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U.S. Citizenship and Immigration Services

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[redacted]

File: EAC 07 058 51891 Office: VERMONT SERVICE CENTER Date: SEP 03 2008

IN RE: Petitioner:
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)

IN BEHALF OF PETITIONER:

[redacted]

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.

for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: On April 4, 2007, 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 April 3, 2008, the AAO dismissed the appeal. On April 30, 2008, counsel to the petitioner filed a Motion to Reopen and Reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The Motion will be dismissed pursuant to 8 C.F.R. §§ 103.5(a)(1)(iii)(C), 103.5(a)(2), 103.5(a)(3), and 103.5(a)(4).

The petitioner filed this nonimmigrant visa 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 is a corporation organized under the laws of the State of Texas and is allegedly engaged in the wireless telecommunications business as a retailer. The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The AAO dismissed the subsequently filed appeal and further denied the petition based on the petitioner's failure to establish that the beneficiary was employed abroad in a primarily managerial or executive capacity and based on the petitioner's failure to establish that it has a qualifying relationship with the foreign employer.

On motion, counsel to the petitioner asserts that the AAO erred in dismissing the appeal, because the record establishes that the beneficiary was employed abroad, and will be employed in the United States, in a primarily managerial or executive capacity. Counsel did not address the AAO's determination that the petitioner failed to establish that it and the foreign employer are qualifying organizations.

Upon review, the motion shall be dismissed for failing to meet applicable requirements.

The regulation at 8 C.F.R. §§ 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and motions to reconsider. Section 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion did not meet the applicable filing requirements listed in 8 C.F.R. **§ 103.5(a)(1)(iii)(C), it must be dismissed for this reason.**

Furthermore, upon review, the AAO will dismiss the motion for failing to meet the applicable requirements for motions to reopen set forth in 8 C.F.R. § 103.5(a)(2). "[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." *Id.* In this matter, counsel offers no new evidence on motion. The unsupported statements of counsel 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).

Accordingly, the motion does not meet the applicable requirements of a motion to reopen and must be dismissed for that reason.

Finally, the AAO will dismiss the motion for failing to meet the applicable requirements for motions to reconsider set forth in 8 C.F.R. § 103.5(a)(3). This regulation states, 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 [Citizenship and Immigration Services (CIS)] policy." *Id.* In this matter, counsel fails to cite to any precedent decisions that establish that the AAO's decision to dismiss the appeal because the petitioner failed to establish that the beneficiary was employed abroad, or will be employed in the United States, in a primarily managerial or executive capacity was based on an incorrect application of law or policy.

For example, counsel cites *Omni Packaging, Inc. v. INS*, 733 F. Supp. 500 (D. Puerto Rico 1990), as support for its argument that the AAO acted unreasonably in determining that the petitioner failed to establish that two of the beneficiary's subordinates are "professional" employees. However, the petitioner's reliance on this decision will not support a Motion to Reconsider. First, the decision in *Omni Packaging* is not a precedent decision for purposes of the instant motion because the AAO is not bound to follow the published decisions of United States district courts even in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Regardless, even if it were a precedent decision, the decision in *Omni Packaging, Inc.* is not pertinent. Counsel has not established that the facts of the instant petition are analogous to those in *Omni Packaging, Inc.* Furthermore, while counsel argues that the AAO erred in its "assumption that [the subordinate positions] are not professional level employees...without any basis," it is emphasized that the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. As the petitioner failed to carry its burden of proof, the AAO properly dismissed the appeal.

Counsel's reliance on the decision in *Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006), is also misplaced. First, the AAO is not bound to follow the published decisions of a Untied States circuit court in reviewing matters not arising from that circuit. *See Matter of Anselmo*, 20 I&N Dec. 25, 31 (BIA 1989).[1] Second, the petitioner again fails to establish how this decision is pertinent to the reasoning in the AAO's April 3, 2008 decision. As thoroughly explained by the AAO in its decision, the petitioner failed to establish that the beneficiary will be employed, or was employed abroad, in a primarily managerial or executive capacity. Counsel fails to explain how, exactly, the AAO's decision is inconsistent with the holding in *Nadarajah*. The random citation of general authority will not permit a motion to reconsider to survive scrutiny as to whether it meets the minimum requirements under the regulations. Rather, as made clear by the regulations, the movant must, at a minimum, cite pertinent precedent decisions and specifically connect this law with the AAO's alleged failure to follow these precedents. 8 C.F.R. § 103.5(a)(3). As counsel failed to do this in this matter, the motion must be dismissed.[2]

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[1]Counsel's reliance on the decision in *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 534 U.S. 819 (2001), is similarly misplaced.

[2]Finally, it must be noted that counsel's citation to a 1993 letter allegedly written by an official of the legacy Immigration and Naturalization Service does not constitute the citation to a pertinent precedent decision under the regulations. Not only is this letter not a "decision," it is not binding on the AAO in its consideration of the instant appeal. *See generally Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (holding that CIS memoranda merely articulate internal guidelines for INS personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely"); *see also Noel v. Chapman*, 508 F.2d 1023 (2nd Cir. 1975) (finding that policy memoranda to INS district directors regarding voluntary extended departure determinations to be "general statements of policy"). Regardless, counsel has failed to establish that this INS

As such, the motion does not meet the applicable requirements and must be dismissed. 8 C.F.R. § 103.5(a)(4).

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 movant has not met that burden. The motion will be dismissed.

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

Once again, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act. The petitioner has not sustained that burden. 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.

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letter is pertinent to the instant appeal. As explained by the AAO in its April 3, 2008 decision, the beneficiary does not appear to have been employed abroad because the foreign employer is a sole proprietorship owned by the beneficiary. The beneficiary cannot employ himself. Counsel does not explain how, exactly, this determination is inconsistent with the INS letter.