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20 Mass. Ave., N.W., Rm. 3000
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U.S. Citizenship
and Immigration
Services

D7

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File: EAC 06 144 52331 Office: VERMONT SERVICE CENTER Date: FEB 01 2008

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, Chief
Administrative Appeals Office

DISCUSSION: On October 20, 2006, the Director of the Vermont Service Center denied the nonimmigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on September 6, 2007, the AAO dismissed the appeal. On October 17, 2007, a motion to reopen and reconsider the AAO's decision was filed with the Vermont Service Center. The motion will be dismissed pursuant to 8 C.F.R. §§ 103.5(a)(1)(i), 103.5(a)(1)(iii)(E), 103.5(a)(2), 103.5(a)(3), and 103.5(a)(4).

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, a New York corporation, claims to be a distributor of pedicure, manicure, beauty, and surgical instruments.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner appealed to the AAO. On September 6, 2007, the AAO dismissed the appeal and further denied the petition because the petitioner failed to establish that it has a qualifying relationship with the foreign employer. On October 17, 2007, a motion to reopen and reconsider was filed. Counsel asserts that the AAO and the director erred and that the petitioner sufficiently established that the beneficiary will perform qualifying duties in the United States. Counsel also requests that the AAO grant the petitioner an additional 60 days to submit evidence addressing the qualifying relationship issue raised by the AAO in its September 6, 2007 decision.

The regulation at 8 C.F.R. § 103.5(a)(1)(i) states in pertinent part that:

Any motion to reconsider an action by [Citizenship and Immigration Services (CIS)] filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before [CIS] filed by an applicant or petitioner, must be filed within 30 days of the decision that the motion seeks to reopen, 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 applicant or petitioner.

In this matter, the instant motion was filed with the Vermont Service Center on October 17, 2007, or 41 days after the decision of the AAO. The record is devoid of evidence establishing that the petitioner's failure to timely file the motion with the Vermont Service Center was reasonable and beyond its control. Therefore, the motion must be dismissed for failing to meet applicable requirements. 8 C.F.R. § 103.5(a)(4).¹

¹The record indicates that an attempt to file the instant motion was made directly with the AAO on October 9, 2007, 33 days after the decision of the AAO. It is noted that the attempt to file this motion directly with the AAO did not establish a receipt date of October 9, 2007. As clearly explained in the AAO's decision dated September 6, 2007, further inquiries regarding the matter should have been made to the Vermont Service Center. Moreover, the regulation at 8 C.F.R. § 103.5(a)(1)(iii)(E) clearly requires that this motion be filed at the office maintaining the record, i.e., the Vermont Service Center, for forwarding to the official having jurisdiction, i.e., the AAO. Therefore, the receipt date for the instant motion was the day it was received by the Vermont Service Center – October 17, 2007.

The motion must also be dismissed for failing to meet the requirements pertaining to motions to reopen and motions to reconsider. The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that "[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.²

Likewise, the regulations at 8 C.F.R. § 103.5(a)(3) state, in pertinent part, that "[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 [CIS] policy."

In this matter, the petitioner failed to state any new facts for the AAO to consider in the reopened proceeding. The only evidence submitted on motion is a letter dated October 4, 2007 written by the petitioner, which reiterates its earlier assertion that the beneficiary will perform qualifying duties in the United States. As such, there is no evidence submitted on motion that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen.³

Similarly, the petitioner has not stated any reasons for reconsideration. The petitioner failed to state the reasons for reconsideration or to cite any pertinent precedent decisions establishing that the AAO's decision was based on an incorrect application of law or CIS policy. Accordingly, the motion does not meet the requirements of a motion to reconsider.

Motions for the reopening or reconsideration 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. *See 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 petitioner has not met that burden.

²The 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).

³As noted above, the petitioner requests 60 days to submit additional evidence addressing the AAO's decision to further deny the petition because the petitioner failed to establish that it has a qualifying relationship with the foreign employer. However, as explained above, a motion to reopen must "be supported by affidavits or other documentary evidence." 8 C.F.R. § 103.5(a)(2). Unlike the regulations pertaining to appeals, the regulations pertaining to motions to reopen and reconsider do not permit the filing of briefs or additional evidence other than concurrently with the motion except when CIS reopens or reconsiders a decision on its own motion. *See* 8 C.F.R. § 103.3(a)(2)(vii); 8 C.F.R. § 103.5(a)(5)(v)(ii). Therefore, the AAO would not consider a brief or evidence not submitted concurrently with the instant motion, and the motion must be dismissed for failing to be supported by affidavits or other documentary evidence.

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

Accordingly, the motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.