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

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG [illegible] 2014

IN RE: Petitioner:
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:

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

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion to reconsider. The motion will be dismissed and the AAO's previous decision will be affirmed.

According to the documentary evidence contained in the record, the petitioner was established in 2000 and claims to be an exporter of computers, computer parts, and equipment. The petitioner claims to be a subsidiary of It claims four employees and $256,845.00 in gross annual income. The petitioner seeks to extend its authorization to employ the beneficiary in the United States as its general manager for a period of three years, at an annual salary of $36,000.00.

The director determined that the record was not persuasive in demonstrating that the beneficiary had been or would be employed in a primarily managerial or executive capacity. The director stated that it appeared that the beneficiary had been working alone until early 2001 and therefore performed, rather than managed, the day-to-day functions of the organization. The director further stated that although the petitioner hired two additional employees early in 2001, there had been no evidence submitted to show that either new employee performed in a professional, managerial, or supervisory capacity. The director concluded by noting that it appeared the beneficiary was acting as an agent for the foreign entity rather than in a managerial or executive capacity. The AAO affirmed these determinations on appeal. The AAO also noted that the two new hires were an administrative assistant and a sales representative, and that the evidence failed to establish that a majority of the beneficiary's duties would be managing or directing the management of a function, department, subdivision or component of the organization.

On motion, counsel submits a brief and additional evidence to address the grounds of the director's denial and the findings of the AAO. Counsel contends that the beneficiary has been and will be responsible for managing the essential function of project development, and that the function is essential in that it involves business relations with government agencies. Counsel further contends that the director and AAO incorrectly relied upon the size of the organization rather than the reasonable needs of the entity in determining eligibility. On motion, counsel asserts that the beneficiary spends 70 percent of his time "exercising his discretionary authority in managing client relations . . . ," and 30 percent of his time "meeting with employees to explore options . . . , promoting the company's image, helping in the development of the marketing plan, negotiating prices with suppliers and clients, and overseeing the export of parts and computers . . . ." Counsel further asserts that the beneficiary, as general manager and president, is also employed by the U.S. entity in an executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. In the instant matter, the evidence of record demonstrates that the beneficiary performs the function of the organization rather than managing it. For instance, counsel describes the beneficiary's responsibilities in part as identifying client's needs, solving business problems, developing objectives for modification of existing procedures, and assigning resources to effectuate development and modification of existing procedures. There has been no evidence submitted detailing any of the procedures described. There is no evidence to show that the administrative assistant or sales representative are in any way involved in the processes described. 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). In this matter, the petitioner has not provided sufficient evidence to substantiate its claim that the beneficiary manages the project development function.

On motion, counsel contends that the beneficiary, as general manager and president of the U.S. entity, is employed in an executive capacity and reiterates the regulations and statutory definitions in support of the contention. Rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of executive capacity. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as managing an essential function which is the project development work, establishing the goals and policies regarding that function, and exercising wide latitude in discretionary decision making. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. The reasonable needs of the petitioner do not, however, supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the

statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but not a beneficiary who spends the majority of his or her time on non-qualifying duties.

Counsel has not stated any plausible reasons for reconsideration, nor does the petitioner furnish any new facts to be provided in the reopened proceeding. 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]

A review of the evidence that the petitioner submits on motion reveals no fact that could be considered "new" pursuant to the regulation at 8 C.F.R. § 103.5(a)(2).

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." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the petitioner has not met that burden.

The regulation at 8 C.F.R. § 103.5(a)(3) 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.

The regulation at 8 C.F.R. § 103.5(a)(4) states, in pertinent part, that a motion that does not meet applicable requirements shall be dismissed.

Although counsel has submitted a motion entitled "Motion to Reconsider," counsel does not submit any document that would meet the requirements of a motion to reconsider. Counsel does not state any plausible reasons for reconsideration nor does he cite any precedent decisions in support of a motion to reconsider. Therefore, the motion to reconsider will be dismissed.

Finally, it should be noted for the record that, unless CIS directs otherwise, the filing of a motion to reopen or reconsider does not stay the execution of any decision in a case or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

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[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 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, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.