



U.S. Citizenship
and Immigration
Services

(b)(6)

[REDACTED]

DATE: **SEP 09 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)

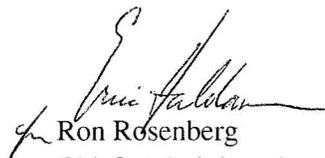
ON BEHALF OF PETITIONER:
[REDACTED]

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,


for 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 filed the nonimmigrant petition seeking to classify the beneficiary under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), as an intracompany transferee employed in a managerial or executive capacity. The petitioner, a New York corporation, is engaged in commercial and residential improvements. The petitioner claims to be an affiliate of [REDACTED] located in Buenos Aires, Argentina. The petitioner has employed the beneficiary in L-1A status since December 2005 and seeks to extend his status for one additional year.

The director denied the petition on June 2, 2009, concluding that the petitioner failed to establish that the beneficiary will be employed in a qualifying executive or managerial capacity. In denying the petition, the director emphasized that the petitioner failed to provide requested information regarding the beneficiary's job duties and the structure of the U.S. company in response to a request for evidence issued on November 17, 2008. As such, the director determined that the record contained no detailed description of the beneficiary's duties and insufficient evidence to establish that the beneficiary would be relieved from performing non-qualifying duties associated with the day-to-day operations of the petitioner's remodeling business.

On June 22, 2009, the petitioner filed a motion to reopen. The director granted the motion and affirmed the previous decision. The director concluded that the evidence of record, including the limited new evidence submitted on motion, did not establish that the beneficiary's duties are primarily managerial or executive in nature, that he functions at a senior level within the organizational hierarchy, or that he currently manages a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties necessary for the operation of the petitioning company.

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. The AAO dismissed the appeal, finding that the petitioner failed to respond to the director's request for evidence pertaining to the beneficiary's duties and the personnel structure of the company. The AAO further determined that the limited evidence submitted supports a finding that the beneficiary himself is solely responsible for the day-to-day tasks associated with the operation of the business.

The petitioner subsequently filed the instant motion to reopen. On motion, counsel for the petitioner states that the petition was "unaware" of prior counsel's failure to respond to the RFE until receiving the denial decision. Counsel requests that the Vermont Service Center reopen the case.

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

The petitioner did not submit any evidence in support of its brief. Counsel for the petitioner generally states that the petitioner was unaware of prior counsel's failure to respond to the director's RFE issued on November 17, 2008. 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).

Here, the petitioner has failed to provide evidence that it has fulfilled any of these requirements. Furthermore, counsel's unsupported claim that the petitioner was previously unaware of former counsel's failure to fully respond to the RFE does not include new facts that were not available or that could not have been discovered in the previous proceeding. 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).

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.

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).