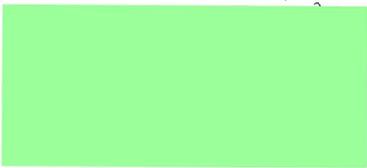




U.S. Citizenship
and Immigration
Services

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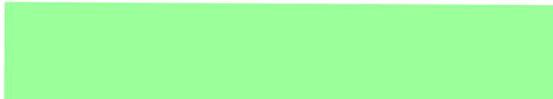


DATE: **JAN 17 2013**

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:

SELF-REPRESENTED

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 AAO inappropriately applied the law in reaching its 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 motion 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 any motion to 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 petition for a nonimmigrant visa, and the Administrative Appeals Office (AAO) dismissed the petitioner's appeal. The petitioner subsequently filed a second appeal, which the AAO rejected as improperly filed pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(1). Further, the petitioner filed a motion to reopen and reconsider and the AAO dismissed the motion. The matter is now again before the AAO on a motion to reopen and reconsider. The AAO will dismiss the motion.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its vice president 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 corporation organized in the State of New Jersey, operates a hotel, and claims to be engaged in commercial and real estate dealings. The beneficiary was previously granted one year in L-1A classification in order to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay for three additional years.

The director denied the petition on April 10, 2008, concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The AAO dismissed the petitioner's subsequent appeal and affirmed the director's determination in a decision dated September 30, 2008. The AAO further found that the petitioner failed to establish that the petitioner had been doing business for the year prior to filing the extension request, as required by 8 C.F.R. § 214.2(l)(14)(ii)(B), and denied the petition for this additional reason.

On November 3, 2008, the petitioner filed a second appeal. The petitioner indicated on Form I-290B, Notice of Appeal or Motion, that it would submit a brief and/or additional evidence to the AAO within 90 days, but no brief or evidence was submitted within the stated time period.

On June 30, 2009, the AAO rejected the petitioner's appeal, noting that it does not exercise appellate jurisdiction over AAO decisions. The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003) and subsequent amendments. While the AAO has appellate jurisdiction over Form I-129 nonimmigrant petitions, the AAO had no jurisdiction over the petitioner's second Form I-290B because no appeal lies from the AAO's dismissal of a prior appeal. Accordingly, the appeal was not properly before the AAO, and the AAO rejected it as improperly filed pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(1).

The AAO noted in its decision that the petitioner did have the option of filing a motion to reopen or a motion to reconsider the AAO's decision within 33 days of service pursuant to 8 C.F.R. § 103.5. The AAO also reviewed the petitioner's appeal to determine whether it met the requirements of a motion, but found that it did not. In this regard, the AAO noted that, although the regulation at 8 C.F.R. § 103.3(a)(2)(vii) states that a petitioner may be permitted additional time to submit a brief or additional evidence to the AAO in connection with an appeal, no such provision applies to a motion to reopen or reconsider. The additional evidence must comprise the motion. *See* 8 C.F.R. §§ 103.5(a)(2) and (3). As the petitioner submitted no brief, evidence or other argument in support of the appeal, the AAO concluded that it did not meet the requirements of either a motion to reopen or a motion to reconsider. *See* 8 C.F.R. § 103.5(a)(3) and (4).

Thereafter, the petitioner proceeded to file a motion to reopen and reconsider and asserted that the director and the AAO both abused their discretion in denying the petition and dismissing the appeal. Counsel contended that the AAO did not provide reasoning for determining that the beneficiary's duties were non-managerial; improperly considered the degrees of the beneficiary's subordinates as relevant to the beneficiary being a manager under the Act; argued that reflecting the percentages of managerial duties was an impossible and fruitless exercise; and that providing 2006 tax returns related to the petitioner would have been impossible since the petitioner did not begin operation until 2007 as a new office. Additionally, counsel maintained in the motion that the second appeal was indeed properly filed and its rejection was due to USCIS error for not forwarding "the appeal to the appropriate authority." Further, counsel asserted that USCIS had no grounds to deny the extension based on the original approval of the new office petition and further requested oral argument before the AAO to best clarify the record.

The AAO dismissed the motion to reopen and reconsider concluding that the second appeal had been properly rejected. The AAO again noted that it does exercise appellate authority over AAO decisions, and that the petitioner should have a motion to reopen or reconsider. The AAO found that the petitioner's contention that it should have forwarded the appeal to "to the appropriate authority" was without merit under the Act. Additionally, the AAO pointed out that counsel's assertion that the full record should have been reviewed upon the second appeal, and on motion to reopen and reconsider, was misguided and also not required by the Act. Lastly, the AAO denied the petitioner's request for oral argument as she concluded that the petitioner had not identified any unique factors or issues of law that could not be adequately addressed in writing, again as stipulated by the Act.

The matter is now again before the AAO on a motion to reopen and reconsider. The petitioner asserts that it has provided sufficient evidence pursuant to the Act to qualify the beneficiary and appropriately responded to the director's Request for Evidence (RFE). The petitioner offers that the AAO's previous decision was wholly subjective and without supported reasoning. The petitioner further lists the beneficiary's previously provided duties for the record and maintains these duty descriptions are sufficiently descriptive and qualify the beneficiary as a manager consistent with the Act. Additionally, the petitioner suggests that the AAO's previous decision was "based on irregularity and/or deficiency of procedure," and contends that these "procedures" include: (1) respecting the liberal and open minded ideals of America; and (2) boosting the economy of the country. Lastly, the petitioner again requests oral argument of the matter before the AAO "in the interest of justice."

According to 8 C.F.R. § 103.5(a)(1)(ii), jurisdiction over a motion resides in the official who made the latest decision in the proceeding, in this case, the AAO.

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 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 motion to reopen or reconsider on September 16, 2011.

The AAO previously conducted a *de novo* review of the entire record of proceeding, an appellate decision was issued, and the deficiencies were expressly stated in the AAO's 12-page decision issued on September 30, 2008. The AAO notes that in this decision numerous detailed grounds were provided for the denial of the petition including, but not limited to: (1) material discrepancies between the number of employees compensated in payroll records provided by the petitioner and the number of employees the petitioner claimed to employ; (2) material discrepancies in the record regarding the type of business the petitioner was conducting; (3) lack of specificity in the beneficiary's stated duties and repetition of the statutory language in such duties; (4) a failure to effectively articulate the percentage of duties the beneficiary spent on managerial tasks; (5) a failure on a number of counts to properly respond to the director's Request for Evidence (RFE) as required; and (6) a failure to establish that the petitioner was doing business as required by the Act due to material discrepancies in the petitioner's submitted payroll records and the purported location of the petitioner's business.

In sum, the AAO provided more than adequate reasoning in affirming the decision of the director, including appropriately detailed explanations of why the AAO found the beneficiary's duties to be non-managerial and overly vague, why the petitioner's failure to provide information regarding the degrees of the petitioner's subordinates was relevant, and why the director and the AAO have the clear right to subsequently reject a petition for the extension of a previously granted L-1A new office petition. The AAO notes that prior approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). More specifically, the AAO has already provided a sufficiently reasoned and objective appellate decision related to this matter, and there is no regulatory or statutory provision that allows a petitioner more than one appellate decision per petition filed. Additionally, the petitioner's contention that the decision was wholly subjective, and the citing of precedent to this effect, is not convincing given the myriad of reasons provided for the AAO's previous affirmation of the director's decision in the decision dated September 30, 2008.

Also as noted above, the AAO is not under an obligation to completely reconsider the full record pursuant to a motion to reopen to reconsider, but only consider 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 previous decision. However, on motion, the petitioner does not provide any such additional evidence or appropriate precedent decisions to overcome the AAO decision issued on June 30, 2009 to reject the petitioner's second appeal as improperly filed, which was affirmed in the AAO's subsequent decision dated September 16, 2011. The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003) and subsequent amendments. While the AAO has appellate jurisdiction over Form I-129 nonimmigrant petitions, the AAO had no jurisdiction over the petitioner's second Form I-290B because no appeal lies from the AAO's dismissal of a prior appeal. As such, the petitioner's second appeal was properly rejected.

Also, the AAO properly found in its decision of June 30, 2009 that the second appeal was not a motion to reopen or reconsider because it did not offer any "new" evidence, which could not have presented in the initial proceeding. Indeed, the petitioner did not submit any brief or arguments in support of this second appeal. Further, petitioner's argument that the AAO should consider "open minded ideals" and the economic potential of an approval is without basis in the Act or regulations. As such, the motion to reopen and reconsider in the current matter must be dismissed for reasons similar to the previous referenced dismissals, as the petitioner has not presented and documented new facts or documented sufficient reasons, supported by pertinent precedent decisions to reopen or reconsider the AAO's previous dismissal on September 16, 2011, but only vaguely argues that the full record should be re-considered as the AAO made a "subjective" decision.

In addition, the regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." The petitioner's motion does not contain this statement. The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion does not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must be dismissed for this additional reason.

Finally, the AAO acknowledges that the petitioner once again requests an opportunity for oral argument before the AAO, "in the interest of justice." As noted in the AAO's previous two decisions, the regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, pursuant to 8 C.F.R. § 103.3(b), U.S. Citizenship and Immigration Services has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. In this instance, the petitioner identified no unique factors or issues of law to be resolved, but only offers vague arguments regarding the full reconsideration of the case which were already sufficiently determined in the AAO decision dated September 30, 2008. Moreover, the written record of proceeding fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

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.

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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).

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 motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.