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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



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Date: **AUG 08 2012** Office: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker under 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you.

Perry Rhew
Chief, Administrative Appeals Office

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DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The petitioner appealed the denial and the AAO subsequently dismissed the appeal. The matter is now before the Administrative Appeals Office (AAO) on motion to reopen and reconsider. The motion will be dismissed.

The petitioner filed the nonimmigrant petition seeking approval of the beneficiary's employment under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), as an intracompany transferee employed in a managerial or executive capacity. The petitioner, a Florida corporation, states that it is engaged in document preparation services. It claims to be an affiliate of [REDACTED] at [REDACTED]. The petitioner seeks to employ the beneficiary as its President.

The director denied the petition concluding that the petitioner failed to establish (1) that the beneficiary will be employed in a managerial or executive capacity or (2) that the petitioner would support the beneficiary in such a capacity, within one year of commencing operations in the United States. The AAO subsequently dismissed the appeal concluding that the petitioner failed to establish: (1) that the beneficiary will be employed in a managerial or executive capacity, (2) that the beneficiary has been employed for one continuous year in the three-year period preceding the filing of the petition in an executive or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3)(v)(B), (3) that a qualifying relationship exists between the petitioner and the foreign entity, and (4) that the foreign entity will continue to do business as required at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2).

On motion, counsel contends that the AAO erred in determining that the beneficiary would not be employed in a primarily managerial or executive capacity. Counsel also asserts that the previously submitted evidence, in addition to newly attached letters, demonstrate that the beneficiary worked in a managerial capacity for the foreign entity for a period of more than one year. Counsel does not address either of the AAO's finding that the record fails to evidence that the petitioner and the foreign entity are qualifying organizations for the purpose of an L-1 transfer or that the record fails to evidence that the foreign entity will continue to do business.

Counsel's assertions do not satisfy the requirements of either a motion to reopen or a motion to reconsider.

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

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).

On motion, the petitioner submits: (1) copies of two professional performance certifications with English translations, (2) a certificate of use verifying that the petitioner's offices at [REDACTED] is suitable for general business, and (3) IRS statements from July 28, 2009 to October 28, 2009 showing monthly payments due.

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). The evidence submitted was either previously available and could have been discovered or presented in the previous proceeding, or it post-dates the petition.

The petitioner has not provided a reason as to why the two professional performance certifications and the certificate of use could not be obtained prior to the filing date. Furthermore, all of the evidence submitted on appeal post-dates the petition. The petition was filed on June 23, 2008. The professional performance certifications are dated November 5, 2009 and November 2, 2009. The certificate of use is dated April 23, 2009. Finally, the IRS statements were issued in July of 2009 through October of 2009.

The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

In addition, the documentation presented on motion does not overcome the concerns addressed in the AAO's dismissal of the appeal. It is not clear why the petitioner submits a certificate of use for the premises, as the AAO did not deny the appeal on the basis of failure to evidence sufficient physical premises to support a managerial or executive position. In fact, the petitioner provided no explanation as to why the certificate of use is included with the motion. Similarly, there is no clear reason why the petitioner included monthly IRS statements showing payments due as this evidence does not relate to any grounds of the AAO's denial. Furthermore, in the petitioner's letter dated November 13, 2009, there appears to be a reference to bank statements although no bank statements are enclosed with the motion.

The only documentation relating to the AAO's ground for denial are the two professional performance certificates submitted by the petitioner. These performance certificates, however, are insufficient to establish that the beneficiary has been serving in a managerial capacity for one continuous year in the three-year period preceding the filing of the petition. The certificates are from the foreign employer's CPA and a former client and make general statements confirming the beneficiary's services as legal advisor, rather than her purported work in a managerial position of a legal services firm.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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" of proof. *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.

In addition, the motion does not satisfy the requirements of a motion to reconsider. 8 C.F.R. § 103.5(a)(2) 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.

On motion, counsel does not submit any document that would meet the requirements of a motion to reconsider. A review of the record and the adverse decision indicates that the AAO properly applied the statute and regulations to the petitioner's case. The petitioner only continues to "insist and reaffirm that [the beneficiary] will act in a primarily managerial/executive capacity in the organization." The petitioner does not specify why the director's decision was based on an incorrect application of law or Service policy. As previously discussed, the petitioner has not met its burden of proof and the denial was the proper result under the regulation.

Accordingly, the petitioner's claim is without merit. As noted in the AAO's decision, the petitioner did not provide sufficient evidence to establish that the beneficiary will be employed in a managerial or executive capacity or has been employed for one continuous year in the three-year period preceding the filing of the petition in an executive or managerial capacity. Nor has the petitioner established that a qualifying relationship exists between the petitioner and the foreign entity, and that the foreign entity will continue to do business as required.

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 CFR 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 reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion will be dismissed. The director's and AAO's decision will be undisturbed. The petitioner is denied.