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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 17 2013** Office: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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 with the field office or service center that originally decided your case by filing a 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

[www.uscis.gov](http://www.uscis.gov)

**DISCUSSION:** The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The Administrative Appeals Office (AAO) dismissed the petitioner's subsequent appeal. The petitioner later filed a motion to reopen and reconsider which the AAO also dismissed. The matter is now again before the AAO on a combined motion to reopen and reconsider. The AAO will dismiss the motion.

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 Florida limited liability company, intends to purchase and export luxury automobiles to Russia. It claims to be an affiliate of [REDACTED] located in Russia. The petitioner seeks to employ the beneficiary as president of its new office in the United States for a period of one year.

The director denied the petition based on three independent and alternative grounds, concluding that the petitioner did not establish: (1) that it had secured sufficient physical premises to house the new office; (2) that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity for at least one year within the three years preceding the filing of the petition; or (3) that the U.S. entity would support a managerial or executive position within one year.

The AAO dismissed the petitioner's subsequent appeal on April 29, 2010. The AAO concurred with the director's decision that the petitioner had failed to establish sufficient premises to house a new office. The AAO noted the petitioner's failure to properly respond to the director's Request for Evidence (RFE); including but not limited to, the petitioner's failure to submit a layout of the proposed office and a letter from the claimed sub-lessor confirming that the petitioner and the sub-lessor were sharing the premises. Further, the AAO agreed that the petitioner had not shown that the beneficiary was employed by the foreign employer in a primarily managerial or executive capacity. The AAO reasoned that the petitioner had submitted vague duties and contradictory job titles for the beneficiary on the record; had failed to submit material evidence requested by the director such as subordinate position descriptions; and did not clearly articulate the nature of the foreign employer's operations and the beneficiary's place therein. Lastly, the AAO did not find counsel's arguments persuasive that the beneficiary would act primarily in a managerial or executive capacity within one year. The AAO noted the petitioner's lack of hiring plans in the first year of operations, inconsistencies in the offered hiring plans, and insufficient evidence to establish that the beneficiary would be primarily relieved from performing day-to-day operational duties after the first year.

The petitioner later filed a motion to reopen and reconsider, which the AAO dismissed on June 19, 2012. The AAO concluded that the petitioner had not submitted new evidence to establish that the petitioner had secured sufficient premises as of the date of the filing of the petition. Further, the AAO did not find convincing the counsel's assertion that the beneficiary's foreign managerial or executive position was "self-evident," noting the three pages of analysis it provided in its decision which established that such a conclusion was not supported by the record. Also, the AAO concluded that counsel had not asserted a specific incorrect application or law of policy with respect to the AAO's finding that the beneficiary was not likely to act primarily in a managerial or executive capacity after one year. Again, the AAO noted that it was not sufficient to maintain that the beneficiary's position was inherently a manager or executive. Lastly, the AAO stated that it could not accept the newly revised business plan, as this did not constitute new evidence by law, but simply a material change in the petition in an attempt to conform the petition to USCIS standards.

The petitioner now files another motion to reopen and reconsider maintaining that the AAO abused its discretion in dismissing the petitioner's appeal. Counsel largely raises the same assertions, and references the same evidence, submitted in support of the previously dismissed motion. Counsel again indicates that the U.S. office location has been relocated to [REDACTED], a residential home that the beneficiary purchased in 2007. Counsel states that this space will be sufficient for the conduct of the company's business and maintains that this qualifies as new evidence. With respect to the issue of the beneficiary's managerial or executive employment in the United States after one year, counsel again maintains that the very nature of the position requires that the beneficiary devote more than 50% of his time to managerial or executive duties. Counsel does not contest the AAO's previous finding that the petitioner had failed to establish that the beneficiary has been employed primarily in a managerial or executive capacity with the foreign employer.

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 petitioner has not submitted any new evidence, nor has it established that the AAO's decision to dismiss the previous motion was based on an incorrect application of law or USCIS policy. 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 petitioner asserts, as it did in support of the previous motion to reopen and reconsider, that the petitioner acquired sufficient physical premises to house the new office through relocation from the address listed on the petition to the beneficiary's residence at [REDACTED]. The petitioner also provides a floor plan for the aforementioned property. Counsel contends that it is a contradiction on the part of the AAO to conclude that the petitioner had both made material changes to the petition and not submitted new evidence. Further, counsel contends that it has not made material changes to the petition, but only clarified certain translations which it claims were misinterpreted by the AAO.

The AAO does not find counsel's arguments persuasive. As previously noted by the AAO, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. The petitioner states that the petitioner has moved to an entirely new address, claimed as sufficient premises, not previously mentioned on

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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).

the record prior to the filing of the petitioner's first motion to reopen and reconsider on June 1, 2010. The petitioner had multiple occasions throughout the proceeding to offer this other property as sufficient premises but failed to submit any information related to this property, including in support of the original petition, in response to the director's RFE, and in support of the appeal. Therefore, it is more likely than not that the petitioner is merely attempting to modify the record in order to allow it to conform to USCIS standards in response to the AAO's decision. Again, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Additionally, new evidence does not constitute the modification of the record to help it conform to USCIS requirements. Further, to the extent any office move did indeed take place, it appears to have occurred after the petitioner's original filing of the petition since this property was not previously mentioned on the record prior to the petitioner filing the first motion to reopen and reconsider. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Also, counsel's assertion that the submittal of the new address represents a correction in translation is not convincing. Counsel offered a completely new location for the petitioner's office with the first motion in direct contradiction to the previous record and there is no evidence to suggest that this was a result of correcting unclear translations. Even if the petitioning company has relocated, the petitioner still bears the burden of establishing eligibility pursuant to 8 C.F.R. § 214.2(l)(3)(v)(A) as of the date of filing the petition. The petitioner has not addressed the AAO's finding that the petitioner failed to establish that it had obtained sufficient physical premises to house the new office as of April 11, 2008, nor has it submitted any additional evidence pertaining to the premises located at the address indicated on the initial petition. Evidence that the petitioner relocated at a later date is not considered "new" evidence under 8 C.F.R. § 103.5(a)(2).

The AAO also dismissed the appeal based on a finding that the petitioner had failed to establish that it would employ the beneficiary in a primarily managerial or executive capacity within one year of the approval of the new office petition. Counsel once again asserts "logically, the very nature of [the beneficiary's] functions requires that he devote more than 50% of his time to his executive/managerial functions" and contends that any discrepancies on the record are due to mistakes in translation. Counsel's arguments are not persuasive in this instance. Counsel has not specifically articulated reasons for reconsideration and supported them with pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. Counsel requests a complete reevaluation of the record by arguing that the beneficiary's role is inherently in a managerial or executive capacity. 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. Indeed, the AAO clearly noted the reasons why the petitioner was unlikely to support the beneficiary in a managerial or executive capacity after one year, including a lack of hiring plans in the first year of operations, inconsistencies in the offered hiring plans, and insufficient evidence to establish that the beneficiary would be relieved from primarily performing day-to-day operational duties after the first year. However, the petitioner has offered no new evidence on motion to contest these findings other than a new business plan which maintains that the beneficiary will now have subordinates in the first year, in direct contradiction to its previous assertions on the record directly expressing that it would not hire any subordinates during the first year. Submitted insufficient hiring plans in support of the original petition, and throughout the proceeding, is not overcome by now provided contradictory hiring plans on motion. Again, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). New evidence on motion does not constitute the modification of the record to help it conform to USCIS requirements. The

unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Further, counsel's argument that the AAO's previous decisions were based on incorrect translations now corrected on appeal is not convincing. Counsel has not offered a specific example of an incorrect translation and how any of the claimed translation mistakes were misinterpreted by the AAO. Again, it is incumbent upon the petitioner to specifically articulate reasons for reconsideration supported by pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy, and the petitioner has failed to provide this on motion.

Lastly, the AAO notes that the petitioner does not contest in the current motion the previous finding of the AAO that the beneficiary was not employed by the foreign entity in a primarily managerial or executive capacity. The AAO, therefore, considers this issue to be abandoned. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at \*1, \*9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO).

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 petitioner has not met the filing requirements for a motion to reopen or 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.

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.