U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

D7

[redacted]

FILE: LIN 01 036 50105 Office: NEBRASKA SERVICE CENTER Date: SEP 0

IN RE: Petitioner: [redacted]
Beneficiary

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

PUBLIC COPY

identifying data deleted to
prevent unwarranted
invasion of personal privacy

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based visa petition and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be dismissed.

The petitioner is a limited liability company organized in the State of Oregon in 1999. It is a sewing machine sales and service company. It seeks to extend the employment of the beneficiary temporarily as its general manager. Accordingly, the petitioner endeavors to classify the beneficiary as a 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 avers that the foreign entity in this matter is Sewing Machine Specialists located in Durban, South Africa.

The director denied the petition concluding that the petitioner had not established a qualifying relationship with the foreign entity and that the beneficiary would not be employed in a managerial or executive capacity for the petitioner. The AAO determined that the petitioner had overcome the director's decision on the issue of qualifying relationship but affirmed the director's decision on the issue of the beneficiary's managerial or executive capacity.

On motion, counsel for the petitioner submits additional evidence to address the grounds of the director's denial and the findings of the AAO. However, counsel does not state any reasons for reconsideration, nor does counsel furnish any new relevant facts to be provided in the reopened proceeding.

The regulation at 8 C.F.R. section 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.

On motion, counsel for the petitioner re-submits evidence showing that the petitioner had employed Jane Josephsen, when the extension petition was filed. Counsel re-asserts that Jane Josephsen is a degreed professional and that the beneficiary's supervision of this individual is sufficient to establish that the beneficiary's assignment is in a managerial capacity. On motion, counsel provides an extensive description of Jane Josephsen's duties for the petitioner. Counsel also submits documentation regarding a second store purchased by the petitioner in August 2001, as well as Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement for the 2002 year.

A review of the evidence that the petitioner submits on motion reveals no relevant documentation that could be considered "new" pursuant to 8 C.F.R. section 103.5(a)(2). The petition was filed in October 2000. Documentation relating to petitioner's purchase of a second store in August 2001 and employee wages in 2002 is not relevant to this proceeding. 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. 1978). The petitioner's description of Jane Josephsen's duties is also not new. Such a description was previously available and could have been presented in the previous proceeding. It is further noted that the

director requested identification of the petitioner's employees by name, job title, and job duties. As the petitioner was previously put on notice and provided with a reasonable opportunity to provide the required evidence, the description submitted on motion will not be considered "new" and will not be considered a proper basis for a motion to reopen.

The AAO acknowledges that a mistake was made in the previous decision. In the February 28, 2003 AAO decision, the AAO noted that counsel on appeal had indicated that the petitioner had a store manager with a degree in home economics. The AAO concluded that this employee was a new employee, hired after the extension petition had been filed. Citing 8 C.F.R. section 103.2(b)(12), the AAO observed that the beneficiary must be eligible for the benefit sought when the extension petition is filed.

On motion, counsel for the petitioner clarifies that the store manager with the degree in home economics is Jane Josephsen. The record before the director and the AAO shows that the petitioner employed Jane Josephsen when the extension petition was filed. However, Jane Josephsen's job title and description of job duties before the director consisted of the phrase "sales person, quilting & serger instructor." Thus the record before the director indicated that Jane Josephsen, rather than being a store manager or an individual with a degree in home economics, was one of four salespersons. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. at 176.

Moreover, the AAO affirmed the director's decision specifically noting that the petitioner's description of the beneficiary's duties did not comport with either the statutory definition of managerial capacity or executive capacity. On motion, counsel does not address the petitioner's insufficient description of the beneficiary's duties and the conclusion that many of his tasks are related to non-qualifying duties. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Furthermore, although requested by the director, the current record does not establish what proportion of the beneficiary's duties would be managerial and what proportion would be non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). For this reason, the AAO cannot determine whether the beneficiary would be primarily performing the duties of a manager. *See e.g. IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are 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." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.