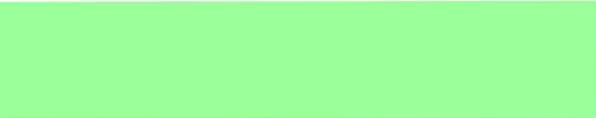


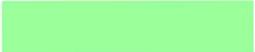
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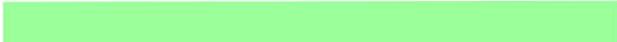
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



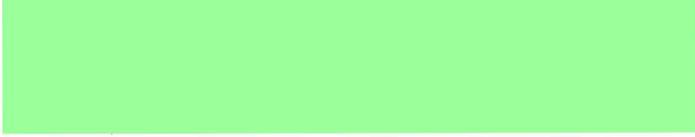
U.S. Citizenship
and Immigration
Services



DATE: **MAY 14 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 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,

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

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 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 limited liability company, organized in the State of Texas, and engaged in the investment in food, hospitality, and retail industries. The beneficiary was previously granted one year as an L-1A nonimmigrant intracompany transferee in order to open a new office in the United States, and was subsequently extended in this status for two additional years. The petitioner now seeks to extend the beneficiary's employment in the United States for three additional years.¹

The director denied the petition, concluding that the record did not establish that a qualifying relationship existed between the petitioner and foreign employer. The director further found that the petitioner had not established that the beneficiary had been, or would be, employed in a managerial or executive capacity. Lastly, the director also concluded that the petitioner had not shown that it was doing business as defined by the regulations, or providing goods or services in a regular, systematic, and continuous fashion necessary to establish as a qualifying organization.

The petitioner subsequently filed an appeal. The AAO dismissed the petitioner's subsequent appeal and affirmed the director's determination. The AAO also concluded that the beneficiary was not acting in a managerial or executive capacity for the petitioner, noting that the petitioner had not developed any revenue generating business after three years of operation in the United States. Further, the AAO indicated that the petitioner's current operations were insufficient to support the beneficiary's stated executive role and that the beneficiary's provided duties were too vague. Additionally, the AAO concurred with the director, finding that the petitioner had not shown that a qualifying relationship existed between the petitioner and the foreign employer. The AAO specified that the petitioner had not submitted consistent and reliable evidence of ownership in the foreign employer and that a proxy agreement provided relevant to the petitioner did not establish common ownership and control between the entities. Finally, the director also agreed with the director that the petitioner had not established that it was doing business as defined by the Act. The AAO noted that the petitioner's business had not accrued any revenues in the previous three years of operation.

The petitioner now files a motion to reopen and reconsider the aforementioned AAO decision.²

¹ The petitioner requests to extend the beneficiary's status for an additional three years. However, pursuant to 8 C.F.R. § 214.2(l)(15)(ii), an extension of stay may only be authorized in increments of up to two years.

² The AAO notes that counsel indicated on the Form I-290B Notice of Appeal or Motion that she was filing an appeal. Alternatively, counsel's cover letter states the petitioner is submitting a motion to reconsider. However, counsel's brief clearly states that the intended filing is a motion to reopen and reconsider, and offers argument consistent with these motions. As such, the AAO will treat the filing as a combined motion to reopen and reconsider despite the aforementioned discrepancies.

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 previous appeal.

First, the AAO notes that the petitioner has not submitted any new evidence.³ Second, the petitioner has not articulated an error on the part of the AAO in its decision, or referenced valid precedent, as required in a motion to overcome the AAO's findings.

On motion, counsel contests the AAO's decision on several grounds. First, counsel asserts that the petitioner suffered irreparable harm due to ineffective assistance of counsel on the part of the petitioner's original counsel who filed the petitioner's first extension in March 2009. Counsel further states that the AAO erred in its decision by treating the petitioner as a corporation and not as a limited liability company, asserting this represents a material misunderstanding of the record which warrants full reconsideration of the record. Additionally, counsel states that the petitioner's limited operations and failure to conduct business is due to forces beyond the petitioner's reasonable control such as the complexity of completing the purchase of business franchises in the United States, the recent world economic downturn, and political instability in Pakistan. Counsel also maintains that the beneficiary should be able to recapture time spent in Pakistan during the previous extension from April 2010 through December 2010, or eight months and seven days, asserting that the beneficiary's inability to return in a more timely fashion was due to delays on the part of the U.S. consulate in Pakistan. Further, counsel asserts that the petitioner has established that the beneficiary qualifies as a manager or executive, consistent with the Act. On appeal, counsel submits additional

³ 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 College Dictionary* 736 (2001)(emphasis in original).

documentation, including but not limited to, e-mails between the beneficiary and former counsel; a complaint filed against former counsel with the Board on Professional Responsibility- District of Columbia Court of Appeals; and a brief written by former counsel.

Ineffective assistance of counsel

Counsel asserts that the petitioner suffered irreparable harm due to ineffective assistance of counsel on the part of the former counsel, Ms. [REDACTED] an attorney practicing law in the State of Texas. Counsel states that former counsel was not appropriately responsive, breached confidentiality, withdrew petitions without the petitioner's consent, did not file certain immigration petitions as instructed by the petitioner, and withheld petitioner documentation necessary to file the subsequent L-1A extension. More specifically relevant to the current matter, the petitioner maintains that Ms. [REDACTED] failed to file a Form I-131 Advanced Travel Parole Application in December 2009 which the petitioner states caused the a potential business deal with [REDACTED] to sell beverage products in Pakistan to fail. Counsel further asserts that Ms. [REDACTED] failed to provide proper counsel as to the requirements of gaining an extension of L-1A nonimmigrant status and withdrew a Form I-140 Petition for Immigrant Worker without the petitioner's consent. The petitioner submits a complaint filed against Ms. [REDACTED] with the Board on Professional Responsibility- District of Columbia Court of Appeals asserting complaints similar to those listed above, amongst others. The AAO notes that the petitioner subsequently retained other representation from Mr. [REDACTED] who submitted the petitioner's most recent petition for extension at issue in this motion. In short, counsel claims that Ms. [REDACTED] caused irreparable harm to the petitioner, causing the petitioner to miss deadlines and otherwise act in manner which determinately impacted the petitioner's extension of the current petition. Counsel contends that the actions of Ms. [REDACTED] justify a full reconsideration of the record by the AAO.

The AAO does not find counsel's claim to ineffective assistance of counsel persuasive. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Although the petitioner has submitted on appeal a complaint leveled against Ms. [REDACTED] in the District of Columbia Court of Appeals, the petitioner has not shown with sufficient evidence the agreements made by and between former counsel and the petitioner, or that Ms. [REDACTED] has been informed of the allegations and given an opportunity to respond. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. 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).

Further, even if accepted as true, the alleged actions of Ms. [REDACTED] are of little relevance to the current matter. The AAO's review is limited to the AAO's previous decision. In the current matter, or the extension of the

petitioner's L-1A nonimmigrant status, petitioner retained new counsel who filed the petitioner's Form I-129 Petition for a Nonimmigrant Worker, responded to two separate Requests for Evidence issued from the director, and subsequently filed the petitioner's appeal of the director's denial. As such, the actions of Ms. [REDACTED] are of little apparent impact on the current matter. Further, the petitioner has not specifically articulated how Ms. [REDACTED]'s claimed withholding of documentation impacted the current proceeding; for instance, by detailing what evidence, if any, was withheld and not subsequently submitted by later counsel. Additionally, the petitioner has not established with sufficient evidence that Ms. [REDACTED] failed to file travel documentation for the beneficiary in December 2009, and that such was the material cause of the petitioner's failure to complete a business deal with [REDACTED] to sell their goods in Pakistan. Indeed, e-mails submitted on the record suggest that the [REDACTED] business deal was still very speculative, and it is questionable whether the petitioner's claimed trip would have definitively closed this business deal. The petitioner has also not articulated how the failure to close the [REDACTED] deal impacts the petitioner's current operations and its failure to establish eligibility under the current petition. Also, the petitioner had over three years to commence doing business in the United States and failed to accomplish this, even if Ms. [REDACTED] actions were deemed to cause the failure of the [REDACTED] business deal. Indeed, it is not made clear how the selling of Snapple products in Pakistan would impact the petitioner's lack of operations in the United States. The petitioner is required to do business in a regular, systematic, and continuous fashion and to have operations sufficient to support the beneficiary's managerial or executive position in order to be eligible for extension, and USCIS' analysis is limited to the petitioner's actual current business operations submitted on the record as of the date of the filing of the extension. The AAO acknowledges the uncertainty and risk related to business dealings, particularly in unstable parts of the world, including deals lost due to factors beyond the reasonable control of a company or individual. However, the AAO cannot predict what the circumstances would be in the event a business deal were closed in order to determine eligibility, but must rely on a petitioner's actual current business operations established on the record. On motion, the petitioner has not submitted any new evidence meant to establish that it is currently doing business in the United States.

Further, although counsel asserts that Ms. [REDACTED]'s actions caused missed deadlines, no missed deadlines are articulated in the current proceeding. Also, Ms. [REDACTED]'s alleged failure to file an I-140 Petition for an Immigrant Worker, even if supported on the record, is not relevant to the current L-1A nonimmigrant visa extension. Lastly, counsel's assertion that Ms. [REDACTED] did not provide effective counsel on the law related to the coming L-1A extension is also not persuasive. Indeed, it was Ms. [REDACTED] who successfully filed a two year extension for the petitioner in March 2009; and as noted, the petitioner retained separate counsel to file the current extension, against whom, it does not claim ineffective assistance of counsel. Therefore, counsel's request to fully reconsider the case based on ineffective assistance of counsel is not convincing. The AAO is not under an obligation to completely reconsider the full record pursuant to a motion to reopen to reconsider. The AAO has already provided an 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.

AAO error

Counsel also asserts that the AAO erred in its decision by treating the petitioner as a corporation in its decision rather than a limited liability company. Counsel contends that this is a material misunderstanding of the record on the part of the AAO and therefore warrants a full reconsideration of the record. Upon review of

the AAO's decision, it is clear that the AAO treated the petitioner as a limited liability company. In fact, in the second paragraph of the decision the petitioner is referred to as a limited liability company and the AAO uses language consistent with a limited liability company repeatedly in the decision's section on qualifying relationship. For instance, the AAO refers to the petitioner's "members," not shareholders; and the petitioner's "articles of organization," not articles of incorporation. Later on page 14 of the decision, the AAO provides evidentiary requirements for a limited liability company to establish ownership. As such, there is no apparent confusion on the record in the decision related to the whether the petitioner is a limited liability company or a corporation. Therefore, the AAO does not find counsel's assertion persuasive.

Doing business

Counsel claims that the petitioner established that it is doing business as defined by the Act based on an upcoming acquisition of fast food restaurants in the greater [REDACTED] area. Further, counsel asserts that the petitioner will imminently acquire fast food franchises in the United States in order to conduct business and states that the petitioner's plans were hampered by the volatile U.S. real estate market, the complexity of purchasing [REDACTED] franchises, and instability in Pakistan and the Middle East. The AAO addressed this issue at length in the previous decision, finding that the petitioner was not conducting business in a regular, systematic, and continuous fashion as required by the Act, or doing business sufficient to support the beneficiary's claimed executive position. As noted previously in the current decision, the petitioner is required to do business in a regular, systematic, and continuous fashion and to have operations sufficient to support the beneficiary's managerial or executive position in order to be eligible for extension, and USCIS' analysis is limited to the petitioner's actual current business operations submitted on the record as of the date of the filing of the extension. 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). As such, speculation as to eligibility is irrelevant to the proceeding, unless a petition is a new office petition under the regulations. The petitioner is not a new office under the regulations, but an already established business filing for the beneficiary's extension. Despite counsel assertions, the petitioner may not be continually granted L-1A visa approval based on speculative business endeavors. The L-1A nonimmigrant visa is not an entrepreneurial visa classification that would allow an alien a prolonged stay in the United States in a non-managerial or non-executive capacity to start up a new business. The regulations allow for a one-year period for a U.S. petitioner to commence doing business and develop to the point that it will support a managerial or executive position. By allowing multiple petitions under the more lenient standard, USCIS would in effect allow foreign entities to create under-funded, under-staffed or even inactive companies in the United States, with the expectation that they could receive multiple extensions of their L-1 status without primarily engaging in managerial or executive duties. Indeed, this appears to be the petitioner's intention under the current extension petition.

Recapture or extend duration of visa

Furthermore, counsel maintains that the beneficiary should be entitled to recapture time lost aboard during his previously approved extension from March 2009 through March 2011. The petitioner states that the beneficiary traveled to Pakistan on April 17, 2010 in order to attend the funeral of his father-in-law and was unable to return to the United States until December 24, 2010 due to a claimed delay in consular processing in

Pakistan. As previously noted in the AAO's decision and cited directly from the regulations, Section 214(c)(2)(D) of the Act states that the period of authorized admission for an L-1 nonimmigrant admitted to render services in a managerial or executive capacity shall not exceed 7 years. *See also* 8 C.F.R. § 214.2(l)(15)(ii). While it is true that only time spent physically present in the United States shall be counted towards the seven-year maximum period of admission, the petitioner may not seek to recapture the time spent outside the United States in this extension proceeding. Rather, the petitioner may request that any full days spent outside the United States during the period of petition validity be added back to the beneficiary's total maximum period of stay, such that the beneficiary, if otherwise eligible for L-1A classification, would be able to receive extensions beyond the seventh year of petition validity. There are no regulatory or statutory provisions that would allow for reissuance of an approval notice for a prior petition for the purpose of recapturing days spent outside the United States during the validity of that specific petition. The beneficiary was granted the maximum two-year extension of stay permitted by 8 C.F.R. § 214.2(l)(15)(ii) and is not approaching the seven-year limit on authorized admission. In short, a beneficiary is not eligible to recapture time spent outside the United States during the validity of his previously approved petition, but may only add such time to the seven-year maximum period of admission, to the extent the petitioner is eligible at that time. Again, counsel's assertion that the AAO erred in concluding the beneficiary could not presently recapture time lost abroad during a then valid petition is not convincing.

Managerial or executive capacity

Lastly, counsel additionally contends that the beneficiary has been established as acting in a managerial or executive capacity with the petitioner. However, counsel merely reiterates the beneficiary's duties previously provided on the record, notes the petitioner will soon be acquiring four [REDACTED] restaurants in the [REDACTED] area, and that the beneficiary will then have managerial or supervisory subordinates upon the completion of this transaction. Again, the same assertions are directly addressed, and appropriately dismissed, in the AAO's previous decision. First, counsel does not offer any additional new evidence to establish these assertions, specific reasons why the director's conclusion was incorrect, or cite any law or precedent decisions establishing an error on the part of the AAO. Again, the AAO is not under an obligation to completely reconsider the full record pursuant to a motion to reopen to reconsider. The AAO has already provided an 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. As such, counsel's reiteration of previous arguments previously addressed in the AAO decision is not convincing towards the granting of the motion.

Therefore, for the reasons specified above, the petitioner has not submitted sufficient new evidence, nor has it established that the AAO's decision to dismiss the appeal was based on an incorrect application of law or USCIS policy. As such, the motion will be dismissed.

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.

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.