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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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FILE: WAC 03 222 54332 Office: CALIFORNIA SERVICE CENTER Date: APR 02 2009

IN RE: Petitioner:
Beneficiary:



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

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: On October 23, 2003, the Director of the California Service Center denied the nonimmigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and the AAO dismissed the appeal on February 5, 2005. On March 9, 2005, counsel to the petitioner filed a Motion to Reopen or Reconsider that decision in accordance with 8 C.F.R. § 103.5. The Motion will be dismissed pursuant to 8 C.F.R. §§ 103.5(a)(1)(iii)(C), 103.5(a)(2), 103.5(a)(3), and 103.5(a)(4).

The petitioner is a California limited partnership operating as a real-estate management and development company. It seeks to employ the beneficiary as an accountant. It therefore filed this nonimmigrant visa petition to classify the beneficiary as an H-1B nonimmigrant worker in a specialty occupation, pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition upon his finding that the petitioner failed to establish that the proffered position is a specialty occupation. The AAO dismissed the appeal upon determining that the evidence of record did not establish that the proffered position satisfied any specialty-occupation criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will dismiss the motion for failure to meet the applicable requirements for motions to reopen set forth in 8 C.F.R. § 103.5(a)(2) and motions to reconsider set forth in 8 C.F.R. § 103.5(a)(3).

As preliminary background, the AAO notes that the record of proceedings indicates that the members of the petitioning partnership, [REDACTED] are all members of a family named [REDACTED] and that, in varying combinations, these same relatives are members in other partnerships, one of which is [REDACTED].

The AAO bases its decision upon its review of all the submissions constituting the motion, which are counsel's Form I-290A and the following documents accompanying it: (1) a March 8, 2005 letter from the petitioner; (2) a letter from the Chief Executive/Co-Chairman for [REDACTED] (3) three promotional pages published by [REDACTED] on its services as "a diversified real estate firm that specializes in acquiring, developing, and managing shopping centers and other commercial assets"; (4) a biographical information sheet on each of the three Certified Public Accountants (CPAs) that comprise [REDACTED], Certified Public Accountants (hereinafter referred to as [REDACTED]); (5) an eight-page promotional portfolio on [REDACTED] and its services; (6) a March 8, 2005 letter from [REDACTED]; (7) a March 8, 2005 letter from [REDACTED]; (8) a March 8, 2005 letter from [REDACTED], Professor of Accounting, California State University at Fullerton; (9) a series of documents related to the nature and composition of the partnership that is the petitioner; (10) (a) a series of documents related to the nature and composition of the limited liability company known as [REDACTED] and (b) organizational documents, grant deeds, and other documents related to the business entities with whom [REDACTED] has a relationship in a partnership, limited liability company, or corporation; (11) a check for \$16,496.41 from [REDACTED] to the

petitioner, and sheets reflecting the allocation of expenses between [REDACTED] and the petitioner for the sharing of personnel and other resources; and (12) documents comprising a "Sample Copy of the Management Report of [NMMC]."

In its July, 17, 2003 letter submitted with the Form I-129, the petitioner presented the following as the four main services that the beneficiary would perform:

1. **Accounting Services** - Accounting services will be divided into three sections (approximately 60% of the time being spent).
 - A. In essence, the accounting duties with the company will be varied and highly-detailed. For example, we will require that this individual prepare cash-flow projections on our behalf. In this sense, [the beneficiary] will be required to project the amount of cash expenditures, as well as how these expenses will be applied. Furthermore, we are also requiring that the Accountant be prepared to engage in budgetary projections in our behalf. This will require an analysis of income, expenses, and capital expenditures, and will also necessitate the preparation of revenues, costing, and budgeting, coupled with an analysis of standard and variable costs that are particularly oriented to our industry. In short, this type of work simply cannot be performed by an individual lacking the four-year bachelor's degree level of study in Business, Accounting, or a related field where a person studies budgets and learns how to prepare them on behalf of his/her future employers. Conversely, through accurate budgetary projections, both are present and future operations will be greatly influenced to the extent that important business decisions will be directly impacted by the accounting formulations derived in this particular area by the Accountant.
 - B. We will additionally require our Accountant to engage in financial statement analysis and preparation. In short, as a company, we will require advice as to the financial implications of our statements. In other words, the statements will be compared to the budgeted projections indicated earlier. If there are variances, we will require that the Accountant explain why the variances occurred, how they differed from the budgeted expenditures, potential tax consequences that may be incurred by the company, and what steps could be taken in order to rectify any discrepancies. In addition to this, in conjunction with the financial statement aspect to the position, our Accountant will be equally responsible for carrying-out Profit & Loss Statements and Balance Sheet Preparation. In doing so, we will be assured that our financial statements will be accurately portrayed.
 - C. Lastly we will require our Accountant to institute, develop, and modify a computerized accounting software system customized to meet our specific

needs. Through the institution of this system, the Accountant will be better-able to review financial procedures as well as other related documentation applying to our transactions, as well as assuring their complete accuracy.

* * *

2. **Tax Services** – Tax services will be divided into three sections (approximately 5% of the time being spent).

- A. Due to the growing number of Tax laws, especially the new IRS' policies, we will require our accountant to research and explain these new policies and their consequences. President Bush's administration has also passed new Federal Tax Laws. It will be [the beneficiary's] duty to interpret the new law, and use the new Tax Cut Policies for the benefit of our company.
- B. Governor Davis has currently passed new State Tax Policies that will help small/midsize companies to reduce their state tax liabilities. These new policies discuss unpaid tax settlements and discounts in interest which have been owed to the California Treasury Department. These new laws are very complex, and therefore, it is the duty of our Accountant to research and be familiar with these new policies.
- C. Our Accountant will ascertain and assist in any IRS/State audits. She will negotiate and settle any tax liabilities with the IRS/State auditors, and will document and explain the systematic process of negotiating and settling past/present liability accounts with the IRS/State Treasury Department.

* * *

3. **Attestation (Auditing) Services** – Attestation Service will be divided into three sections (approximately 25% of the time being spent).

- A. Financial Statement Audit - we will require an audit of our annual, quarterly, and (8k) (periodic) financial statements in a systematic process of objectively obtaining and evaluating evidence concerning the financial statements, and determining whether or not the financial statements are fairly stated in accordance with Generally Accepted Accounting Principals (GAAP).
- B. Compliance Audit - we will require that our Accountant determine whether or not certain requirements have been met. For example: First, whether our company needs to adhere to our loan covenants from our creditors; Second,

whether we have to adhere to specific provisions within State/Federal Tax Law, especially toward IRS regulations; Third, whether all contractual agreements entered into between our company and third parties have been met with all our clients, vendors, and distributors, and other business partners.

- C. **Operational Audit** – we will require that our Accountant determine whether or not our business activities are functioning efficiently, effectively, economically, and optimally. Hence, this will be one of the most important duties that our Accountant will perform. This service will save us thousands of dollars by reducing unnecessary costs and reducing our productivity.

* * *

4. **Consultation Services** - Consultation services will be divided into two sections (approximately 10% of the time being spent).

A. Our Accountant will set up a system of Quality Control. Quality Control is a set of policies and procedures that will be established by our Accountant to ensure conformity with professional standards. [The beneficiary] will set up a practice that encompasses the following:

- i. Engagement performance: encompasses planning, reviewing, documenting, and communicating the results of each business activity taking place. These policies and procedures must therefore be established within our company in order for us to be reasonably assured that the work performed by our company meets applicable professional standards, regulatory requirements, and the general standards of quality.
 - ii. Acceptance and continuance of clients and engagements will involve, in given instances, the development of policies and procedures in determining the profitability of associating with certain clientele. This will entail the auditing of financial records and documents in order to apprise us, where needed, as to the financial viability of a particular client or a potential client.
- B. Our Accountant will oversee management in ensuring that our daily operations will be free of conflicts of interest, and also that management will not misrepresent facts or subordinate proper judgment to other employees. This service seems trivial, but maintaining objectivity and integrity in any business is the first step to operating a successful

company. Our accountant will investigate any suspected fraudulent operation within the company activity, and will set up a guideline of prohibitive activities within our operation.

(Please note that consultation services performed by our Accountant is essential in order for our company to maintain an excellent reputation with our clients, creditors, suppliers, and even government agencies such as the IRS. These services will not only improve our company's reputation, but, eventually, it will improve our overall profitability. . . .)

Counsel's addendum to the Form I-290B submitted on appeal bears the first reference to the "principals" of the partnership, and the first suggestion that the beneficiary would perform work not just for the petitioner but for its individual members. The pertinent sections of the addendum are the statement that the list of properties previously submitted into the record includes some owned not by the petitioner partnership, [REDACTED] but by "the same four individuals owning more or less the same percentage of the property as that reflected in [REDACTED]" and the statement that [REDACTED] "has a legitimate and bona fide need to hire the services of an in-house and part-time Accountant in light of this company's *and the principals'* extensive property development activities." (Italics added.)

The AAO first notes that it will not accept the petitioner's attempts on motion and on appeal to materially expand and alter the duties of the proffered position beyond those initially described when the petition was filed. The petitioner attempts to accomplish this by interjecting beneficiary duties that materially exceed those presented prior to the appeal in terms of both their scope and the entities generating them.

Prior to the appeal, the petition identified the petitioner partnership as the beneficiary's employer and the business matters of the partnership, not of its individual members or other entities, as the subject matter of the beneficiary's work. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits the classification sought. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to U.S. Citizenship and Immigration Services (USCIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Further, as evident in the language of the provisions at 8 C.F.R. §§ 103.5(a)(2) and 103.5(a)(3), a motion is not a vehicle for offering a new position or materially expanding the duties of a position beyond those upon which the initial decision was based. Therefore, any evidence about duties or work for entities other than the petitioner or that otherwise exceed the scope of duties as outlined in the petitioner's July 17, 2003 letter excerpted above are not relevant to this motion. If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than continuing to seek approval of a petition that is not supported by the facts in the record.

Consequently, counsel's statement on motion that the AAO should consider the proffered position's duties as extending to the accounting work of the "entire [REDACTED] family investment scheme" is contrary to precedent and shall not be followed. Likewise, because it would materially exceed the scope of the beneficiary's responsibilities and work as related prior to the appeal, the AAO will not accept the request of the petitioner's March 8, 2008 letter on motion to include duties to be performed for [REDACTED] and with regard to other properties "of which [REDACTED] or its principals have an equity interest as well as management responsibilities." Such duties appear in the letter's following rendition of duties that the letter indicates are to be performed for the petitioner, [REDACTED] and the [REDACTED] family:

[The beneficiary's] responsibilities will include such high-level components as financial statement preparation and analysis, cash flow and budgetary projections and analysis, analysis of construction financing options, review of tax implications vis-à-vis property sales, evaluation of leveraged acquisitions, review of tax implications vis-à-vis property sales, evaluation of leveraged acquisitions, divestitures and new construction, review of joint venture and profit participation agreements in conjunction with business attorneys and our C.P.A. for overall tax implication analysis, calculating "Section 743" and "Section 754" adjustments applicable to change in partnership interests, analyzing the potentialities for specific "1031" exchanges, undergoing detailed depreciation analysis and calculation in regards to cost segregation reports, and handling complex "tax basis" issues regarding partnerships/LLCs, including the "at-risk" rule dealing with the taxability of partnership income."

As the duties as described above include an unspecified share of work from entities outside [REDACTED] and as they extend the description of duties to areas not earlier identified, such as construction financing, leveraged acquisitions, divestitures, new construction, joint venture and profit participation agreements, and work "in conjunction with business attorneys and our C.P.A.," who were mentioned earlier, they materially expand the scope of the beneficiary's work and responsibilities beyond what was before the AAO in its initial decision and are therefore irrelevant.

Regardless, the motion shall be dismissed for failing to meet a filing requirement. The regulation at 8 C.F.R. § 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and motions to reconsider. Section 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." That same regulatory requirement was in effect at the time that the petitioner filed the Form I-290A in 2005. In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). 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 did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

The motion shall also be dismissed for failure to meet the applicable requirements for motions to reopen set forth in 8 C.F.R. § 103.5(a)(2).

The regulation at 8 C.F.R. § 103.5(a)(2) states in pertinent part that "[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." On motion, neither counsel nor the petitioner provides a statement of new facts to be provided in a reopened proceeding; their statements relate to facts previously existing and known to the petitioner. Further, neither counsel's statement on the Form I-290A, the petitioner's letter on motion, the submission from [REDACTED] letter from [REDACTED] the letter from [REDACTED], the letter from [REDACTED] the letter from [REDACTED], nor any other statement or document presented on appeal contains information or evidence not previously available to or discoverable by the petitioner. Accordingly, as the motion does not meet applicable requirements, it must be dismissed as a motion to reopen. 8 C.F.R. § 103.5(a)(4).

To merit reconsideration of an issue upon which an adverse decision was based, the matters filed on motion to reconsider must: (1) 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; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

The AAO finds that the motion neither cites nor is supported by any pertinent precedent decisions to establish that the AAO's decision to dismiss the petitioner's appeal was based upon an incorrect application of law or USCIS policy to the evidence before it on appeal. The decision to dismiss the appeal was a correct disposition on the evidence of record before the AAO at the time of the decision. In this regard, the AAO also notes that, besides not qualifying as new evidence for consideration on reopening, the opinions on the position's educational requirements offered on motion from [REDACTED] and [REDACTED] are based upon evidence not before the AAO at the time of its dismissal of the appeal, namely, the duty descriptions first presented in the petitioner's March 8, 2005 letter submitted on motion, which contain duties not earlier specified. The AAO also here incorporates this decision's earlier discussion regarding the irrelevance of evidence presented for the first time on appeal that materially expands the duties of the proffered position beyond what was presented prior to the director's decision. Further, nearly all of the documents presented on motion were not before the AAO when it considered the appeal and, therefore, are not relevant to a request for a reconsideration of the action that the AAO took on the basis of the evidence then before it.

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. The motion will be dismissed.

Finally, it should be noted for the record that, unless CIS directs otherwise, the filing of a motion 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 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.