



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: **AUG 07 2013** Office: VERMONT 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center ("the director"), denied the nonimmigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's 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 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 Texas corporation, states that it is engaged in landscape design and lawn maintenance. It claims to be an affiliate of [REDACTED] located in Pakistan. The petitioner seeks to extend the beneficiary's employment so that he may serve for an additional two years in the position of President.

The director denied the petition concluding that the petitioner failed to establish that it will be employ the beneficiary in a primarily executive or managerial capacity or that it has grown to the point that it can support a manger or executive.

The AAO dismissed the petitioner's appeal, finding that the evidence does not support a finding that the beneficiary will be employed in a primarily managerial or executive capacity. In denying the petition, the AAO observed that, based on the petitioner's description of the beneficiary's duties, he allocates more than 50 percent of his time to non-qualifying first-line supervisory and operational tasks. The AAO also found that the petitioner failed to establish that it had been doing business for one year prior to filing the petition, as required by the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B).

The petitioner subsequently filed the instant motion to reopen and reconsider. On motion, counsel for the petitioner submits a brief that is essentially identical to his previously submitted appellate brief. The petitioner states that the job duties supplied with the initial petition evidence the beneficiary's employment as a function manager. The petitioner further states that both the AAO and the director failed to take into account the reasonable needs of the organization in light of staffing levels. Counsel for the petitioner also asserts that the AAO and the director erred in taking into account the extent of the petitioner's growth during its first year of operations. Counsel does not address the AAO's finding that the petitioner failed to establish that it was doing business for the previous year.

The petitioner'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).

The petitioner did not submit any evidence in support of its brief. Furthermore, the brief did not contain any new fact not previously provided.

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, the petitioner 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 reiterates the same arguments and citations previously put forward on appeal. The petitioner does not present any precedent decision not already considered by the AAO or further establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Specifically, the petitioner fails on motion to state how the previous AAO decisions incorrectly applied the law of Service policy when determining that the beneficiary's duties do not establish that he has been or would be performing primarily managerial duties. The petitioner's only reiterates its previous contention on appeal that the beneficiary's job duties meet the burden of proof without further legal analysis. The petitioner again asserts that the beneficiary will serve as a functional manager based on his job duties without specifying what function the beneficiary will manage, as noted in the AAO's prior decision on appeal.

Furthermore, counsel asserts that the AAO erred in taking into account the size of the petitioner's operation. The AAO dismissed the petitioner's appeal based primarily on a finding that the petitioner failed to establish that the beneficiary's duties would be primarily managerial or executive in nature. This finding was based on an analysis of the petitioner's description of the beneficiary's actual duties and not on the size of the petitioning company. While counsel objects to the AAO's finding that the beneficiary would spend the majority of his time performing non-qualifying duties, it has not offered any further support for a finding that the duties described should be considered managerial in nature.

The AAO acknowledged that a smaller company in the early stages of development may require an L-1A employee to perform a greater percentage of non-qualifying duties. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. 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'r 1998).

Reading section 101(a)(44) of the Act in its entirety, the "reasonable needs" of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See *Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir., 2008).

Regardless, the AAO's holding was based on the conclusion that the beneficiary is not primarily performing managerial duties and did not rest on the size of the petitioning entity or the number of staff he supervised.

Counsel objects to the AAO's reference to *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988). Counsel observes that Congress omitted the language that discussed individuals who produce a product or provide a service from the Immigration Act of 1990 and asserts that this is a clear indicator that such individuals are not precluded from qualifying as multinational managers or executives. However, the AAO will not draw this conclusion based solely on an omission.

Despite the changes made by the Immigration Act of 1990, the statute continues to require that an individual "primarily" perform managerial or executive duties in order to qualify as a managerial or executive employee under the Act. The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, that individual cannot also "principally" or "chiefly" perform managerial or executive duties. Counsel submits no evidence in the form of congressional reports, case law, or other documentation to support his argument. Accordingly, counsel's unsupported assertions are not persuasive on this point.

As previously discussed, the petitioner has not met its burden of proof and the denial was the proper result under the applicable statute and regulations. Accordingly, the petitioner's motion to reconsider will be dismissed.

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, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met. The regulation at 8 C.F.R. § 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 is dismissed.