U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUL 11 2014 Office: VERMONT SERVICE CENTER FILE

IN RE: Petitioner:
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:

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, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal 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 South Carolina limited liability company established in 2010, is in the convenience store and gas station business. The petitioner seeks to continue to employ the beneficiary as a senior manager for an additional two years.

The director denied the petition, concluding that the petitioner did not establish that it will employ the beneficiary in a qualifying managerial or executive capacity

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel contends that the petitioner has provided a sufficiently descriptive duty description for the beneficiary demonstrating that the beneficiary will primarily perform qualifying managerial tasks.

I. THE LAW

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

Finally, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, United States Citizenship and Immigration Services (USCIS)

must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

II. MANAGERIAL OR EXECUTIVE CAPACITY (UNITED STATES)

The sole issue to be addressed in this proceeding is whether the petitioner established that the beneficiary would be employed in a managerial or executive capacity in the United States.

A. Facts

The petitioner filed the I-129 Petition for a Nonimmigrant Worker on May 22, 2013. The petitioner stated that it is part of the family of companies, consisting of the petitioner, the foreign entity, and , located in New York. The petitioner's 2012 IRS Form 1120S U.S. Income Tax Return for an S Corporation indicated that it earned $538,242 in revenue during that year and the Form I-129 specified that it had three employees. Submitted evidence indicated that the petitioner operates a gas station, convenience store, and food establishment, doing business as the ,

The petitioner explained that the beneficiary has worked, and will continue to work, as a senior manager for the company. The petitioner stated that the beneficiary will spend 10-12% of her time conducting final negotiations with vendors and contractors. Specifically, the petitioner indicated that the beneficiary will review product and vendor research collected by her store manager, and "fix a meeting with each vendor/contractor for final negotiations and quality verifications." The petitioner provided a listing of vendors providing various types of products, including providing "raw material for food," supplying beer, and providing tobacco products. The petitioner further stated that the beneficiary will spend approximately 8% of her time on purchasing or repairing major equipment, including reviewing an "equipment health check report" supplied by the store manager Mr. The petitioner indicated that the beneficiary will spend 8% of her time on fund allocations and provisions, including conducting a ten minute meeting with Mr. each morning relevant to the financial status of the company. The petitioner stated that the beneficiary sets priorities for Mr. and questions him if she "detects anything suspicious." In addition, the petitioner explained that the beneficiary will spend another 8% of her time on the "final selection of employees" following the receipt of recommendations from Mr. The petitioner noted that the beneficiary conducts a final interview after being forwarded candidates from Mr.

The petitioner further stated that the beneficiary will devote 4 to 5% of her time creating and maintaining customer retention programs. The petitioner indicated that it employed a marketing planner, who suggests new customer programs and schemes to the store manager, and that the beneficiary has "in depth discussion with both of them" regarding these proposed plans. The petitioner also explained that the beneficiary would spend 5 to 6% of her time on "cost control," noting that "Mr. (Manager) would do this exercise on a regular basis and

keep me informed whenever needed and bring it to my attention when [*sic*] found something fishy." Lastly, the petitioner indicated that the beneficiary will devote approximately 20 to 25% of her time to "overall business," including generating considerable sales and controlling costs, taking actions to grow the business after consulting with a CPA and the store manager, keeping employees happy through training sessions and regular meetings, and attending to customer satisfaction.

In addition, the petitioner stated in a letter submitted in support of the petition that it had three employees in addition to the beneficiary: store manager , cook and cashier and cook and cashier

A submitted 2012 IRS Form W-2 Wage and Tax Statement relevant to indicated that he resides in New Jersey. Schedule D of the petitioner's 2012 IRS Form 1120S stated that was its vice president, and a submitted IRS Form 2553 Election by a Small Business Corporation demonstrated that he holds a 49% ownership interest in the petitioner. A position description for explained that he was acting as a "cook/clerk," handling register duties, stocking, cooking, and cleaning. Likewise, was described as performing these same duties. The stated duties of the store manager, were: selecting vendors (10%), making timely payment to vendors (5%), handling the register (40%), planning (5%), customer relations (5%), reporting (5%), procurement (10%), employee management (10%), customer/vendor feedback to the owner (5%), and banking (5%).

The beneficiary's name and signature also appeared on various operational documents submitted on the record, including an invoice from the dated March 8, 2013; a invoice, dated March 26, 2013; and, a tobacco purchase order form dated January 2013. Further, provided bank account statements showed that the beneficiary signs a majority of the petitioner's checks, most reflecting payments to vendors for food and beverage supplies. Lastly, the foreign entity submitted a duty description for the beneficiary in the United States stating that the beneficiary would "oversee and direct operations," "conduct routine inspections," and be "responsible for delivering exceptional service to the customers and addressing their concerns while working towards customer recovery."

The director later issued a request for evidence (RFE) stating that the evidence submitted was insufficient to establish that the beneficiary would act in a qualifying managerial or executive capacity. The director requested that the petitioner submit a letter describing the beneficiary's expected managerial decisions, including an explanation of how the beneficiary would supervise and control the work of other supervisory, professional or managerial employees. Further, the director asked that the petitioner submit an organizational chart indicating the names and job titles of its employees and a summary of their duties, their education levels, and salaries. The petitioner also requested that the petitioner submit state quarterly wage reports for the first and second quarters of 2013 indicating the names and employees and amounts paid to them during these quarters.

In response, the petitioner stated that it originally began operations in the United States as in New York for the purpose of conducting business in the textile industry, but had since shifted its operations to South Carolina and the gas station and convenience store business through the formation of The petitioner provided its operating agreement dated October 7, 2010 which indicated that the beneficiary owns a 51% membership interest in the company and that holds a 49% membership interest. Further, the petitioner submitted a "Contract Purchase Sublease Agreement" dated October 10, 2010 between it and an stating that the company was subleasing the convenience store, including all inventory, for the "purchase price" of $270,000. The agreement also stated that the "seller" Ms. was extending credit to the petitioner in the amount of $130,000 to complete the "purchase."

In addition, the petitioner submitted a letter from the beneficiary dated June 10, 2013. In this letter, the beneficiary explained that she did not accept a salary from the company so that these funds could be used "to invest more in the business." The beneficiary stated that "[the petitioner is] ready to invest in another business as we are already looking for [*sic*] adding another business." The beneficiary indicated that it had been in contact with brokers in an effort to expand its operations and it submitted various contracts with brokers executed in 2013. The agreements reflected that the brokers would explore other businesses for the petitioner in the gas station, convenience store, liquor store and similar retail industries.

The petitioner submitted additional duties for the beneficiary intending to differentiate her duties from those of the store manager. The petitioner emphasized that the beneficiary did not focus on day-to-day operational tasks, but that she oversaw and directed the subordinate store manager who provided reports to her on various operational matters. The duty description also indicated that the store manager devoted 40% of his time to handling the register and another 10% of his time to "procurement." The petitioner specified the following duties for the beneficiary:

1. Recruitment and employee management: handles final process like (A) understand the need of role from the manager and his reports (B) final round of interview and (C) selection of (D) training. 3% time spent
2. Training of employees: imparts the training based on the report received from the manager. 2% time spent
3. Arranging time schedule: finalize the time schedule based on the report rec[eive]d. 2% time spent
4. Salary of the employees: approves the statement and disburse the salary. 1% time spent
5. Business generation: gets the report, understand[s] the need, takes the call on important business decision[s] and execution. 25% time spent
6. Fund management: takes the final decision based on the report and does the actual fund management based on the income & expenses. 3% time spent
7. New tie-up: single handedly by the owner.
8. Pricing: based on the reports, takes the final decision on final pricing. 10% time spent

9. Quality control: only understand the customer needs and based on that takes the final call on introduction. 10% time spent
10. New products introduction: understand and justify the need and based on that takes the final call on introduction. 2% time spent
11. Sponsorship: takes the final decision when needed. 2% time spent
12. Customer retention program and customer relationship: based on the reports, and understanding, takes a decision weather [*sic*] to alter or continue the program. 4% time spent
13. Vendor management: based on the reports, takes the final decision on vendors and if needed does the negotiations. 10% time spent
14. Procurement: takes the final call and control. 2% time spent
15. Taxation: handles it fully with the help of outsourced CPA. 2% time spent
16. Payment: observes the whole process for smooth operations. 2% time spent
17. Dealing with government authorities: handles the whole process for smooth operations. 2% time spent
18. Purchase/maintenance: takes the final decision of the purchase or maintenance. 8% time spent

The petitioner submitted an IRS Form 941 Employer's Quarterly Federal Tax Return for the quarter ending March 31, 2013, indicating that the petitioner had paid $3,298.75 in wages to $2,356.25 to and $2,356.25 to The petitioner further provided a five-year lease agreement, dated October 8, 2010, between it, , and for the lease of the premises where the gas station and convenience store is located.

In denying the petition, the director concluded the beneficiary's duties did not establish that she primarily performed qualifying managerial or executive duties. In addition, the director found that the evidence failed to demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel. The director also noted that there was significant overlap between the duties of the beneficiary and her lone managerial subordinate, the store manager.

On appeal, counsel contends that the petitioner has provided a sufficiently detailed description of the beneficiary duties demonstrating that she primarily performs managerial tasks, including establishing corporate entities, negotiating and concluding business purchases, delegating operational tasks to her store manager, and exercising discretionary control over a capital account exceeding $1 million in value. In addition, counsel submits a "sublease/purchase agreement" dated September 9, 2013 whereby a is shown to sublease premises for five years in , North Carolina from a for the operation of a convenience store. The sublease agreement is signed by the beneficiary as the president of Counsel also provides a statement from the beneficiary dated August 31, 2013 within which she describes her involvement with brokers to acquire additional convenience store businesses and the company's decision to settle on the store in The beneficiary includes a spreadsheet of nine other locations that were considered in Massachusetts, South Carolina, Georgia, and Virginia

and the reasons behind the petitioner's decision not to select these businesses for expansion. The beneficiary further states that she "approached about 15 different stores who sales [*sic*] Indian ethnic wear in the U.S. to help [*sic*] providing them latest varieties and designs of Indian ethnic wears & sarees and start liasoning [*sic*] with their top officials and owners." The petitioner provided a listing of Indian textile businesses located across the United States.

B. Analysis

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or 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 definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Here, the petitioner has offered duties for the beneficiary indicating that she will devote a majority of her time to non-qualifying operational duties. In the current matter, counsel asserts that the beneficiary does not spend a majority of her time on non-qualifying duties, but that these duties are handled by her lone supervisory subordinate, Store Manager The beneficiary's duty description indicates that she receives reports on operational matters from Mr. and that she merely exercises final decision making authority as to these operational decisions. However, asserting that a beneficiary has final discretionary authority as to day-to-day operational matters is not sufficient to demonstrate that they are primarily engaged in qualifying tasks, such as setting overall goals and policies for the organization. Despite the beneficiary's claimed final decisions on operational, these decisions are indicative of an employee primarily engaged in daily operational matters such as paying and training employees, finalizing time schedules, paying vendors, setting daily prices, and purchasing and maintaining equipment.

Indeed, the petitioner asserts that the store manager provides all manner of reports to the beneficiary thereby shielding her from the performance of operational matters. However, the petitioner fails to submit a single store manager report on the record to substantiate this assertion. Likewise, the petitioner has not provided sufficient detail as to her claimed qualifying duties, including supporting evidence of claimed vendor negotiations, marketing strategies, training, new product introductions, or customer retention programs. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient.

Although the petitioner has submitted evidence suggesting that the beneficiary has been engaged with brokers to identify additional businesses opportunities, this evidence fails to sufficiently establish that the beneficiary spends a majority of her time on qualifying managerial or executive tasks. In fact, the broker agreements provided indicate that independent contractors perform most of the duties relevant to identifying new businesses for expansion, reinforcing a conclusion that the beneficiary is primarily engaged in the performance of non-qualifying tasks related to the operation of the

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The evidence presented fails to establish that the petitioner has sufficient operational employees to relieve the beneficiary from primarily performing non-qualifying tasks. For instance, the submitted IRS Forms 941 indicate that none of the petitioner's three employees are paid a fulltime salary amounting to at least forty hours per week at minimum wage. The IRS Forms 941 for the quarter ending March 31, 2013 demonstrate that the petitioner paid $3,298.75 in wages to $2,356.25 to and $2,356.25 to during that quarter. The publicly stated hours for the are 6:30 am to 10:00 pm Monday through Saturday and 10:00 am to 9:00 pm on Sunday, or a total of 92 hours per week. Over a quarter (3 months), this would equate to approximately 1,104 hours of operating time. However, the lone store manager, who is asserted as responsible for all operational matters, is shown to work only a minimum of 439 hours per quarter, assuming Mr. makes at least the federal minimum wage of $7.50 per hour. Likewise assuming the required payment of the federal minimum wage, and are shown to work only a minimum 314 hours per week each, or an estimated 628 hours combined. As such, the wage evidence presented demonstrates that the store has no cook or cashier almost 50% of the time and a store manager less than 50% of the time. In sum, despite the petitioner's assertion that the beneficiary is not engaged in any operational matters, the lack of wages paid to his subordinates indicates that she is likely being engaged in operational matters to account for this shortfall in staffing.

Indeed, the record demonstrates that the beneficiary has signed a majority of the petitioner's checks over the last year, including those relevant to pay for goods, supplies, equipment and payroll. In addition, the foreign entity states in a support letter that the beneficiary will be responsible for conducting routine inspections and delivering exceptional customer service, duties suggestive of an employee primary devoted to non-qualifying operational matters.

Further question is left as to the sufficiency of the petitioner's operational staff due to discrepancies on the record related to one of the petitioner's two asserted cook/cashiers. For example, the provided IRS Forms W-2 indicate that lives in

New Jersey and corporate documentation submitted demonstrates that Mr. is a 49% owner of the petitioner and its vice president. Also, the beneficiary's duties mention that works as a marketing manager. In sum, these discrepancies leave question as s asserted engagement as a cook and cashier. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In addition, the petitioner's assertions with respect to its business plans leave further doubt as to the beneficiary's primarily engagement in an executive or managerial capacity. First, the petitioner originally filed a Form I-129 to qualify the beneficiary as an L1-A manager or executive with located in New York, a company stated to be engaged in the textile industry. However, the record indicates that the beneficiary abandoned this employment and is now employed by the petitioner in the gas station and convenience store business. Further, the petitioner submitted a "Contract Purchase Sublease Agreement" dated October 10, 2010 between it and an stating that the company was both subleasing and purchasing the House of Wings convenience store, including all inventory, for a "purchase price" of $270,000. However, the petitioner has not clarified how the petitioner is able to both sublease and purchase a property.

On appeal, the petitioner submits evidence that a is subleasing a property for five years from a North Carolina for the operation of a convenience store. But, the petitioner is not a party to this agreement and it fails to articulate the relevance of this "lease/purchase" the company's operations. Further, even if deemed relevant the petitioner's operations, the lease agreement is dated in September 2013, approximately four months after the filing of the petition. The petitioner also continues to assert on appeal that it is continuing to investigate its expansion into the textile industry. However, this speculative evidence is not probative in establishing that the beneficiary acts in a qualifying managerial or executive capacity as of the date of the filing of the petition. Indeed, even if all assertions were accepted, the petitioner fails to address the beneficiary's apparent primarily performance of operational duties related to the House of Wings or its lack of sufficient operational employees. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In addition, 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).

For the foregoing reasons, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity. For this reason, the appeal must be dismissed.

III. Conclusion

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.

ORDER: The appeal is dismissed.