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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
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U.S. Citizenship
and Immigration
Services

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OCT 19 2009

FILE: EAC 03 165 50593 Office: VERMONT SERVICE CENTER Date:

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:

SELF-REPRESENTED

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry J. Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The petitioner has subsequently filed a total of three appeals and three motions with the Administrative Appeals Office (AAO). Most recently, the AAO rejected the petitioner's third appeal in a decision dated November 25, 2008. The matter is currently before the AAO on a motion to reopen and reconsider.

The petitioner seeks to extend the employment of the beneficiary as its vice president as an L-1A nonimmigrant intracompany transferee pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L). The petitioner, a corporation organized under the laws of the State of New Jersey, claims to be engaged in the wholesale of general merchandise and states that it is a subsidiary of M.R. Utensils, located in Ahmedabad, India. The beneficiary was initially granted a one-year period of stay in the United States in order to open a new office, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition on February 24, 2004, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The AAO summarily dismissed the petitioner's appeal on February 1, 2006, and subsequently granted a motion to reopen in order to consider a timely filed appellate brief that had not been incorporated into the record prior to the AAO's initial decision. The AAO issued a 14-page decision affirming the denial of the petition and dismissal of the appeal on May 17, 2007. The petitioner subsequently filed an appeal on June 14, 2007. The AAO rejected the petitioner's second appeal as improperly filed on December 4, 2007, noting that the AAO does not exercise appellate jurisdiction over AAO decisions. In its decision, the AAO reviewed the petitioner's appeal and found that it did not meet the requirements for a motion to reopen or reconsider. A subsequent motion, filed on January 4, 2008, was reviewed by the AAO and dismissed in a decision dated July 7, 2008. The AAO rejected the petitioner's subsequent appeal on November 25, 2008, again noting that the AAO does not exercise appellate jurisdiction over AAO decisions. The AAO determined that the appeal did not meet the requirements of a motion to reopen or reconsider.

The petitioner filed the instant motion to reopen and reconsider on December 29, 2008. In a brief dated December 19, 2008, the petitioner asserts that the service center director, in denying the petition, "ignored all the information and evidence on record," made an impermissible "subjective determination," and ignored a prior approval involving the same petitioner and beneficiary. The petitioner requests a "personal hearing" based on a desire to "present all facts and law in person." The petitioner submits a brief but no additional evidence in support of the appeal.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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 evidence that was not available and could not have been discovered or presented in the previous proceeding.¹ The petitioner's brief contains no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2), nor is it properly supported by affidavits or documentary evidence as required by the regulations.

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.

The petitioner argues that the denial of the request to extend the beneficiary's L-1A status constitutes a violation of U. S. Citizenship and Immigration Services (USCIS) policy and an abuse of discretion because USCIS previously approved a petition filed on the beneficiary's behalf for the same position. The petitioner made this same claim in a prior motion and the AAO addressed the petitioner's argument in its decision dated July 7, 2008. Once again, the AAO emphasizes that prior approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Further, the petitioner's prior petition to which counsel refers was a petition to allow the beneficiary to enter the United States to open a new office. Thus, that petition was governed by the regulations pertaining to new offices. *See* 8 C.F.R. § 214.2(l)(3)(v). The present petition is a request for an extension of the beneficiary's status after completing a one-year period to open a new office. Thus, the present petition is governed by a different set of regulations pertaining specifically to new office extensions. *See* 8 C.F.R. § 214.2(l)(14)(ii).

A 2004 interoffice memorandum to USCIS Service Center Directors and Regional Directors regarding the significance of prior USCIS approvals specifically states that, while deference should be given to the prior adjudicators in matters relating to an extension of nonimmigrant petition validity involving the same parties and the same underlying facts, such policy does not apply to nonimmigrant petitions "where the initial approval is granted to allow the petitioner and/or beneficiary to effectuate a tentative or prospective business plan or otherwise prospectively satisfy the requirements for the visa classification." L-1 "new office" petition extensions are specifically included in this class of nonimmigrant petitions. *See*

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).

Memorandum of William R. Yates, Associate Director for Operations, USCIS, to Service Center Directors, et al, *The Significance of a Prior CIS Approval on a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity* (April 23, 2004).

As different law and evidentiary requirements apply to the present petition, the director had a duty to carefully review the petitioner's representations and documentation to determine if eligibility has been established. Contrary to the petitioner's suggestion, the fact that a prior petition was approved on behalf of the beneficiary does not serve as *prima facie* evidence that eligibility has been established in the present proceeding. Despite any number of previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by USCIS regulation, that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational and/or it does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petition was denied because the U.S. company, one year after the approval of the new office petition, had not reached the point where it could employ the beneficiary in a predominantly managerial or executive position.

On motion, the petitioner does not address the AAO's prior 14-page decision in which the merits of the petitioner's arguments and evidence were discussed in great detail, and the AAO concurred with the director's determination that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. Rather, the petitioner is requesting reconsideration of the director's original decision issued on February 24, 2004.

The AAO emphasizes that the purpose of a motion is different from the purpose of an appeal. While the AAO conducts a comprehensive, *de novo* review of the entire record on appeal, a review in the case of a motion to reconsider is strictly limited to an examination of any purported misapplication of law or USCIS policy, which must be supported by precedent case law. The AAO previously conducted a *de novo* review of the entire record of proceeding when it reopened the matter to consider the petitioner's appellate brief in its May 17, 2007 decision. There is no regulatory or statutory provision that allows a petitioner more than one appellate decision per every petition filed. In the present matter, an appellate decision was issued and the deficiencies were expressly stated. The petitioner persists in filing motions

and improperly filed appeals reiterating arguments that have been addressed and found to be insufficient in prior AAO decisions.

Rather, the AAO's review in this matter is limited to the narrow issue of whether the petitioner has presented and documented new facts or documented sufficient reasons, supported by pertinent precedent decisions, to warrant the re-opening or reconsideration of the AAO's prior decisions. Again, the petitioner does not acknowledge the AAO's findings or its five previous decisions. As such, counsel's most recent assertion that the petitioner submitted sufficient evidence to establish eligibility for the benefit does not meet the requirements of a motion. The AAO previously conducted a *de novo* review of the entire record of proceeding and addressed the petitioner's arguments regarding the appropriate standard of review. Thus, the motion fails to establish that the director's decision was incorrect based on the evidence of record at the time of the initial decision, as required by 8 C.F.R. § 103.5(a)(3).

The regulation at 8 C.F.R. § 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." The petitioner's previous motion to reconsider did not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C), nor does the current motion. 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 does not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

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.

The AAO acknowledges the petitioner's request for oral argument. However, the regulation at 8 C.F.R. § 103.3(b) provides that the requesting party must explain in writing why oral argument is necessary. USCIS has the sole authority to grant or deny a request for oral argument and will grant oral argument only in cases involving unique facts or issues of law that cannot be adequately addressed in writing. In this instance, the petitioner identified no unique fact or issue of law to be resolved. Consequently, the request for oral argument is denied.

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.