

(b)(6)



U.S. Citizenship
and Immigration
Services

DATE: **APR 05 2013**

Office: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

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)

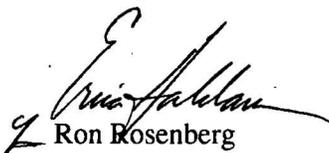
ON BEHALF OF PETITIONER:

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 in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** 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,


Ron Rosenberg

Acting Chief, Administrative Appeals Office

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

The petitioner filed the nonimmigrant petition seeking to classify the beneficiary 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 Mississippi corporation, states that it is a private investment company. At the time of filing, it claimed to operate a gas station/convenience store and a discount tobacco store. It claims to be a subsidiary of [REDACTED] located in Mumbai, India. The beneficiary was initially granted a one-year period of stay to open a new office in the United States in 2002 and was subsequently granted two extensions of status. The petitioner seeks to extend the beneficiary's L-1A status for two additional years.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The AAO initially dismissed the petitioner's appeal on February 3, 2009, concurring with the director's determination that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The AAO based the decision on the petitioner's failure to submit a detailed description of the beneficiary's duties. The AAO also found that the petitioner failed to establish that it employs sufficient subordinate staff to relieve the beneficiary from performing the day-to-day functions of the business.

Subsequently, the petitioner has filed a series of motions to reopen/reconsider the AAO's original dismissal of the petitioner's appeal. The AAO dismissed the first motion on December 2, 2009 based on a finding that the petitioner's submission did not meet the requirements for a motion to reopen or reconsider pursuant to the regulations at 8 C.F.R. § 103.5, as it did not include evidence which could be considered new and was not based on a claim that the adverse decision was incorrect based on the evidence of record at the time of the initial decision. On December 16, 2011, the AAO dismissed the petitioner's second motion as moot after determining that the petitioning company had been dissolved. The AAO did not address the merits of the petitioner's claims or reach a determination as to whether the petitioner's submission met the requirements of a motion to reopen or reconsider.

In the instant motion to reopen and reconsider, the petitioner states that the AAO incorrectly dismissed the petitioner's second motion to reopen. The petitioner provides evidence that the entity is in good standing with the State of North Carolina. Accordingly, the AAO's decision dated December 16, 2011 is withdrawn. The AAO will reconsider the merits of the petitioner's second motion filed on January 4, 2010.

Upon review, counsel's assertions do not satisfy the requirements of either a motion to reopen or a motion to reconsider.

On motion, the petitioner requests reconsideration of "all arguments made in the previous motion." The petitioner also submits evidence that at the time of filing, the beneficiary was "shopping for and negotiating new business opportunities."

The regulation at 8 C.F.R. § 103.5(a)(2) states:

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.

The regulation at 8 C.F.R. § 103.5(a)(3) states:

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 [U.S. Citizenship and Immigration Services (USCIS)] 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 regulation at 8 C.F.R. § 103.5(a)(4) states, in pertinent part: "A motion that does not meet applicable requirements shall be dismissed."

The petitioner does not provide any new facts to be considered in the reopened proceeding. For the second time on motion, the petitioner presents evidence and a brief description of the beneficiary's proposed managerial duties relating to the acquisition of "new business opportunities." The petitioner did not present this evidence or describe any related managerial duties in the initial petition, in response to the director's request for additional evidence, or on initial appeal. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

Furthermore, the instant petition was filed in July 2007. 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. *Id.* at 248. As previously addressed by the AAO, the petitioner's acquisition of a business in 2009, nearly two years after the petition was filed is not a "new fact" that could establish eligibility as of the date the petition was filed. Accordingly, the petitioner's motion does not meet the requirements of a motion to reopen.

Furthermore, counsel neither states a clear reason for reconsideration nor provides any precedent decision to establish that the decision was based on an incorrect application of law or USCIS policy. The basis for the motion is to request a new determination regarding the beneficiary's employment capacity based on the

petitioner's business operations and staffing levels as of 2009. As noted above, 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. A review of the record and the adverse decision indicates that the AAO properly applied the statute and regulations to the petitioner's case. Accordingly, the motion does not meet the requirements of a motion to reconsider.

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.

As a final note, the proper filing of a motion to reopen and/or reconsider does not stay the AAO's prior decision to dismiss an appeal or extend a beneficiary's previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The AAO's decisions dated December 2, 2009 and February 3, 2009 are affirmed.
The petition is denied.