



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **MAY 29 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:

[REDACTED]

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) summarily dismissed the petitioner's subsequent appeal. The matter is now again before the AAO on a motion to reconsider.¹ The AAO will dismiss the motion.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its Vice President of Operations 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 Florida in 2010. It is engaged in international freight forwarding, logistics, and product sourcing. The beneficiary was previously granted one year in L-1A classification and now seeks to extend the beneficiary's status for two additional years.

The director denied the petition, concluding that the record did not establish that the beneficiary was employed in a managerial or executive capacity as defined by the Act and regulations. The director noted discrepancies on the record related to the petitioner's stated number of employees; the vagueness of the beneficiary's stated duties; and the petitioner's failure to show that the beneficiary was more than a first line supervisor of non-professional employees.

The petitioner subsequently filed an appeal. The AAO dismissed the petitioner's appeal and affirmed the director's determination. The AAO noted that although counsel had indicated he would submit a brief in support of the appeal, he failed to do so. As such, the AAO summarily dismissed the appeal concluding that the counsel had not identified an erroneous conclusion of law or statement of fact on the part of the director to form the basis of an appeal.

The petitioner now files a motion to reconsider the aforementioned AAO decision. According to the regulation at 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)(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 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

¹ Counsel indicated that he was filing a motion to reconsider so this decision is limited to evaluating the merits of a motion to reconsider.

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 reconsideration of the AAO's decision to summarily dismiss the petitioner's previous appeal.

Here, the petitioner has not established that the AAO's decision was based on an incorrect application of law or USCIS policy. The decision before the AAO today relates to its prior decision dated December 20, 2012, in which the AAO summarily dismissed the applicant's appeal. Counsel raises concerns about the Vermont Service Center's decision of March 27, 2012, rather than the AAO's prior decision. Even if the AAO were to review the director's decision of March 27, 2012, the AAO would uphold the director's decision.

Counsel references *Matter of Irish Dairy Board* as precedent to establish that the beneficiary is acting in an executive capacity. Specifically, counsel notes that this decision established that a beneficiary could be found to act as an executive based upon the management of an essential function and through the direction of subordinate independent contractor employees. The AAO does not find the reference to *Matter of Irish Dairy Board* convincing in establishing an error on the part of the AAO in its previous decision. First, the aforementioned decision is unpublished. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Regardless, the AAO does not disagree that a beneficiary could be deemed to act in an executive capacity through the direction of independent contractor subordinates. However, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the referenced unpublished decision. In fact, counsel's assertion that the beneficiary has independent contractor subordinates is contrary to its previous response to the director's RFE which maintained that the petitioner, and its subsidiary A. Active, did not hire contractors for any positions. Also, counsel has not produced any evidence to support that the petitioner, or its U.S. subsidiary, employ independent contractors necessary to perform the day-to-day operational duties of the enterprise, and to support the claimed subordinate managerial positions reporting to the beneficiary. Therefore, counsel's reference to the unpublished AAO decision is not convincing in establishing an error on the part of the AAO.

As previously noted, the AAO's review in this matter is limited to the narrow issue of whether the petitioner has submitted reasons for reconsideration, supported by pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. The petitioner has not cited relevant law or precedent decisions or asserted sufficient reasons necessary to conclude that the AAO's decision to summarily dismiss the case was incorrect. For this reason, the motion must 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.

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.

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.