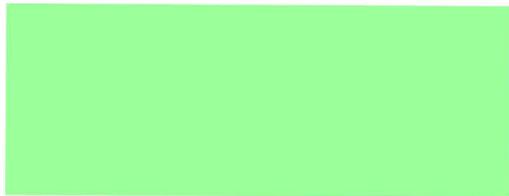


(b)(6)

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

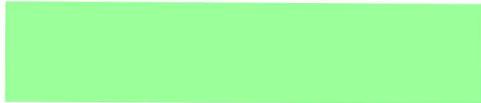


DATE: **MAY 16 2013**

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg", is written over a circular stamp or seal.

- Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, revoked the approval of the nonimmigrant visa petition. The petitioner filed two subsequent motions to reopen, and the director affirmed his previous decision in both proceedings. The petitioner subsequently filed an appeal of the director's decisions to the Administrative Appeals Office (AAO), which dismissed the appeal. The matter is now again before the AAO on a motion to reopen. The AAO will dismiss the motion.

The petitioner filed this nonimmigrant petition to classify the beneficiary as an intracompany transferee in a managerial or executive capacity 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 New York corporation, states that it operates a travel agency with six employees. It claims to be an affiliate of [REDACTED] located in Karachi, Pakistan. The petitioner seeks to employ the beneficiary in the position of travel manager for a period of three years.

The director initially approved the petition and granted the beneficiary the requested change of status and L-1A classification for the period September 12, 2007 through March 30, 2010. On May 23, 2008, the director issued a notice of intent to revoke the approval and allowed the petitioner an opportunity to submit additional evidence in support of the petition, in accordance with 8 C.F.R. § 214.2(l)(9)(iii)(B). The director revoked the approval of the petition on June 26, 2009 based on a finding that the petitioner failed to establish: (1) that the beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition (noting the beneficiary's time in the United States on a B-2 travel visa from June 28, 2006 through September 16, 2006); (2) that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity; and (3) that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed a motion to reopen on July 27, 2009. The motion consisted of a letter in which the petitioner sought to clarify the beneficiary's dates of employment with the foreign entity, asserting that the beneficiary was acting as a manager and executive with the foreign employer while in the United States from June 28, 2006 through September 16, 2006. The director concluded that the petitioner had not submitted sufficient independent evidence to support its claims on motion to overcome the director's previous grounds for denial. The director found insufficient new evidence to find that the beneficiary acted, and was acting, in a managerial or executive capacity. Accordingly, on February 24, 2010, the director affirmed his decision to revoke the approval of the petition based on the grounds stated in the original revocation decision.

On March 29, 2010, the petitioner filed a second motion to reopen. The petitioner submitted evidence pertaining primarily to the beneficiary's period of employment with the foreign entity and included: a salary payment voucher issued to the beneficiary by the foreign entity for the month of June 2005; a notarized letter from a representative at the beneficiary's bank attesting to his receipt of salary payments from the foreign entity; notarized copies of the beneficiary's bank statements for a six-month period; and notarized copies of the beneficiary's income tax returns for the period 2005-2006 and 2006-2007.

The director affirmed his previous decision to revoke the approval of the petition on June 22, 2010. In affirming the revocation decision, the director questioned the credibility of the beneficiary's payment voucher from the foreign entity for the month of June 2005, noting that the document appeared to be altered. In addition, the director advised the petitioner that USCIS had obtained a copy of the Nonimmigrant Visa

Application (Form DS-156) the beneficiary submitted in connection with a B-2 visa application on May 4, 2006. The director noted that, based on the information provided on that application, the beneficiary's employer from June 2005 through May 2006 was listed as [REDACTED] and not the petitioner's foreign affiliate.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner conceded that the beneficiary was employed by [REDACTED] on a part-time basis at the time he applied for a B-2 nonimmigrant visa, but asserted that the beneficiary worked primarily for the petitioner's foreign affiliate from June 2005 up until the date the instant petition was filed. The petitioner further asserted that the petitioner has submitted sufficient evidence that the foreign entity paid the beneficiary's salary between 2005 and 2007, and contended that the director misinterpreted certain evidence.

The AAO completed a comprehensive review of the record, and issued a decision on June 22, 2012 dismissing the petitioner's appeal. The AAO found that the petitioner had not established that the beneficiary had at least one year of continuous fulltime employment aboard within the three years preceding the petition. The AAO noted that the time spent by the beneficiary in the United States on a B-2 travel visa from September 28, 2006 through September 16, 2006, and again from September 23, 2006 until the filing of the petition, did not count towards the one year of fulltime employment aboard per the regulations. Therefore, since the beneficiary's start of employment with the foreign employer was offered as July 1, 2005, the beneficiary had not been shown to have been employed aboard with the foreign employer for one continuous year. Further, the AAO did not find convincing the petitioner's assertion that the beneficiary's true start date was June 3, 2005, citing evidence on the record that suggested that his start date was indeed July 1, 2005, as was previously maintained by the petitioner. The AAO also noted the petitioner's failure to provide payroll documentation for 2005 and 2006 to confirm the beneficiary's continuous fulltime employment aboard and to submit an adequate explanation of why the petitioner did not disclose the foreign employer as his employer on his B-2 travel visa. Lastly, the AAO pointed out that the petitioner had failed to contest the director's previous findings that the beneficiary had not been shown to act in a managerial or executive role with the foreign employer or the petitioner, and had not submitted new evidence at any stage of the proceedings to refute these conclusions of the director.

The petitioner currently files a motion to reopen the AAO's previous decision. The petitioner now submits previously requested tax return documentation and bank statements purporting to show regular payments by the foreign employer to the beneficiary in support of his claimed foreign employment, and requests that the AAO reconsider the record. The petitioner again maintains that the beneficiary began employment with the foreign employer on June 3, 2005 and submits the beneficiary's tax return documentation for 2005 and 2006 to support this assertion. Further, the petitioner also submits an annex to the beneficiary's Pakistani Form R3 Employer's Certificate in Lieu of Return of Total Income, in response to the AAO's previous questioning of this as a discrepancy on the record, contending this establishes the beneficiary's claimed part-time employment with [REDACTED]. Lastly, the petitioner again asserts that the beneficiary is acting in a managerial or executive capacity with the foreign employer, generally citing evidence previously submitted on the record.

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)(4) states, in pertinent part: "A motion that does not meet applicable requirements shall be dismissed."

Here, the petitioner does not submit any new 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.<sup>1</sup>

The purpose of a motion to reopen 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, to warrant the re-opening of the AAO's decision to dismiss the petitioner's previous appeal.

The AAO previously concluded that the beneficiary had not been shown to have been employed with the foreign employer for one continuous year, affirming the previous decisions of the director. The AAO reasoned that the beneficiary could not have been employed with the foreign employer for one continuous year since the petitioner had initially claimed on the record that the beneficiary had commenced employment with the foreign employer on July 1, 2005 and the beneficiary was shown to have entered the United States in June 28, 2006. The AAO stated that the period spent in the United States is not counted toward continuous foreign employment. *See* 8 C.F.R. § 214.2(l)(1)(ii)(A). Further, the AAO noted evidence on the record that the beneficiary began employment with the foreign employer on July 1, 2005, including the foreign employer's employment offer letter to the beneficiary; and a letter from the beneficiary's former employer, [REDACTED] noting the end of the beneficiary's employment on June 30, 2005. Further, the AAO questioned the petitioner's failure to submit the beneficiary's tax return documentation for 2005 and 2006, despite being directly requested by the director to submit this documentation in the notice of intent to revoke. Also, the AAO pointed out that the petitioner had been given ample opportunity to submit the foreign employer's payroll records for 2005 and 2006 and had failed to do so at every point in the proceeding. As mentioned in the previous decision, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition and the non-existence or other unavailability of required evidence creates a presumption of ineligibility. *See* 8 C.F.R. § 103.2(b)(14) and 8 C.F.R. § 103.2(b)(2)(i).

Now, on motion, the petitioner submits the beneficiary's 2005 tax return documentation in an attempt to establish that the beneficiary began employment with the petitioner on June 3, 2005, and not on July 1, 2005 as asserted previously on the record. However, the submitted 2005 tax return documentation cannot be considered new evidence, or evidence just discovered, found, or learned. In fact, the evidence was directly requested by the director and was questionably not provided by the petitioner. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the

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<sup>1</sup> 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).

benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The 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). Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on motion. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaighbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* As such, the beneficiary's 2005 tax return documentation cannot be considered new evidence and accepted on motion because it is both not "new" as defined by law, and since the petitioner was given ample opportunity to submit this documentation at various other points in the proceedings. Beyond this, the petitioner has not submitted any other new evidence relevant to overcoming the AAO's previous finding that the record supported the beneficiary's commencement of employment with the foreign employer on July 1, 2005 rather than June 3, 2005. Indeed, the petitioner has again not produced convincing new evidence, such as internal payroll documentation of the foreign employer, to establish that the beneficiary began employment on June 3, 2005 as claimed. Therefore, the petitioner has not documented new facts or sufficient reasons, to warrant the re-opening of the AAO's decision to dismiss the petitioner's previous appeal based on a failure to show that the beneficiary was employed aboard for one continuous year prior to filing the petition. For this reason, the motion will be dismissed.

Additionally, the AAO dismissed the petitioner's appeal, noting the director's previous grounds for revocation, including findings that the beneficiary had not been established as: (1) employed by the foreign employer in a primarily managerial or executive capacity, or (2) employed in the United States in a primarily managerial or executive capacity. The AAO's dismissal on these grounds was based on the petitioner's failure to contest these findings of the director on appeal, thereby leaving the issues abandoned. Further, the AAO noted that it was prevented from conducting a *de novo* review of the director's underlying decision since the petitioner had filed two subsequent motions to reopen with the director and not appeals to the AAO. Therefore, the AAO's previous decision was limited to the director's decision dated June 22, 2010, which did not include any discussion of the above referenced reasons for original revocation. Likewise, currently on motion, the AAO's review is limited to the AAO's decision of June 22, 2012, where the above reasons for revocation were considered abandoned. Now, on motion, the petitioner argues that the beneficiary was acting in a managerial or executive capacity as defined by the Act and regulations both with the foreign employer and the petitioner citing evidence previously submitted on the record. However, as before, the AAO is again precluded from providing a *de novo* review of these issues as they were previously abandoned by the petitioner. Further, even if considered, the petitioner offers no new evidence, or affidavits or other documentary evidence, to establish that the beneficiary was acting in a managerial or executive role with the foreign employer or the petitioner. Again, the AAO's review in this matter is limited to the narrow issue of whether the petitioner has presented and documented new facts to warrant the re-opening of the AAO's decision to dismiss the petitioner's previous appeal. The petitioner has not met this burden, as it only asserts evidence previously submitted on the record related to issues previously abandoned by the petitioner. Therefore, the AAO is not afforded the ability to grant the petitioner's request for a comprehensive review of the entire record of the proceedings as to the issue of whether the beneficiary was acting in a managerial or executive capacity with the foreign employer and the petitioner. For this additional reason, the motion will be dismissed.

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.

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.