to support the beneficiary in a managerial or executive role when it originally filed the extension petition in February 2011, and that future speculative business dealings are largely irrelevant to the beneficiary's eligibility. 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).

Regardless, even if the AAO were to consider the petitioner's business operations after the filing of the petition, the petitioner has presented no new evidence to support its claim that it "has recently closed escrow on a franchise in TX." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). 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 new evidence submitted on motion fails to address the remaining grounds for denial of the petition. As discussed, the AAO also concluded that the petitioner failed to submit a detailed description of the beneficiary's duties and that it had not submitted sufficient evidence of a qualifying relationship between the petitioner and the foreign employer. The AAO observed that the submitted proxy agreement was insufficient to establish common ownership and control between the petitioner and the foreign employer. However, although the petitioner contests the AAO's finding with respect to qualifying relationship under the current motion, it has not provided new evidence of ownership in the petitioner or the foreign employer.

In sum, although the petitioner has submitted new evidence related to its claim that it received ineffective assistance from a former attorney, the evidence is not sufficient to overcome the grounds for denial of the petition and dismissal of the petitioner's subsequent appeal.

As the petitioner indicated that it was filing a combined motion to reopen and motion to reconsider, the AAO will address whether the instant motion meets the requirements for a motion to reconsider. The regulation at 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 appear on any form prescribed for those submissions.[2] 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 asserts that the AAO erred in its finding on multiple grounds and states that petitioner has established that a qualifying relationship exists between the petitioner and the foreign employer, that the petitioner will employ the beneficiary in a qualifying managerial or executive capacity, and that the petitioner is doing business as defined by the regulations.

Upon review, counsel's assertions do not meet the requirements of a motion to reconsider.

The purpose of a motion to reconsider is to contest the correctness of the original decision based on the previously established factual record. A motion to reconsider based on a legal argument that could have been raised earlier in the proceedings will be denied. *See Matter of Medrano*, 20 I&N Dec. 216, 219-20 (BIA 1990, 1991). The "reasons for reconsideration" that may be raised in a motion to reconsider should flow from new law or a *de novo* legal determination reached by the AAO in its decision that could not have been addressed by the party. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). Further, a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. *Id.* Instead, the moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *Id.* at 60.

Here, counsel does not specifically articulate how the AAO misapplied applicable law to the facts of this matter, but merely makes unsupported statements regarding the beneficiary's eligibility. For example, counsel asserts that the petitioner and the foreign employer are affiliates and that the AAO erred in concluding that no such relationship exists. Counsel states that both the petitioner and the foreign entities are closely-held family businesses subject to the control of Iqbal Khan, the family patriarch, despite the fact that Mr. Khan owns only a one-third interest in the petitioning company.

The AAO concluded that the record did not contain sufficient evidence of the ownership and control of the petitioner or the foreign employer. Further, the AAO noted various discrepancies with respect to actual

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[2] 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.

ownership of the foreign company. Specifically, the AAO observed that the petitioner submitted: (1) two versions of the foreign employer's articles of association which indicate that the company is jointly owned by and between Iqbal Khan and Nasim Khan, (2) a letter stating that the foreign employer has seven shareholders, and (3) a letter stating (as asserted above) that Iqbal Khan owns 70% of the foreign employer. The AAO concluded that there was a lack of consistent and credible evidence of the foreign entity's actual ownership and control as of the date of filing. Further, with respect to the petitioner, the AAO found that the submitted proxy agreement was insufficient to establish that Iqbal Khan had 70% control of the company as claimed. Specifically, the AAO noted that the terms of the agreement gave Mr. Khan only a 43% voting interest in the petitioner. Further, the AAO emphasized that the proxy agreement was executed subsequent to the filing of the petition.

On motion, counsel fails to address any of these discrepancies or offer specific legal arguments as to why the AAO's determination was incorrect based on the evidence submitted and the applicable law. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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).

While the AAO acknowledges the petitioner's claim that the two companies are owned by members of the same family, this familial relationship could not form the basis of a qualifying relationship under the applicable regulations. *See Ore v. Clinton*, 675 F.Supp.2d 217, 226 (D.C. Mass. 2009) (finding that the petitioner and the foreign company did not qualify as "affiliates" within the precise definition set out in the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(L)(1), despite petitioner's claims that the two companies "are owned and controlled by the same individuals, specifically the Ore family").

Counsel also contends that the AAO erred in concluding that the petitioner is not doing business and that the beneficiary would not be employed in a managerial or executive capacity. However, counsel offers no specific reasons as to how the AAO's previous determinations on these issues resulted from a misapplication of relevant law. In fact, as discussed herein, the petitioner has not presented any evidence to demonstrate that it has established any business operations, let alone operations sufficient to support the beneficiary in an executive or managerial capacity. Indeed, the petitioner makes reference to its limited operations on motion, asserts its intention to conduct business, and submits no evidence of actual current business operations at the time of the filing of the petition. Again, 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).

Further, counsel fails to address the overly vague duties submitted for the beneficiary and merely repeats the statutory language in support of her assertion that the beneficiary would be employed in an executive

capacity. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Therefore, the petitioner has not specified the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision, or indicated how a change in law materially affects the prior decision. 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 petitioner 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.

ORDER: The motion to reconsider is dismissed and the previous decision of the AAO is affirmed.