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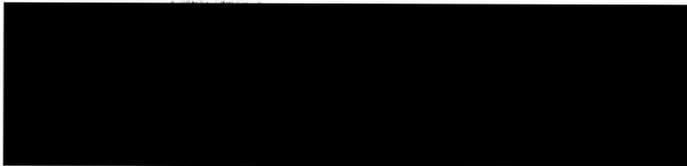
FILE: LIN-03-016-52947 Office: NEBRASKA SERVICE CENTER Date: JUL 14 2006

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)

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, Nebraska Service Center, denied the petition for a nonimmigrant visa. The petitioner subsequently filed a motion to reopen. The director granted the motion to reopen but upheld the prior decision to deny the petition. The petitioner then filed an appeal. The Administrative Appeals Office (AAO) summarily dismissed the appeal for failing to submit a brief or otherwise identify specifically any erroneous conclusion of law or statement of fact for the appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be dismissed.

The petitioner states that it is operating a cafe. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its managing director. The director denied the petition concluding that the petitioner had not established that the beneficiary has been or will continue to be employed in a managerial or executive capacity.

The motion stems from the petitioner's failure to timely submit a brief in support of its appeal of the director's decision on motion to uphold the initial decision to deny the petition. The AAO summarily dismissed the appeal because a brief specifically identifying an erroneous conclusion of law or fact had not been submitted. The petitioner filed a motion to reopen and reconsider the AAO's decision, asserting that a brief was timely filed. In support of this assertion it submits an unprocessed mailing label showing that a brief was mailed to the Nebraska Service Center. The regulation at 8 C.F.R. § 103.3(a)(2)(viii) and the instructions to the Form I-290B Notice of Appeal require the affected party to submit the brief directly to the AAO, not the Nebraska Service Center. Because the affected party did not follow the regulation or the instructions, the AAO was not in possession of plaintiff's brief and therefore did not consider it on appeal. Therefore, the AAO's decision to summarily dismiss the appeal for failure to submit a brief clearly identifying an erroneous conclusion of fact or law was proper.

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

On motion, counsel for the petitioner submits a copy of the brief and additional evidence, which he claims was previously submitted to the AAO in June 2003.² As argument, counsel principally states: "The [AAO] states that no brief was received regarding this matter. However, our office did mail a brief to the [AAO] on June 5, 2003. Please refer to attached affidavit of [counsel] attesting to sending the mailing. We also attach a copy of the brief that was mailed on June 5, 2003."

A review of the evidence that the petitioner submits on motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2). Based on counsel's and the petitioner's own admission, all evidence submitted was previously available and could have been discovered or presented in the previous proceeding. As noted above, the regulations and the I-290B instructions clearly indicated that the brief should have been submitted directly to the AAO. As the petitioner was previously put on notice and provided with a reasonable

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).

² Contrary to counsel's claim that the appeal was submitted directly to the AAO, the record indicates that, if a brief was mailed, it was submitted to the Nebraska Service Center.

opportunity to provide the required evidence, the evidence submitted on motion will not be considered "new" and will not be considered a proper basis for a motion to reopen.

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)(3) 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.

Although counsel has submitted a motion entitled "Motion to Reopen and Reconsider," counsel does not submit any document that would meet the requirements of a motion to reconsider. Counsel does not state any reasons for reconsideration nor cite any precedent decisions in support of a motion to reconsider. Counsel does not argue that the previous decision to summarily dismiss the matter was based on an incorrect application of law or Service policy. Other than the title of the motion, counsel does not assert that a motion to reconsider should be considered as an alternative to the motion to reopen.³ Assuming, *arguendo*, that the petitioner intended to file a motion to reconsider, the petitioner's motion will be dismissed.

Even if the petitioner's motion were granted, counsel's brief primarily restates portions of the Immigration and Nationality Act (the Act) and various sections of Title 8 of the Code of Federal Regulations, repeatedly claiming that the petitioner is eligible for the benefit sought, and rewrites the beneficiary's job description in an attempt to qualify the beneficiary for this classification

However, the director did a thorough analysis and specifically discussed inconsistent representations by the petitioner and the petitioner's failure to justify, explain or reconcile those inconsistencies. In addition to counsel's failure to timely submit a brief on appeal, counsel's general objections to the denial of the petition in the appeal brief, without specifically identifying any new fact to be considered for the motion, or any errors on the part of the director in rendering the decision, are simply insufficient to overcome the well-founded and logical conclusions the director reached based on the evidence submitted by the petitioner. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

³ Based on a review of the motion, it appears that counsel for the petitioner has submitted a simple motion to reopen which is erroneously titled "Motion to Reopen and Reconsider." Counsel does not explicitly claim that there are two motions made in the alternative, nor does counsel cite to any regulation that would clarify the intended motion.

Contrary to counsel's assertions, the facts of the case do not speak for themselves, particularly in light of the director's detailed list of reasons for denying the petition. Rather, the record shows a number of inconsistent representations. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In the instant case, counsel fails to acknowledge, much less resolve the inconsistencies discussed in the denial.

Finally, it should be noted for the record that, unless Citizenship and Immigration Services (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, 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.