

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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



U.S. Citizenship
and Immigration
Services



D7

DATE: OCT 31 2011

Office: CALIFORNIA 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 in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa, and the Administrative Appeals Office (AAO) dismissed the petitioner's appeal. The matter is now before the AAO on a combined motion to reopen and motion to reconsider. The AAO will dismiss the motion.

The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's employment 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 California corporation established in 2002, operates a flooring, cabinetry and remodeling business. It claims to have a qualifying relationship with [REDACTED] located in United Arab Emirates. The beneficiary has been employed as the petitioner's managing director and chief executive officer since April 2003 and the petitioner now seeks to extend his L-1A status for two additional years.

The director denied the petition on two separate grounds, concluding that the petitioner failed to establish: (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; and (2) that the U.S. company maintains a qualifying relationship with a foreign entity. The AAO affirmed the director's decision and dismissed the petitioner's appeal in a decision dated September 3, 2009.

The matter is now before the AAO on a combined motion to reopen and reconsider. On motion, the petitioner emphasizes that the petitioner need only establish eligibility by a preponderance of the evidence in a nonimmigrant proceeding. The petitioner cites to the regulations defining "managerial capacity," "executive capacity," and "qualifying organization" at 8 C.F.R. § 214.2(l)(1)(ii), and relies on an unpublished AAO decision to stand for the proposition that an individual may be employed in an executive capacity even if he or she does not supervise a subordinate staff. The petitioner contends that "the fact [the beneficiary] is not the company's sole employee strengthens his case in favor of a grant." Finally, the petitioner argues that the instant petition was the company's third request for an extension of the beneficiary's status, and contends that there was no evidence that the previous petitions were approved in error. The petitioner requests that the extension be granted "as a matter of fairness" as it "involves the same information that has been submitted before."

The regulation at 8 C.F.R. § 103.5(a)(2) states:

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.

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

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 [U.S. Citizenship and Immigration Services (USCIS)] 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.

In addition, the regulation at 8 C.F.R. §103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any

judicial proceeding." The petitioner's motion does not contain this statement.

The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion does not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must be dismissed for this reason.

Even if the petitioner had complied with the requirements at 8 C.F.R. § 103.5(a)(1)(iii)(C), the petitioner did not submit any new evidence, nor has it established that the AAO's decision to dismiss the appeal was based on an incorrect application of law or USCIS policy.

The instant motion consists of the petitioner's 10-page brief. The purpose of a motion to reopen or motion to reconsider is different from the purpose of an appeal. While the AAO conducts a comprehensive, *de novo* review of the entire record on appeal, the AAO's review in this matter is limited to the narrow issue of whether the petitioner has presented and documented new facts or documented sufficient reasons, supported by any pertinent precedent decisions, to warrant the re-opening or reconsideration of the AAO's decision to dismiss the petitioner's appeal on September 3, 2009. The AAO previously conducted a *de novo* review of the entire record of proceeding, an appellate decision was issued, and the deficiencies were expressly stated in the AAO's 15-page decision.

With respect to the AAO's finding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity, the petitioner contends that the AAO failed to explain why it found the petitioner's description of the beneficiary's duties to be overly generalized and not persuasive, considering that the petitioner had relied on the same job description to establish the beneficiary's eligibility in two prior petitions. The petitioner states that the beneficiary "directs and coordinates the finances of [the petitioner], directly, plans and implement [*sic*] policies and activities [*sic*] of the U.S. operation, and supervises the employees to ensure smooth operation of the business." The petitioner indicates that all of these duties provide specific information about the beneficiary's responsibilities.

The petitioner's assertions are not persuasive. The AAO devoted at least six paragraphs of its decision to a discussion of the beneficiary's job descriptions and included a detailed explanation of the deficiencies thereof. Contrary to the petitioner's contention, AAO did not summarily dismiss the position description as being overly vague or generalized. While portions of the position description were in fact vague, the AAO also emphasized that there were material differences between the petitioner's initial description and the description the petitioner submitted in response to the service center director's request for additional evidence. The AAO noted that, while the petitioner indicating that the beneficiary would perform supervisory or managerial level tasks associated with the company's sales and marketing functions, the petitioner did not claim to employ any sales staff and failed to submit evidence to substantiate its claim that it employed a purchase manager. The AAO further found that the petitioner's purchase invoices and other business documents identified the beneficiary as the person responsible for performing non-managerial duties such as placing orders for purchases and preparing estimates for proposed customer projects, duties which were not included in any of the stated position descriptions. Due to the generalities and inconsistencies found in the petitioner's statements, the AAO correctly found the petitioner's descriptions of the beneficiary's duties to be insufficient to support a finding that his actual duties would be primarily managerial or executive in nature. *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).

On motion, the petitioner further claims that the AAO erred by determining that the petitioner does not have sufficient staff to relieve the beneficiary from involvement in the non-managerial, day-to-day operations of the business. The petitioner maintains that the beneficiary "regularly manages" four employees including a purchase manager, finance manager and project supervisor. The petitioner further refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee of a petitioning company. The petitioner claims that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The AAO's decision dated September 3, 2009 devoted several paragraphs to a discussion of the staffing of the U.S. entity, noting that the petitioner employed only three employees at the time the petition was filed in April 2008. These employees included the beneficiary, the individual identified as the "project supervisor," and the beneficiary's spouse, who had no apparent authorization to work in the United States. The AAO emphasized that the petitioner failed to provide evidence that it actually employed its claimed purchase manager or the contractors who were claimed to engage in the day-to-day tasks of the petitioner's kitchen remodeling and cabinetry business.

The AAO decision acknowledged 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 § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for USCIS 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).

Here, the facts submitted presented a clear absence of employees who would perform the non-managerial or non-executive operations of the company. The AAO observed that, although the beneficiary was granted an extension of his L-1A status in 2006, the record reflected that the beneficiary and his spouse were the petitioner's sole employees throughout 2007 and leading up to the filing of the current extension petition in April 2008. Thus, the petitioner's claim that the beneficiary would perform primarily managerial or executive duties was not persuasive in light of the lack of available staff to produce the products and provide the services of the company.

The petitioner also argues on motion that the AAO overlooked clear evidence of a qualifying relationship between the petitioner and foreign entity, including a letter dated January 30, 2009 in which the beneficiary explained an alleged discrepancy regarding the timing of the transfer of funds from the foreign entity to the U.S. company. The petitioner asserts that "financial decisions regarding the company's operation are within the corporate purview of any successful business, and the Service should not second-guess business decisions made within a company's business discretion."

The petitioner's assertions are not persuasive. The AAO's decision discussed four discrepancies and omissions in the record with respect to the ownership and control of the petitioning entity. The petitioner cannot overcome the grounds for denial by addressing a single deficiency in the previously submitted evidence.

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. Accordingly, the motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.