



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **NOV 25 2013** OFFICE: VERMONT SERVICE CENTER FILE: [REDACTED]

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

PETITION: Petition for a Nonimmigrant Worker under 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center ("the director"), denied the nonimmigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal. The matter is now before the AAO on a motion to reopen. The motion will be dismissed.

The petitioner seeks 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 is a Texas corporation established on November 30, 2010. It operates a gas station and convenience store. The petitioner is an affiliate of [REDACTED] located in Afghanistan. The petitioner seeks to employ the beneficiary as President for an initial period of three years.

The director denied the petition, finding the petitioner failed to establish that it will employ the beneficiary in a managerial or executive capacity.

The petitioner subsequently submitted a timely appeal. The AAO dismissed the appeal, finding that the petitioner's description of the beneficiary's duties was vague and nonspecific, and therefore insufficient to establish that the beneficiary would perform primarily managerial or executive duties. The AAO further noted unresolved discrepancies in the record with respect to the petitioner's staffing levels and organizational structure.

The petitioner subsequently filed the instant motion to reopen. On motion, counsel for the petitioner requests consideration of additional evidence.

Upon review, counsel's assertions do not meet the requirements of a motion to reopen.

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 found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.¹

On motion to reopen, counsel for the petitioner submits the following: (1) a detailed job description for the beneficiary; (2) the petitioner's 2011 Texas Workforce Commission's Quarterly Reports from the third and fourth quarters and all four quarters of 2012; (3) copies of the petitioner's payroll records for the fourth quarter of 2012; and (4) copy of a letter from [REDACTED] stating that the petitioner received a bronze level "Commitment to Excellence" performance award in 2012.

¹ 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).

The petitioner submits the detailed description of the beneficiary's position to "show what the beneficiary will actually be doing on a daily basis." The petitioner has the opportunity to submit this evidence in the initial petition, in response to the RFE, and on appeal. The petitioner does not explain how this evidence was otherwise unavailable prior to motion to reopen and should be considered "new" evidence.

On motion, the petitioner states that the state quarterly reports and payroll summary are provided to "resolve inconsistencies in the record." Again, the petitioner had the opportunity in response to the RFE and on appeal to resolve inconsistencies in the record with respect to the petitioner's staffing levels. Counsel does not offer any further explanation as to how these documents resolve the inconsistencies cited on the prior dismissal of the petitioner's appeal.

In addition, the motion does not satisfy the requirements of a motion to reconsider. 8 C.F.R. § 103.5(a)(2) 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.

On motion, counsel does not submit any document that would meet the requirements of a motion to reconsider. A review of the record and the adverse decision indicates that the AAO properly applied the statute and regulations to the petitioner's case. Further, counsel does not specifically object to the AAO's decision or state that it was based on an incorrect application of USCIS law or policy. The petitioner only supplements the record with evidence that could have been submitted in response to the director's RFE or on appeal. As previously discussed, the petitioner has not met its burden of proof and the denial was the proper result under the regulation.

Motions for the reopening 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. *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" of proof. *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. The motion to reopen will be dismissed.

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. 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does

not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.