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APR 05 2005

File: SRC-02-094-50603 Office: TEXAS SERVICE CENTER Date:

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)

IN 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.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The Administrative Appeals Office (AAO) dismissed the subsequently filed appeal and affirmed the director's decision to deny the petition. The matter is now before the AAO on motion to reopen and motion to reconsider. The motion to reconsider will be granted and the previous decision of the AAO will be affirmed. The petition will be denied.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its 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 corporation organized in the State of Texas that operates a retail business. The petitioner claims that it is the affiliate of [REDACTED], located in India. The beneficiary was initially granted a period of stay in L-1A status, and the petitioner now seeks to extend the beneficiary's stay for a three-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The AAO affirmed this determination on appeal, and further noted that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer.

On motion, counsel for the petitioner submits a brief and a copy of an unpublished AAO decision to address the grounds for the director's denial and the findings of the AAO. Counsel does not furnish any new facts to be provided in the reopened proceeding. Counsel asserts that the AAO applied an erroneous legal standard as reason for reconsideration.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "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."

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.<sup>1</sup>

Although counsel has submitted a motion entitled "Motion to Reopen/Reconsider," counsel does not submit any document that would meet the requirements of a motion to reopen. Counsel has not indicated that new facts have come to light that were not previously available or could not have been discovered or presented in the prior proceeding. See 8 C.F.R. § 103.5(a)(2). Other than the title of the motion, counsel does not assert that a motion to reopen should be considered as an alternative to the motion to reconsider.

Motions for the reopening 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. *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 to reopen will be dismissed.

Furthermore, 8 C.F.R. § 103.5(a)(2) states, in pertinent part:

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<sup>1</sup> 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 RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

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.

As reason for reconsideration, counsel asserts that the AAO applied an erroneous legal standard on several points. Specifically, counsel states that the AAO "erred in requiring proof that the Petitioner will sustain the Beneficiary in a *strictly* managerial or executive capacity." (emphasis in original). Counsel correctly asserts that the Act merely requires a petitioner to show that a beneficiary will be *primarily* engaged with managerial or executive duties. See sections 101(a)(44)(A) and (B) of the Act. Upon review of the prior AAO decision, it is clear that the AAO applied the appropriate legal standard in this regard. In 13 instances, the decision references the petitioner's burden to show that the beneficiary will be employed in a primarily managerial or executive capacity. The AAO cited fully the statutory definitions for managerial and executive capacity as provided in sections 101(a)(44)(A) and (B) of the Act. In a single instance, the AAO stated that "[w]hile it is apparent that the beneficiary's experience is an asset to furthering the petitioner's business objectives, it does not appear at this time that the petitioner is prepared to sustain the beneficiary in a *strictly* managerial or executive capacity." (Emphasis added.) However, a plain reading of the decision reveals that the AAO did not require the petitioner to meet the higher standard of showing that the beneficiary would perform strictly managerial or executive duties. In fact, the decision concludes with the statement that "it cannot be found that the beneficiary has been or will be employed in a *primarily* managerial or executive capacity." (Emphasis added.) Counsel's assertion is not persuasive on this point.

Counsel notes that the AAO stated that the "record does not demonstrate that the U.S. entity contains the *organizational complexity* to support the proposed managerial or executive staff position." (Emphasis in original.) Counsel asserts that "a requirement for 'organizational complexity' effectively re-imposes a staffing size threshold requirement." However, the references to organizational complexity were made in the context of analyzing the beneficiary's actual duties, not in reference to the petitioner's staffing level. The decision does not reflect that the AAO used the petitioner's staffing level as a negative factor in dismissing the appeal, and counsel's assertion is without merit.

Counsel cites *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988) to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. It is noted that *Mars Jewelers, Inc. v. INS* relates to an immigrant visa petition, and not the extension of a "new office" nonimmigrant visa. As the new office extension regulations call for a review of the petitioner's business activities and staffing after one year, *Mars Jewelers, Inc. v. INS* is distinguishable based on the applicable regulations. See 8 C.F.R. § 214.2(1)(14)(ii). Additionally, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. Counsel's reference to *Mars Jewelers, Inc. v. INS* does not constitute support of counsel's assertions by "pertinent precedent decisions." 8 C.F.R. § 103.5(a)(2).

Counsel further refers to an unpublished decision involving an employee of the [REDACTED]. In the unpublished decision, the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has

furnished no evidence to establish that the facts of the instant petition are analogous to those in the [REDACTED] matter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's reference to an unpublished AAO decision does not constitute support of counsel's assertions by "pertinent precedent decisions." 8 C.F.R. § 103.5(a)(2).

Counsel makes further assertions regarding the AAO's interpretation of facts in the evidence of record. Yet, such assertions do not constitute the statement of new facts, or an identification of erroneous legal standards applied in the prior proceeding.

Thus, counsel has neither stated sufficient reasons for reconsideration nor supported his assertions with pertinent precedent decisions, such to establish that the AAO's decision was based on an incorrect application of law or Service policy. 8 C.F.R. § 103.5(a)(2). Accordingly, the previous decision of the AAO will be affirmed.

It is further noted that counsel failed to address the AAO's determination that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer. See 8 C.F.R. § 214.2(I)(14)(ii)(A). In effect, counsel concedes the issue. For this reason alone, the petition must be denied.

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

**ORDER:** The previous decision of the AAO is affirmed. The petition is denied.