

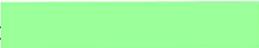
(b)(6)

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

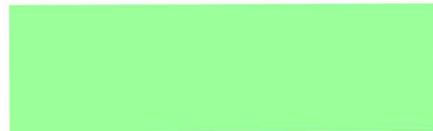


DATE: **JUN 05 2013** Office: CALIFORNIA SERVICE CENTER FILE: 

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 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.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The petitioner filed an appeal with the Administrative Appeals Office (AAO), which the AAO dismissed. The petitioner now files a Motion to Reopen and Reconsider with the AAO.¹ The AAO will dismiss the motion.

The petitioner seeks to extend the employment of the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L). The petitioner, an Oregon corporation, is a trucking business and dispatch company. It claims to be a subsidiary of [REDACTED] (the foreign entity), located in [REDACTED] Russia. The beneficiary was initially granted a one-year period of stay in the United States in L-1A status in order to open a new office, and the petitioner seeks to extend the beneficiary's status and employment as its chief executive officer (CEO).

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity, and that it had a qualifying relationship with the foreign entity. In concluding that the petitioner did not establish a qualifying relationship, the director found that the petitioner's 2010 federal tax return was inconsistent with the petitioner's claims, and that the petitioner failed to submit evidence establishing that the foreign entity provided funding for the U.S. company or paid for the ownership interest claimed.

The petitioner filed an appeal to the AAO. The AAO withdrew the director's decision with respect to the question of whether the beneficiary would be employed in a primarily managerial or executive capacity. The AAO dismissed the appeal with respect to the question of whether the petitioner established a qualifying relationship. In dismissing the appeal for lack of evidence of a qualifying relationship, the AAO again observed that the petitioner's 2010 federal tax return was inconsistent with the petitioner's claims. The AAO also concurred with the director's assessment that the petitioner failed to submit evidence establishing that the foreign entity provided funding for the U.S. company or paid for the ownership interest claimed. Specifically, the AAO found that there was insufficient evidence to establish that the funds in Ms. [REDACTED] personal account originated from the foreign entity or that the funds were ultimately transferred to the U.S. entity.

The petitioner filed Form I-290B, Notice of Appeal or Motion, requesting a motion to reopen and reconsider.² On motion, counsel for the petitioner asserts that the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, contained "a mistake." Counsel asserts that the income tax preparer, [REDACTED] did not sufficiently review and analyze the petitioner's corporate documents. Counsel asserts that, in December 2013, the petitioner requested [REDACTED] to correct the mistakes and to file an amended tax return.³ To support the motion, counsel attaches a copy of the petitioner's IRS Form 1120X, Amended U.S. Corporation Income Tax Return, dated February 7, 2013 for tax year ending in December 2011, indicating that the foreign entity owns 80.65% of the voting stock of the U.S. petitioner. Counsel also

¹ On Part 2, Form I-290B, Notice of Appeal or Motion, the petitioner indicates that it was filing an appeal. In the accompanying brief, however, counsel indicates that it is requesting a motion to reopen and reconsider. The AAO will treat the instant filing as a motion to reopen and reconsider rather than a second appeal. Any second or subsequent appeal would be rejected as improperly filed because the AAO does not exercise appellate jurisdiction over AAO decisions.

² See *supra* footnote 1.

³ Counsel states that the petitioner requested its accountant to correct the mistakes and file an amended tax return in December 2013. The AAO assumes that counsel means December 2012, not December 2013.

attaches a letter dated February 7, 2013 from an accountant at the [REDACTED] acknowledging that "due to lack of a comprehensive [*sic*] knowledge of our client and its operations, our firm incorrectly reported percentage of stock owned by officers and names of shareholders" and that it has "[r]eently . . . prepared amended 2011 corporate tax return which reflects correct names of shareholders and stock ownership allocation." Counsel requests the amended tax return and the accountant's letter to be "considered as a [*sic*] new evidence in making the decision."

As evidence of the foreign entity's funding, counsel submits "additional evidence to show that the funds of the Russian company in fact were deposited on [*sic*] the petitioner's bank account," to wit: copies of the petitioner's bank statements. These bank statements confirm the deposits of the previously submitted cashier's checks paid by [REDACTED]. Counsel also requests the reconsideration of evidence previously submitted. Counsel states: "We do not have any additional evidence to prove that the above funds belong to the Russian company and were indeed transfer [*sic*] to [REDACTED]." Counsel further states: "We do agree with the AAO, that this is a bit unusual way of funds contribution. However, given the totality of the circumstances test we respectfully request . . . the AAO to entertain the [motion] and approve the petition."

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 evidence that was not available and could not have been discovered or presented in the previous proceeding.⁴

The petitioner's statements on motion contain no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2). Although counsel asserts that the petitioner's 2010 tax return contained mistakes, counsel fails to explain why these "mistakes" could not have been discovered or presented in the previous proceeding. The AAO observes that the director's denial specifically discussed the petitioner's 2010 tax return. Similarly, the newly submitted evidence, i.e. the petitioner's IRS Form 1120X dated February 7, 2013, and the February 7, 2013 letter from an accountant at the [REDACTED] cannot be considered "new" under 8 C.F.R. § 103.5(a)(2) because counsel fails to explain why these documents were not available or could not have been discovered or presented in the previous proceeding. Although counsel claims the petitioner requested its accountant to amend its tax returns in December 2012, counsel provides no documentary evidence to support this assertion. The accountant's letter does not state when the petitioner informed him or her of the mistake. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Even assuming *arguendo* that the newly submitted documents could be considered, the petitioner failed to provide any evidence establishing that it actually filed the Form 1120X dated February 7, 2013 with the IRS. The accountant's letter simply states that it prepared the amended return. The petitioner also failed to establish that it will file a Form 1120X for its 2010 federal tax return, which was the tax return referenced in the decisions by the director and AAO.

⁴ 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).

Regarding the new documents purporting to establish the foreign entity's funding of the U.S. office, these documents also cannot be considered "new" under 8 C.F.R. § 103.5(a)(2). Again, counsel fails to explain why these documents were not available or could not have been discovered or presented in the previous proceeding. The AAO observes that the director's RFE specifically requested documentation to show that the foreign entity paid for the U.S. entity, and the director's denial specifically discussed the petitioner's failure to submit such evidence.

Even if the newly submitted documents could be considered, the petitioner still failed to submit sufficient evidence establishing that the funds from [REDACTED] personal account originated from the foreign entity. Ms. [REDACTED] affidavit attesting to the origin of the funds, alone, is insufficient to prove that the funds originated from the foreign entity; the petitioner provided no objective evidence, such as wire transfers or deposit receipts, to support the assertions. 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)). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). If a required document does not exist or cannot be obtained, the petitioner must demonstrate this and submit secondary evidence pertinent to the facts at issue. *Id.* Where a record does not exist, the petitioner must submit an original written statement from the relevant government or other authority establishing this as fact. The statement must indicate the reason the record does not exist and indicate whether similar records for the time and place are available. 8 C.F.R. § 103.2(b)(2)(ii).

For the reasons stated above, the instant motion fails to meet the requirements for a motion to reopen.

Furthermore, 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.⁵ 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.

⁵ 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.

Here, the petitioner fails to support the motion to reconsider with any citations to appropriate statutes, regulations, or precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. Accordingly, the instant motion fails to meet the requirements for 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. 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.

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 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.

ORDER: The motion is dismissed.