



U.S. Citizenship
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Services

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File: WAC 03 228 50664 Office: CALIFORNIA SERVICE CENTER Date: DEC 08 2006

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California 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. The motion will be dismissed.

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 California that is engaged in the import and distribution of basket products. The petitioner claims that it is the subsidiary of [REDACTED] located in Linxi City, China. The beneficiary was initially granted one year in L-1A classification in order to open a new office and was subsequently granted a two-year extension of stay. The petitioner now seeks to extend the beneficiary's stay for three additional years.

The director denied the petition concluding that the petitioner did not establish that: (1) the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) the petitioner has a qualifying relationship with the foreign entity. The AAO affirmed this determination on appeal in a decision dated August 23, 2005.

The petitioner subsequently filed the instant motion on November 15, 2005. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On motion, counsel submits the following statement on Form I-290B:

The Notice of Decision is dated August 23, 2005. However, the beneficiary. . .was out of country since August. He returned back and actually received the Notice on October 25, 2005.

The Notice of Decision identifies, firstly, the petitioner does not consistently identify whether the beneficiary is claiming to be primarily engaged in managerial duties. However, the petitioner is indeed representing the beneficiary as both an executive and a manager. All the document [sic] and evidence can establish that the beneficiary meets each of the four criteria set forth in the statutory definition. A specific duties description and sufficient documentary evidence proving the beneficiary is acting in a primarily managerial capacity and the beneficiary's subordinate employees are supervisory, professional or managerial will be submitted later with the brief.

Secondly, the Notice states that there is no qualifying business relationship between the U.S. petitioning entity and the foreign entity. The adjudicator fails to properly consider the evidence provided by the petitioner. All the document [sic] clearly show that the U.S. entity is 100% owned by the foreign entity.

Petitioner will submit the supporting documentary evidence and a brief within 30 days, providing additional argument and explanation of evidence previously submitted.

In support of the motion, the petitioner submits: (1) a passenger ticket and baggage check receipt issued by China Eastern Airlines to the beneficiary on August 15, 2005; (2) the beneficiary's Form I-94, Departure Record, showing that the beneficiary was admitted to the United States as a parolee in Los Angeles, California on September 9, 2005; and (3) three hotel receipts showing that the beneficiary had hotel rooms reserved in Las Vegas, Nevada and Baker, California from October 5, 2005 through October 25, 2005. As of this date, the AAO has not received a brief or additional evidence in support of the motion.

The regulation at 8 C.F.R. § 103.5(a)(1)(i) requires that any motion to reopen or reconsider an action by Citizenship and Immigration Services (CIS) be filed within 30 days of the decision that the motion seeks to reopen or reconsider, except that failure to file before this period expires may be excused in the discretion of CIS where it is demonstrated that the delay was reasonable and was beyond the control of the petitioner.

In accordance with 8 C.F.R. § 103.2(a)(7)(i), an application received in a Citizenship and Immigration Services (CIS) office shall be stamped to show the time and date of actual receipt, if it is properly signed, executed and accompanied by the correct fee. For calculating the date of filing, the motion shall be regarded as properly filed on the date that it is so stamped by the service center.

Pursuant to 8 C.F.R. § 103.5a(a)(1), "routine service" consists of mailing a copy by ordinary mail addressed to a person at his last known address. The AAO dismissed the petitioner's appeal on August 23, 2005 and mailed the decision to the addresses of record for the petitioner and petitioner's counsel. According to the date stamp on the Form I-290B Notice of Appeal, it was received by CIS on November 15, 2005, nearly three months after the decision was issued. Accordingly, the motion is untimely filed.

Counsel indicates that the petitioner did not receive the AAO's unfavorable decision until October 23, 2005. However, pursuant to 8 C.F.R. § 103.5a(a)(1), the date of service is the date on which the decision was mailed, not the date on which the petitioner or counsel received the notice. The petitioner has not addressed why its former counsel or the petitioner's own staff would not have received the AAO's decision, nor has the petitioner accounted for the beneficiary's whereabouts between his admission to the United States in Los Angeles on September 9, 2005, and his travel within the U.S. during the month of October 2005. Upon review, the AAO finds that the petitioner was properly given notice of the AAO's decision, and the delay in filing the motion will not be excused as reasonable or beyond the control of the petitioner as a matter of discretion. For this reason, the motion will be dismissed.

Furthermore, although the regulation at 8 C.F.R. § 103.3(a)(2)(vii) allows a petitioner additional time to submit a brief or evidence to the AAO in connection with an appeal, no such provision applies to a motion to reopen or reconsider. The additional evidence must comprise the motion. *See* 8 C.F.R. §§ 103.5(a)(2) and (3). Therefore, in this case, the petitioner's motion consists solely of a Form I-290B containing a statement from counsel and no supporting brief or evidence addressing the two substantive grounds for the denial of the petition.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one

continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

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:¹

Counsel's brief statement contains no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2), nor was it properly supported by timely-filed affidavits or documentary evidence as required by the regulations. Counsel's assertions that the evidence submitted previously was sufficient to establish the beneficiary's eligibility, without specifically addressing the specific deficiencies discussed at length in the AAO's decision, are not sufficient to warrant re-opening of this matter. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

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 100. With the current motion, the movant has not met that burden.

Furthermore, 8 C.F.R. § 103.5(a)(2) 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.

Counsel for the petitioner does not submit any evidence that would meet the requirements of a motion to reconsider. Counsel does not state any specific reasons for reconsideration nor cite any precedent decisions in support of a motion to reconsider. Again, the unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, *supra*; *Matter of Ramirez-Sanchez*, *supra*. The AAO will not grant a motion to reconsider based on counsel's brief statement.

¹ 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).

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).

In visa petition proceedings, the burden of proof 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, the proceedings will not be reopened, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.