

(b)(6)



U.S. Citizenship
and Immigration
Services

[Redacted]

DATE: **DEC 19 2013** Office: VERMONT SERVICE CENTER [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,


For 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 subsequently-filed appeal. The matter is now before the AAO on a combined motion to reopen and reconsider. The motion will be denied.

The petitioner filed this nonimmigrant petition seeking to employ 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, a District of Columbia limited liability company established in December of 2001, claims to operate an herbal supplements business. The petitioner seeks to employ the beneficiary as its manager for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that: (1) the U.S. and foreign entities were doing business; and (2) the beneficiary will be employed in a managerial or executive position.

In its decision dated May 16, 2013, the AAO withdrew the director's findings with regard to the business activities of the petitioner and the foreign entity, but ultimately dismissed the appeal. Specifically, the AAO found that the petitioner failed to overcome the director's finding that the beneficiary would not be employed in a primarily managerial or executive capacity.

The petitioner, through counsel, now files a combined motion to reopen and reconsider. In support of the motion, counsel submits: (1) a copy of the AAO's decision dated May 16, 2013; (2) a letter from the petitioner dated June 13, 2013; and (3) an affidavit by [REDACTED] Executive Director of the petitioner and the foreign entity, dated June 13, 2013.

Upon review, the petitioner has not satisfied 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

In its June 13, 2013 letter, the petitioner submits a detailed description of the beneficiary's position, providing a distinct breakdown of the percentage of time the beneficiary will devote to each stated duty. In addition, the petitioner claims that its Executive Director, [REDACTED], has performed the administrative functions of the petitioner at all times, thus relieving the beneficiary from the performance of non-qualifying duties and establishing his eligibility for the classification requested at the time of filing.

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 AAO, however, does not consider the statements set forth in the petitioner's letter to be "new" evidence. The petitioner had the opportunity to submit this evidence in the initial petition, in response to the RFE, and on appeal. The director specifically requested a detailed breakdown of the percentage of time the beneficiary would devote to his claimed duties, along with an explanation regarding the organizational hierarchy and the role other staff members would play in relieving him from performing non-qualifying tasks, in the RFE issued on August 24, 2010. The petitioner failed to submit this evidence in response to the director's RFE, and does not explain on motion how this evidence was otherwise unavailable prior to the instant motion to reopen. This evidence, therefore, is not considered "new" evidence.

Although the petitioner submits an affidavit from its Executive Director in support of the statements made in its June 13, 2013 letter, this affidavit is likewise deficient. In the affidavit, [REDACTED] claims that, as the executive director, she is authorized to speak on behalf of the petitioner. She states that in addition to her higher-level functions, she has addressed the administrative needs of the petitioner since May 2010 and will continue to do so once the beneficiary arrives in the United States to assume his managerial position. However, in the RFE issued on August 24, 2010, the director specifically requested that the petitioner provide "a letter from an authorized representative of the U.S. company stating the managerial decisions to be made by the beneficiary on behalf of the U.S. organization," as well as additional details regarding the managerial responsibilities of the beneficiary, his supervisory duties, and the technical skills required to perform his duties. The petitioner failed to submit this evidence in response to the director's RFE, and does not explain on motion how this evidence was otherwise unavailable prior to the instant motion to reopen, particularly in light of the claim that the Executive Director has been performing administrative tasks for the petitioner since 2010. This evidence, therefore, is not considered "new" evidence.

At the time of filing, the petitioner claimed on the Form I-129 petition that it had no employees. Moreover, the record did not previously identify an Executive Director as a member of its organizational hierarchy, nor is there any previous evidence that [REDACTED] was employed by the petitioner at the time the petition was filed. The claim that she had been relieving the beneficiary from performing non-qualifying duties is not supported by the evidence in the record, and it is unclear when [REDACTED] actually commenced her role as Executive Director with the petitioner. 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. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

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.

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 for 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. Counsel generally states that the AAO "did not properly view" the beneficiary's job duties in consideration of the fact that the petitioner is a marketing company, and simply reiterates its previous argument on appeal that the beneficiary's job duties meet the burden of proof without further legal analysis. Counsel does not specify why the AAO's decision dismissing the petitioner's appeal was based on an incorrect application of law or USCIS policy, or cite to any relevant statute, regulation or relevant precedent decision. Although counsel makes a brief reference to non-precedent case law relevant to whether the beneficiary qualifies as a function manager, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Moreover, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Consequently, counsel brief reference to this unpublished decision is not considered to be a citation to a relevant precedent decision as contemplated by the regulations.

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

ORDER: The motion is denied.