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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



U.S. Citizenship  
and Immigration  
Services



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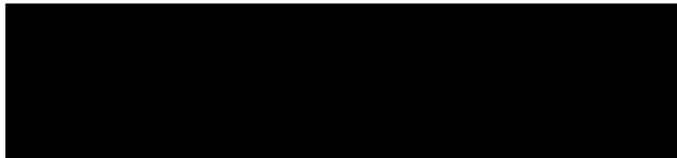
DATE: JUN 22 2011

Office: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker under 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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must 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, California Service Center, denied the petition for a nonimmigrant visa. The petitioner subsequently filed a motion, which the director dismissed, affirming the prior adverse decision. The Administrative Appeals Office (AAO) dismissed the petitioner's subsequent appeal, affirming the propriety of the director's decision to dismiss the petitioner's motion to reopen and reconsider. The matter is now before the AAO on a motion to reconsider. The AAO will grant the motion and remand the matter to the director for entry of a new decision.

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 is a California corporation operating as an investment company. The petitioner seeks to employ the beneficiary in the position of president from September 19, 2007 until September 19, 2010.

The director denied the petition on December 13, 2007, based on two independent grounds of ineligibility: (1) the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity; and (2) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer.

The petitioner subsequently filed a combined motion to reopen and reconsider, disputing the director's grounds for denial. With regard to the motion to reopen, counsel relied upon the petitioner's newly generated documents, which included an explanation of how the foreign entity came to own 51% of the petitioner's issued stock and the petitioner's expansion plan, which purported to establish the beneficiary's executive role within his proffered position of president of the U.S. entity. With regard to the motion to reconsider, counsel argued that the director incorrectly applied the law regarding the requirements for executive capacity and that she erred in her determination that the foreign and U.S. entities do not have a qualifying parent/subsidiary relationship as claimed.

The director dismissed the petitioner's combined motion on February 5, 2008. The director specifically restated the regulatory requirements for a motion to reconsider and briefly discussed how the petitioner's submissions fall short of meeting those requirements. On appeal, counsel asserted that the director erred by addressing only the petitioner's motion to reconsider despite the fact that a combined motion to reopen *and* reconsider had been filed.

In a decision dated October 1, 2008, the AAO affirmed the director's decision to dismiss the combined motion. The AAO acknowledged the director's oversight in failing to provide specific reasons for not granting the petitioner's motion to reopen, but determined that this procedural error did not warrant a remand of this matter back to the service center, as the decision to dismiss the combined motion was correct under the applicable statutory provisions.

The matter is now before the AAO on a motion to reconsider. Counsel requests that the AAO reconsider its decision to affirm the director's denial of the petitioner's motion to reopen or reconsider. Counsel contends

that both the director's decision dated February 5, 2008 and the AAO's decision dated October 1, 2008 were premised solely on an incorrect interpretation of the INA and implementing regulations which resulted in application of the incorrect legal standard. Specifically, counsel asserts that the director and the AAO erred by interpreting the regulation at 8 C.F.R. § 103.5(a)(3) as containing an absolute requirement that a motion to reconsider include citations to pertinent precedent decisions. Counsel submits a brief and additional evidence in support of the motion.

## II. The Law

The regulations governing motions are found at 8 C.F.R. § 103.5. The provision at 8 C.F.R. § 103.5(a)(3) states:

*Requirements for motion to reconsider.* 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.<sup>1</sup> 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.

Therefore, to merit reconsideration of the AAO's decision to dismiss the appeal, the petitioner must both (1) specifically cite laws, regulations, precedent decisions, and/or binding U.S. Citizenship and Immigration Service (USCIS) policies that the petitioner believes that the AAO misapplied in deciding to dismiss the appeal; and (2) articulate how those standards cited on motion were so misapplied to the evidence before the AAO as to result in a dismissal that should not have been rendered.

## II. Discussion

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<sup>1</sup> 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.

The issued to be addressed is whether the AAO erred in affirming the director's determination that the petitioner's combined motion to reopen and reconsider filed on January 15, 2008 did not meet the requirements of either motion, as set forth at 8 C.F.R. § 103.5.

In her decision dated February 5, 2008, the director dismissed the petitioner's combined motion to reopen and motion to reconsider, noting that "the motion to reconsider does not state reasons for reconsideration supported by pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy." The director offered no additional explanation as to why the petitioner's submission failed to meet the requirements of a motion to reconsider. The director did not provide specific reasons for not granting the petitioner's motion to reopen.

In its subsequent appeal, counsel for the petitioner argued that its motion "demonstrated that the Service had incorrectly applied the law to the facts of the instant case." Counsel submitted a 34-page brief which primarily addressed the two substantive grounds for denial of the I-129 Petition, along with additional evidence.

In its decision dated October 1, 2008, the AAO acknowledged that the director erred by failing to state the specific reasons for the dismissal of the petitioner's motion to reopen. However, the AAO determined that the dismissal of the motion to reopen was correct because the motion did not meet the requirements for a motion to reopen pursuant to 8 C.F.R. § 103.5(a)(2).

The AAO further found that the motion to reconsider was properly dismissed because "counsel's argument that the denial of the petition was based on an incorrect application of law or service policy was not supported by pertinent precedent decisions."

In its decision, the AAO acknowledged that the petitioner's appeal addressed the specific substantive grounds for denial stated in the director's initial decision. However, the AAO emphasized that its scope of review was limited to the subject matter that was addressed in the director's last decision issued on February 5, 2008. Therefore, as the director's decision did not address the specific substantive grounds that served as the basis of the denial of the original petition, the AAO did not address these grounds on appeal. The AAO advised the petitioner that if it had wanted the AAO to address such issues, it should have filed an appeal on the director's initial decision rather than a motion to reopen and reconsider.

In the current motion, counsel asserts that the director's dismissal of the petitioner's motion to reconsider, and the AAO's affirmation of the director's decision, were both "guided by an erroneous reading and application of regulation at 8 C.F.R. § 103.5(a)(3), which sets forth the requirements for a motion to reconsider. Specifically, counsel contends that both decisions appear to be based exclusively on the petitioner's failure to cite pertinent precedent decisions in support of the motion.

Counsel further states:

Petitioner disputes the Director and the AAO's interpretation of the regulatory language cited above as containing an absolute requirement of citation to precedent decisions from the AAO. The interpretation adopted by the AAO seems to, inexplicably and without making reference, ignore the plain language of the regulation. Specifically, the regulation states that a motion to reconsider must state the reasons for reconsideration "and be supported by *ANY PERTINENT* precedent decisions. . ." *Id.* (*EMPHASIS PROVIDED*). The AAO's adoption of the Director's statutory construction is contrary to the plain meaning of the regulation and, absent evidence to the contrary, is in violation of the regulation; applying the Director's erroneous interpretation of the regulation to petitioner's case is a clear abuse of discretion.

Counsel asserts that "a fair reading of the plain meaning of this regulation does not include in any way, shape or form, an absolute universally applicable requirement that a motion to reconsider cite to precedent decisions." Rather, counsel contends that a fair analysis of the plain language of the regulation "might, at most, require citation to precedent decisions in certain cases." Counsel requests that the AAO reconsider its affirmation of the Director's decision, review the record in its entirety, and exercise its authority to approve the underlying petition.

In addition, counsel asserts that the petitioner's motion to reopen was erroneously denied based on a misinterpretation of what constitutes "new evidence." Counsel asserts that the evidence submitted in support of the petitioner's combined motion "relate[s] to establishing eligibility under the law and thus are proper new evidence to meet the regulatory definition." Specifically counsel asserts that such evidence, "constructively, was previously unavailable to the Service." Counsel contends that the director did not review any evidence in reaching the initial denial of the Form I-129, therefore, any evidence submitted thereafter should be considered "new."

Finally, counsel requests that the AAO "provide meaningful review" of the prior combined motion and consider all evidence in the record. Counsel asserts that the director's application of an incorrect legal standard in evaluating the motion to reopen and reconsider "deprived petitioner of any chance for fair adjudication of the initial petition and subsequent motion, thereby stripping the petitioner of the right to appellate review."

Counsel's assertions are persuasive in part. Upon review, the petitioner's initial motion filed on January 15, 2008 met the requirements for a motion to reconsider. The AAO will withdraw its previous decision dismissing the petitioner's appeal and withdraw the director's decision dated February 5, 2008, as it relates to the dismissal of the petitioner's motion to reconsider. The matter will be remanded to the director who is instructed to consider the arguments the petitioner made on motion, and to enter a new decision based on the substantive grounds of denial at issue.

Counsel correctly emphasizes that the regulations governing motions to reconsider at 8 C.F.R. § 103.5(a)(2) contain no absolute requirement that the petitioner's motion be supported by pertinent precedent decisions. As noted above, the current instructions for Form I-290B advise petitioners filing motions to reconsider that

the motion must be supported by citations to appropriate statutes, regulations, *or* precedent decisions. The use of the qualifier "*any* precedent decisions" in the regulations further supports counsel's position. The sole stated reason for the director's dismissal of the petitioner's motion to reconsider was the lack of citation to precedent decisions, and the AAO affirmed this decision based on the same grounds.

Upon review of the petitioner's initial motion filed on January 15, 2008, we note that the motion was accompanied by a 34-page brief. While counsel's brief did not cite to pertinent precedent decisions, counsel did specifically cite pertinent regulations that the petitioner believes the director misapplied in denying the Form I-129 petition and articulated the reasons the petitioner felt such regulations were misapplied to the detriment of the petitioner. Accordingly, the director should have granted the motion to reconsider.

However, the AAO will not grant the petitioner's request for a *de novo* review of the entire record of proceeding. The administrative process provides for an appeal or a motion to reopen and/or reconsider as a forum for contesting an adverse decision. The petitioner chose to file a motion to reopen and reconsider instead of an appeal in response to the director's denial of the underlying petition. As such, it precluded itself from having the AAO conduct a *de novo* review of the director's underlying decision to deny the petition. As noted above, the AAO's scope of review on appeal was properly limited to the subject matter that was addressed in the decision being appealed, specifically, the director's dismissal of the petitioner's combined motion to reopen and reconsider.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met. The AAO's decision dated October 1, 2008 and the director's decision dated February 5, 2008 are withdrawn. The matter will be remanded to the director for review with respect to the petitioner's motion to reconsider filed on January 15, 2008, and entry of a new decision, which, if adverse to the petitioner, shall be certified to the AAO.

**ORDER:** The petition is remanded to the director for further action in accordance with the foregoing discussion and entry of a new decision which, if adverse to the petitioner, shall be certified to the Administrative Appeals Office for review.