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U.S. Citizenship  
and Immigration  
Services

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FILE: EAC 00 166 50613 Office: VERMONT SERVICE CENTER Date: JUL 26 2005

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:



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 nonimmigrant visa petition was denied by the Director, Vermont Service Center. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is again before the AAO on a motion to reopen. The motion will be dismissed.

The petitioner operates an automobile junkyard by buying, selling, and exporting used automobiles and auto parts. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had failed to establish that the beneficiary had been or would be employed by the U.S. entity in a primarily managerial or executive capacity. The director noted that the petitioner submitted numerous bills of sale for used automobiles that listed the beneficiary as "Buyer." The director also noted that the petitioner submitted numerous bills of sale for used automobiles it sold that listed the beneficiary as the "Salesman." The director concluded by stating that it appeared from the record that the beneficiary has been and would continue to primarily perform the day-to-day tasks of buying, reconditioning, and selling used automobiles and automobile parts rather than primarily performing managerial or executive duties. The AAO affirmed these determinations on appeal, and also noted that based upon the record it did not appear that the petitioner would be able to remunerate the beneficiary for his services, the gross revenues being just under \$80,000 and the beneficiary's salary being \$100,000 per year.

On motion, counsel submits additional evidence to address the grounds of the director's denial and the findings of the AAO. Counsel has not stated any plausible reasons for reconsideration, nor does he furnish any new facts to be provided in the reopened proceeding.

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>

On motion, counsel claims that the U.S. entity has been involved in an expansion project. As evidence of this expansion and remodeling project, the petitioner submitted a copy of a letter, dated July 8, 2002, that was written by the beneficiary describing the changes in the company. The petitioner also submitted photographs of building construction in progress, copies of a building permit, inspection permit, construction blue prints, and other business documents. Counsel asserts that during the months preceding the Citizenship and Immigration Services (CIS) decision, the petitioner engaged in a massive expansion and remodeling project that altered the structure and function of the business, which in turn altered the beneficiary's responsibilities. Counsel contends the beneficiary's new responsibilities do not include any of the duties that AAO pointed to as non-qualifying, in that new employees will be hired to perform those tasks. Counsel further contends that upon completion of the expansion project, the beneficiary will be responsible for the oversight of the entire business operation.

A review of the evidence that the petitioner submits on motion reveals no fact that could be considered "new" pursuant to the regulation at 8 C.F.R. § 103.5(a)(2). The fact that counsel admits to the beneficiary performing primarily non-qualifying duties, and that the company expansion took place subsequent to the filing of the petition is in accordance with the director's denial and the AAO's findings. The petitioner must establish

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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).

eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Accordingly, the motion will be dismissed.

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 and the initial decision of the director and the findings of the AAO will be sustained.

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. 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, and the previous decisions of the director and the AAO will not be disturbed.

**ORDER:** The motion is dismissed.