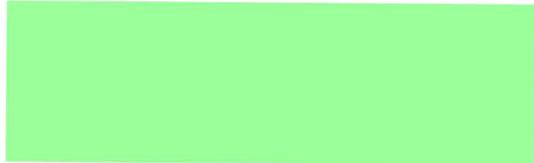




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **SEP 19 2013** Office: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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:

SELF REPRESENTED

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,

/s/ Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's status 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 Georgia corporation established in 2010, operates a convenience store in Alabama. The petitioner seeks to extend the beneficiary's employment in the position of President-Chief Executive Officer for an additional three years.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in a managerial or executive position under the extended petition.

In its decision dated July 16, 2012, the AAO affirmed the director's findings and dismissed the petitioner's appeal. The AAO concluded that the petitioner's description of the beneficiary's job duties was vague, failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine, and failed to articulate the percentage of time spent on each of the beneficiary's managerial or executive duties. The AAO concluded that many of the beneficiary's stated duties included non-qualifying duties. The AAO also concluded that the petitioner failed to provide any evidence of its claimed "outsourced" accountant and five cashiers and clerks that are purportedly provided by a staffing company. Specifically, the AAO noted that the petitioner provided invoices from the claimed staffing company, [REDACTED] but failed to provide a contract or other evidence to indicate that this company actually provided cashiers and clerks as claimed.

The petitioner subsequently filed a motion to reopen and reconsider. The AAO affirmed its previous decision, noting that the petitioner failed to provide any credible documentation that it has five contract employees. Furthermore, the AAO affirmed its previous conclusion that the beneficiary would be involved in daily operational tasks necessary to conduct the petitioner's business.

The petitioner subsequently filed the instant motion to reopen and reconsider. The petitioner reiterates its prior assertion that USCIS erred in denying its petition "by failing to consider depth and scope of my business operations [*sic*]." The petition provides an affidavit signed by four member managers regarding the construction of a convenience store to be operated by the petitioner. The petitioner also provides the same evidence provided in support of the previous motion to reopen and reconsider, specifically: (1) a letter from the petitioner and the foreign parent; (2) its organizational chart; (3) evidence of sales tax payment to the State of Alabama, IRS Form 941s, evidence of payment made to employees, and invoices for staffing services; and (4) photographs of the petitioner's business.

Upon review, the petitioner has not satisfied the requirements of either a motion to reopen or a motion to reconsider.

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 only evidence not previously submitted is the petitioner's affidavit dated April 2013 regarding a parcel of property on which to construct a convenience store in the future. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

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.

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, the petitioner 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. The petitioner does not specify why the AAO's decision dismissing the petitioner's motion was based on an incorrect application of law or USCIS policy, or cite to any relevant statute, regulation or relevant precedent decision. The petitioner generally states that the underlying director's decision was based on a "misapplication" of "Title 8 of CFR Section 101(a)(44)." The petitioner reiterates its previous argument on appeal and on motion that the beneficiary's job duties meet the burden of proof without further legal analysis. As previously discussed, the petitioner has not met its burden of proof and the denial was the proper result under the applicable statute and regulations. Accordingly, the petitioner's motion to reconsider will be 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).

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).

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

The regulation at 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, the proceedings will not be reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.