

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY

87



File: WAC 07 261 50482

Office: CALIFORNIA SERVICE CENTER

Date: OCT 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:** The Director, California Service Center, denied the petition for a nonimmigrant visa. The petitioner subsequently filed a motion, which the director dismissed, affirming the prior adverse decision. The matter is now on appeal before the Administrative Appeals Office (AAO) to determine the propriety of the director's decision to dismiss the petitioner's motion to reopen and reconsider the denial of the petitioner's Form I-129. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as 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 California corporation operating as an investment company. The petitioner seeks to employ the beneficiary from September 19, 2007 until September 19, 2010.

The director denied the petition on the basis of two independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity; and 2) the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer.

The petitioner subsequently filed a combined motion to reopen and reconsider, disputing the director's grounds for denial. With regard to the motion to reopen, counsel pointed to the petitioner's newly generated documents, which included an explanation of how the foreign entity came to own 51% of the petitioner's issued stock and the petitioner's expansion plan, which purported to establish the beneficiary's executive role within his proffered position of president of the U.S. entity.

With regard to the motion to reconsider, counsel argued that the director incorrectly applied the law regarding the requirements for executive capacity and that she erred in her determination that the foreign and U.S. entities do not have a qualifying parent/subsidiary relationship as claimed.

The record shows that the director dismissed the petitioner's combined motion. The director specifically restated the regulatory requirements for a motion to reconsider and briefly discussed how the petitioner's submissions fall short of meeting those requirements.

On appeal, counsel asserts that the director erred by addressing only the petitioner's motion to reconsider despite the fact that a combined motion to reopen *and* reconsider had been filed.<sup>1</sup>

Upon review, the AAO finds that the director's decision to dismiss the motion was warranted and need not and should not be withdrawn. While the AAO acknowledges the director's oversight in not providing the

---

<sup>1</sup> The AAO notes that while the petitioner's appeal addresses the specific grounds cited in the director's original denial, the AAO's scope of review has been limited to the subject matter that was addressed in the director's last decision. As the director determined that the petitioner did not merit the granting of the motion to reopen and reconsider, the specific grounds that served as the basis for the denial were not addressed in the director's latest decision. As such, the AAO need not and will not address the underlying grounds for denial on appeal. If the petitioner had wanted these underlying issues to be addressed by the AAO, it should have timely filed an appeal on the director's initial decision in this matter.

specific reasons for not granting the petitioner's motion to reopen, this procedural error by itself does not warrant a remand of this matter back to the service center.

The regulation at 8 C.F.R. § 103.5(a)(2) states, 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.<sup>2</sup>

In the present matter, while the petitioner's motion to reopen is supported by new documentation in the sense that it did not exist at the time of the director's initial decision, this documentation does not fit the above definition of new, as the breakdown explaining the foreign entity's ownership of the petitioner as well as the petitioner's expansion plan were internally generated by the petitioner directly in response to the director's denial of the Form I-129. Both documents could have been generated at any time prior to the denial of the petition and therefore cannot be deemed new for this reason.

Therefore, while the director erred in failing to provide an explanation for why the petitioner did not meet the specific requirements of a motion to reopen, the dismissal of the combined motion was correct and will not be disturbed.

In addition, the regulation at 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 CIS 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.

In the present matter, counsel's argument that the denial of the petition was based on an incorrect application of law or service policy was not supported by pertinent precedent decisions. As such, the director's conclusion that the petitioner did not meet the requirements for a motion to reconsider was correct.

In summary, the regulation at 8 C.F.R. § 103.5(a)(4) states, in pertinent part, that a motion that does not meet applicable requirements shall be dismissed. As the director properly determined that the petitioner did not meet the requirements of 8 C.F.R. §§ 103.5(a)(2) and (3) regarding motions to reopen and reconsider, respectively, the director's dismissal of the combined motion will be affirmed.

---

<sup>2</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).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.