

(b)(6)

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

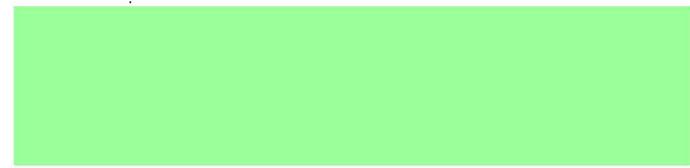


DATE: **DEC 13 2013** Office: VERMONT SERVICE CENTER FILE:

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:



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
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition, and the Administrative Appeals Office (AAO) dismissed the petitioner's appeal. The matter is now before the AAO on a combined motion to reopen and reconsider. The AAO will grant the motion to reopen and the underlying petition will remain denied.

The petitioner filed this nonimmigrant petition seeking to qualify the beneficiary as an L-1A 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). The petitioner is a Texas corporation, established in 2003, that is engaged in the restaurant business. The petitioner states it is a subsidiary of [REDACTED] located in China. The petitioner seeks to employ the beneficiary as its president for a period of three years.

The director denied the petition, concluding that the petitioner did not establish that it would employ the beneficiary in a qualifying managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserted that the director's decision was erroneous and contrary to the evidence submitted.

The AAO subsequently dismissed the appeal. The AAO observed that the petitioner provided a vague position description which failed to convey the nature of the beneficiary's day-to-day duties. Further, the AAO found that the record failed to support the petitioner's assertion that the beneficiary would primarily supervise subordinate managers and supervisors, pointing to the petitioner's failure to specifically identify its employees in the submitted organizational chart, as well as to discrepancies in the number and type of employees to be supervised by the beneficiary. Additionally, although not addressed by the director, the AAO concluded that the petitioner had failed to establish that its foreign parent company employed the beneficiary in a qualifying managerial or executive capacity. In denying the petition, the AAO determined that the petitioner provided a vague description of the position the beneficiary held abroad, and noted inconsistencies in the record with respect to the foreign company's organizational structure. Finally, the AAO observed that the beneficiary's claimed start date with the foreign employer actually pre-dated the establishment of the company.

The petitioner now files a motion to reopen and reconsider the AAO's decision.

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, 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.

This regulation is supplemented by the instructions on the Form I-290B, Notice of Appeal or Motion, by operation of the rule at 8 C.F.R. § 103.2(a)(1) that all submissions must comply with the instructions that appear on any form prescribed for those submissions.¹ With regard to motions for reconsideration, Part 3 of the Form I-290B submitted by the petitioner states:

Motion to Reconsider: The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions.

The purpose of a motion to reopen or motion to reconsider is different from the purpose of an appeal. While the AAO conducts a comprehensive, *de novo* review of the entire record on appeal, 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 decision to dismiss the petitioner's previous appeal.

On motion, counsel asserts that the AAO failed to consider that an entity may adjust its organizational structure over time, thereby explaining any discrepancies in the record with respect to the number and types of employees working for the company. Counsel submits an additional support letter from the petitioner that provides further detail with respect to the beneficiary's proposed daily duties. Further, the petitioner provides another support letter from the foreign employer that explains the apparent discrepancy between the beneficiary's start date in 2000 and the foreign company's incorporation in 2009.

Counsel has not stated sufficient reasons for reconsideration supported by pertinent appropriate citations to statutes, regulations, or precedent decisions to establish that the AAO's decision was based on an incorrect application of law or Service policy. In fact, no reference to law or agency

¹ The regulation at 8 C.F.R. § 103.2(a)(1) states in pertinent part :

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission.

policy is set forth in counsel's brief, nor is any statement as to its incorrect application proffered. For this reason, the motion to reconsider will be dismissed.

The AAO will grant the motion to reopen with respect to the beneficiary's proposed employment in the United States since the petitioner has submitted new evidence not previously requested by the director. Specifically, the petitioner has submitted a sufficient duty description for the beneficiary that provides an understanding of the beneficiary's actual day-to-day duties. As such, the previous finding of this office that the duties of the beneficiary were overly vague is hereby withdrawn.

On appeal, the petitioner asserted that the beneficiary qualified as both a personnel manager and an executive. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Further, in order for a beneficiary to qualify as an executive, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988). As such, the issue remaining is whether the petitioner has demonstrated that the petitioner has sufficient managerial, supervisory or professional subordinates to raise the beneficiary to a position beyond that of a first-line supervisor of non-professional employees.

However, counsel has failed to address the AAO's specific reasons for dismissing the appeal. For instance, in the previous decision, this office indicated the petitioner's failure to specifically identify the individuals in the petitioner's organizational chart such that a meaningful comparison could be made between the chart and the submitted IRS Forms 941, Employer's Quarterly Federal Tax Return. The AAO emphasized that the petitioner indicated that the only employee identified by name, the general manager, was the former owner of the restaurant and would not be employed by the petitioner in the future. Although this office acknowledges that certain changes can be made to organizational charts over time, the petitioner has failed to specifically address these changes or the discrepancies in the number and type of employees reflected in the record and addressed in the AAO's previous decision. Therefore, in sum, although the petitioner has provided a sufficiently detailed duty description for the beneficiary and his role as the general manager of a restaurant, the petitioner has not provided sufficient other evidence to demonstrate that the petitioner has other managers, supervisors, or professional employees to raise the beneficiary to a position beyond that of a first-line supervisor.

With respect to the beneficiary's foreign employment, the petitioner has submitted an additional support letter from the foreign employer which merely reiterates statements already offered on the record with respect to the beneficiary's foreign employment.² For instance, the petitioner does not offer a more detailed description of the beneficiary's job duties with the foreign entity, nor does the petitioner provide additional evidence to reconcile the discrepancies noted in the foreign employer's organizational chart. Indeed, the director requested that the petitioner identify the beneficiary's supervisory subordinates, and provide their job titles and duties, but the petitioner has still failed to submit the evidence necessary to corroborate the beneficiary's former executive or managerial role with the foreign employer. 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 foreign employer states on motion that the beneficiary supervised mid-level managers "such as [a] sales manager, marketing manager, production manager, and investment administration manager, etc. a total of five." In the provided support letter, the foreign employer states that these managers "in turn manage about 10 employees to perform day-to-day operations, while the production manager manages over 200 employees" and that the beneficiary "oversees the company's entire operations." However, the petitioner submits no additional evidence to support any of these assertions regarding the beneficiary's employment abroad. 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) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). As such, the petitioner has not submitted sufficient new evidence with respect to the beneficiary's foreign employment to reopen this office's previous decision on the matter.

Motions for 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).

² This office previously noted that the petitioner was shown on the record to have been established in 2009, but that the beneficiary's employment with the foreign employer was stated to begin in 2000. The petitioner has explained that the foreign employer changed its corporate status to that of a foreign investment company in 2009, thereby causing the foreign employer formation date to be reflected as being in 2009. The AAO hereby withdraws its comments with respect to this apparent discrepancy.

(b)(6)

Page 6

NON-PRECEDENT DECISION

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. Accordingly, the AAO will affirm its previous decision and the petition will remain denied.

ORDER: The motion is granted. The underlying petition is denied.