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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

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U.S. Citizenship
and Immigration
Services

D7

DATE: **FEB 09 2012** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

[REDACTED]

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

DISCUSSION: The nonimmigrant visa petition was denied by the director, California Service Center. The Administrative Appeals Office (AAO) dismissed the subsequently filed appeal and affirmed the director's decision to deny the petition. The matter is now before the AAO on a motion to reopen and/or motion to reconsider. The motion will be dismissed and the AAO's decision will remain undisturbed.

The petitioner, a retail store for food and general merchandise, seeks to employ the beneficiary as a manager/owner for a period of three years.¹ The petitioner, therefore, endeavors to classify the beneficiary as a 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).

On October 17, 2008, the director denied the petition finding that the record was insufficient to establish that the United States company has been engaged in the regular, systematic, and continuous provision of goods and/or services by a qualified organization.

In a decision dated July 28, 2009, the AAO dismissed the appeal. The AAO withdrew the director's decision with respect to whether the company was engaged in the regular, systematic, and continuous provision of goods and/or services by a qualified organization. The AAO, applying the one-year "new office" provisions, upheld the denial on the grounds that the petitioner did not provide sufficient evidence to establish that: (1) a managerial or executive position could be supported within one year, and (2) physical premises were secured for the new office. On motion, counsel contends that the AAO erred in determining that the petitioner does not have a lease in its name. Counsel requests that the AAO consider "the motion already filed and decided a part of this motion."

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.²

On motion, the petitioner submits: (1) a copy of the 2007 tax returns of Anal Corporation, the company selling its assets to the petitioner; (2) a handwritten organization chart illustrating the petitioner's proposed

¹ Established in 2008, the petitioner had been doing business for less than one year at the time of filing. Accordingly, the petition is governed by the "new office" regulations at 8 C.F.R. § 214.2(1)(3)(v). As a new office, the initial approval would have been limited to one year, not the three years requested by the petitioner.

² 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).

staffing levels after one year of operations; and (3) a letter from [REDACTED] [REDACTED] the lessor of the petitioner's proposed physical premises.

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 filing of the petition.

As the original I-129 petition was filed February 7, 2008, it is reasonable to believe that the 2007 tax returns were unavailable at the time of filing. The tax preparer sent a copy of the 2007 tax returns with cover to [REDACTED] Corporation on May 19, 2008. The petitioner filed the appeal with the AAO on December 24, 2008 without a copy of the 2007 returns. The petitioner has not provided any reason as to why these tax returns were unavailable as of the date of the appeal's filing.

Additionally, the petitioner did not submit the proposed organization chart with either the original I-129 petition or the appeal. The director requested a copy of the U.S. business organization in a Request for Evidence on March 24, 2008. The petitioner did not submit the requested organization chart in response. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner has not provided an explanation as to why the organization chart was unavailable at the time of filing the I-129 petition or the appeal.

The letter from [REDACTED] [REDACTED] The letter enumerates the conditions of a proposed lease assignment from [REDACTED] to an unmentioned third party. The petitioner is not indentified in the letter as the proposed assignee. The petitioner provided a letter dated May 21, 2008 with the initial appeal specifying three of the four same terms as the letter submitted on motion. Both the May 21, 2008 letter and the letter submitted with the motion post-date the filing of the petition.

The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. 8 C.F.R. § 103.2(b)(1); *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 last decision. Counsel claims that the letter from [REDACTED] will overcome the AAO's dismissal of the appeal by evidencing that the lessor gave his assent to the lease assignment. On motion, the petitioner did not submit any additional documentation to establish that [REDACTED] and current lessee, [REDACTED] would be able to meet the conditions for assignment of the lease as stated in the letter. Furthermore, the letter does not refer to the petitioner by name and there is no other evidence to establish that [REDACTED] would in fact assign the lease to the petitioner.

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's primary complaint is that the AAO erred in finding that the petitioner does not have a lease in his name. 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.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

Here, the submitted evidence does not meet the preponderance of the evidence standard. As noted in the AAO's decision, the petitioner did not provide sufficient evidence to establish that a managerial or executive position could be supported within one year or that physical premises were secured for the new office. 8 C.F.R. § 214.2(l)(3)(v).

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 decision of the AAO will remain undisturbed.

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