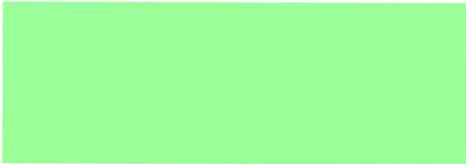


(b)(6)

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



DATE: APR 02 2013

Office: VERMONT SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner filed a 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 Texas limited liability company established in 2005, operates a convenience store and seeks to expand into other businesses. The petitioner seeks to extend the beneficiary's employment in the position of Executive Manager for an additional three years.

I. Facts and Procedural History

In its decision dated July 20, 2012 dismissing the appeal, the AAO concluded that the petitioner failed to establish that the beneficiary would be employed in a primarily executive capacity. The AAO found that the beneficiary's job duties relating to the operation of the convenience store, such as securing bank accounts, preparing a market survey, purchasing equipment, preparing sales reports, placing orders, preparing financial reports, and reviewing inventory, are not managerial or executive in nature. The AAO also found that the petitioner failed to submit a clear and credible breakdown of the beneficiary's job duties at the convenience store, and therefore the AAO could not determine what proportion of his duties would be managerial or executive, or whether the beneficiary primarily performs the duties of a function manager. The AAO found that the petitioner failed to submit documentary evidence to establish that it had employed "contract laborers" or any other employees at the time of filing. The AAO found that the petitioner's organizational structure, consisting of the beneficiary as the only full-time employee, was not sufficient to support an executive-level position. In addition, the AAO found that the petitioner failed to submit any job duties related to the operation of the business expansion, and concluded that without such a description, the AAO could not determine the nature of the beneficiary's job duties and what proportion of his duties would be managerial or executive.

On motion, the petitioner asserts that the beneficiary has been employed in a primarily executive or managerial capacity. The petitioner asserts that it has been operating a convenience store since 2005, and that the beneficiary has been employed in this convenience store in an executive capacity. The petitioner asserts that during the convenience store's first year of operation, it hired "only contract workers for the daily operations of the business." The petitioner asserts that the beneficiary's overall responsibility at the convenience store is to oversee the daily routines of the contract workers and implement any changes would establish excellent customer service, employee retention, quality control, raise sales by offering customers as many conveniences as possible, and oversee and direct all of the financial operations, the business expansion, and the selection for all retail operations. The petitioner lists additional duties for the beneficiary at the convenience store, including "meeting with new and existing vendors and preparing cost analysis," "researching demographics to determine the best products to market," researching the license and permits necessary to establish a small check cashing office, lottery sales, gas, beer, and wine, "establishing and implementing policies and procedures for employees," "establishing a performance evaluation for employees," and "reviewing cash controls, inventory procedures, theft control, and all safety rules."

The petitioner also asserts that it “planned to establish an import/export business in the U.S.” and that the beneficiary is the “executive beneficiary of this company and was offered the opportunity to come to the U.S. and oversee the investment capital.” The petitioner asserts that the beneficiary’s duties at the import/export business will include the following:

1. Establishing relationships with corporate banks and building lines of credit;
2. Developing a strategic plan to advance the company’s mission and objectives;
3. Identifying acquisition and merger opportunities and direct implementation activities, for example, meeting with executives of the foreign entity to plan future business acquisitions;
4. Planning, developing, and implementing strategies for generating resources and/or revenues, for example, meeting with executives of the foreign entity to discuss and plan the new website;
5. Directing and coordinating the company’s financial and budget activities to fund operations, maximize investments, and increase efficiency;
6. Reviewing financial statements, sales and activity reports, and other performance data;
7. Directing and coordinating activities of businesses or departments concerned with the production, pricing, sales, or distribution of products, contracting with vendors for supplies, reviewing sales reports, and contracting with [sic]; and
8. Determining service agreements, contractual agreements, set prices and credit terms;

As evidence of the petitioner’s expansion into the import/export business, the petitioner submits its business plan for the new business, to be named [REDACTED]. The undated business plan states that [REDACTED] will be created for the purpose of engaging in, importing of readymade goods for, wholesale and retail sales, and investments in multiple enterprises in the United States [sic].” The business plan states that the beneficiary is the President of the new business, and his “contributions” to the business shall consist of the following: oversee and direct the financial operations of the business, expansion, selection of location for retail operations, and oversee the productivity of the other executive staff. The business plan states that the “initial investment will be to lease warehouse and import product inventory from our parent company and also known suppliers in Asia.” The business plan further states that “phase I” of its development, to occur in 2005-2006, will be to sell products, namely men’s and women’s quality clothing; from locations at well-known shopping centers. Additionally, the business plan states that “phase II” of its development, to occur in 2006-2007, will consist of expanding into the restaurant business, particularly Middle Eastern cuisine, and “C-stores.”

To support the motion, the petitioner submits, *inter alia*, the following documents:

1. The petitioner’s employee handbook;
2. The petitioner’s employee performance evaluation form;

¹ The public website of the Texas Comptroller of Public Accounts reflects that there are no businesses registered under the name [REDACTED]. See: <https://ourcpa.cpa.state.tx.us/coa/Index.html> (accessed March 20, 2013).

3. The petitioner's IRS Forms 941 for quarters two, three, and four in 2009, and quarter one in 2010, all showing that the petitioner employed one employee;
4. The petitioner's Form 941 for quarter two in 2010 (beginning in April), showing that the petitioner employed two employees;
5. The petitioner's Form 941 for quarter three in 2010 (beginning in July), showing that the petitioner employed three employees;
6. Employment application for [REDACTED] indicating a hire date of April 1, 2010 in the position of cashier;
7. Employment application for [REDACTED] indicating a hire date of April 1, 2010 in the position of assistant manager;
8. The petitioner's Form 941 for quarter four in 2010 (beginning in October), showing that the petitioner employed one employee;
9. The petitioner's Form 941 for quarter one in 2011, showing that the petitioner employed one employee;
10. Another Form 941 for quarter one in 2011, showing that the petitioner employed two employees;
11. The petitioner's Form 941 for quarter three in 2011, showing that the petitioner employed no employees;
12. The petitioner's Forms 941 for quarters two and four in 2011, showing that the petitioner employed one employee;
13. The petitioner's Forms 941 for quarters one and two in 2012, showing that the petitioner employed one employee;
14. Confirmation that the petitioner paid local and state taxes in 2009-2012 for ;
15. Various invoices to the petitioner, d/b/a [REDACTED] for wholesale apparel purchases; and
16. Bank statements for the petitioner, d/b/a [REDACTED] from 2009-2012.

Finally, the petitioner submits a new job description for the beneficiary as "Executive President," which lists the following duties:

1. 25% of time spent on: establishing relationships with bank officers and negotiating lines of credit; reviewing, approving and signing all contractual agreements for "vendor services for the hotel and restaurant;" executing the business plan; and developing prospects for new business relationships and customers;
2. 30% of time spent on: establishing all business registration, licensing, and permits; analyzing expenses and costs; preparing and overseeing delivery of financial statements;
3. 20% of time spent on: analyzing the management of financial development, account planning, trade funds management, and a plan for the completion of all administrative support elements; analyzing the U.S. market and financial analysis; staying updated on all industry and marketing trends;
4. 15% of time spent on: coordinating the entire operation of the management staff during scheduled hours; recruiting, training, and monitoring management needs; meeting management productivity standards and committed sales goals; and attending required team

- meetings and conference calls; and
5. 10% of time spent on: managing subordinates and overseeing management staff; approving all bids and negotiations manager has initiated with vendors and suppliers; organizing management teams and implementing strong and effective communication skills to effectively respond to customer complaints; ensuring that all employees adhere to the company's policies and standards; exercising complete latitude and discretion in the decision process of hiring and firing.

II. Discussion

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."

Furthermore, 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 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.

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.

In the instant case, the petitioner's motion, does not contain any new facts and is unsupported by any statute, regulation or pertinent precedent decisions to establish that the prior decisions were based on an incorrect application of law or USCIS policy. The petitioner merely asserts that USCIS failed to recognize the beneficiary as an executive. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Therefore, the motion will be dismissed in accordance with 8 C.F.R. § 103.5(a)(4).

The petitioner claims to operate two different types of businesses: a convenience store and a retail and wholesale import/export business which currently sells men's and women's clothing. The petitioner has failed to establish that the beneficiary will be employed in a primarily executive capacity in either of these businesses.

In its decision dated July 20, 2012, the AAO concluded that the petitioner failed to establish that the beneficiary's employment at the convenience store is in a primarily managerial or executive capacity. The AAO found that several of the beneficiary's job duties, such as securing bank accounts, preparing a market survey, purchasing equipment, preparing sales reports, placing orders, preparing financial reports, and

reviewing inventory, were non-qualifying in nature. The AAO found that the petitioner did not submit a clear and credible breakdown of the time spent by the beneficiary performing his duties, absent which the AAO could not determine what proportion of the beneficiary's time was spent on qualifying duties. The AAO also found that the beneficiary was the sole employee at the convenience store, and therefore the beneficiary had not been relieved from performing primarily non-qualifying duties.

On motion, the petitioner provides a new list of job duties for the beneficiary at the convenience store, including "meeting with new and existing vendors and preparing cost analysis," "researching demographics to determine the best products to market," researching the license and permits necessary to establish a small check cashing office, lottery sales, gas, beer, and wine, "establishing and implementing policies and procedures for employees," "establishing a performance evaluation for employees," and "reviewing cash controls, inventory procedures, theft control, and all safety rules." However, this new description of the beneficiary's duties is too vague to give a clear understanding of what the beneficiary does on a daily basis. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will 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).

The petitioner's new description fails to account for several previously listed duties for the beneficiary at the convenience store, such as purchasing equipment and interviewing, training, and hiring new staff, ordering groceries and beverages from vendors, advertising, and promoting products. The petitioner failed to explain why it submitted two different descriptions of the beneficiary's duties. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

Moreover, the petitioner's new description fails to contain a clear breakdown of how much time the beneficiary spends on each of his duties. Without such breakdown, the AAO still cannot determine what proportion of the beneficiary's time is spent on qualifying duties.

In its decision dated July 20, 2012, the AAO found that the petitioner failed to submit any evidence establishing that the beneficiary had subordinate employees at the time of filing. On motion, the petitioner submits new evidence to establish that it employed two employees, [REDACTED] and [REDACTED] purportedly to take over the daily operations of the convenience store and relieve the beneficiary from performing operational duties. However, this new evidence fails to overcome the AAO's findings on this matter. The newly submitted evidence confirms that the petitioner began to employ additional employees in April 2010, several months after the instant petition was filed. As the AAO previously discussed, the petitioner's employment of [REDACTED] and [REDACTED] occurred after the filing of the instant petition, and therefore cannot be considered. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or 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).

Even if the AAO were to consider the petitioner's subsequent employment of [REDACTED] and [REDACTED] the new evidence submitted on motion clearly establishes that both were hired for only a short period of time, between April and October 2010. The petitioner's Forms 941 show that the petitioner employed only the beneficiary in 2009 through March of 2010. The petitioner employed two employees in quarter 2 (beginning in April) of 2010, employed three employees in quarter 3 (beginning in July) of 2010, and then reverted back to employing only the beneficiary in quarter 4 of 2010 (beginning in October) and consistently thereafter, with the exception of quarter three in 2011 when the petitioner employed no employees.² Considering the petitioner's short-term employment of [REDACTED] and [REDACTED] both of whom were no longer employed by October 2010, the petitioner's new description of the beneficiary's job duties is not entirely plausible. The petitioner still has not explained who, if not the beneficiary, will be performing the daily operational duties of the convenience store and how its organizational structure consisting of the beneficiary as its sole employee is sufficiently complex to support the beneficiary in a primarily executive position.

Regarding the petitioner's claimed expansion into the retail and wholesale import/export business, the AAO concluded in its decision dated July 20, 2012 that the petitioner failed to submit a credible, relevant description of the beneficiary's job duties related to the operation of the business expansion. On motion, the petitioner submits evidence that it is currently operating a retail outlet selling men's and women's clothing, doing business as [REDACTED] consistent with "phase I" of the business plan. On motion, the petitioner provides a new list of job duties for the beneficiary at the retail outlet.

However, the new list of job duties is insufficient to establish that the beneficiary is employed in a primarily managerial or executive capacity at the retail outlet. The petitioner describes the beneficiary's job duties in vague terms such as "[d]eveloping a strategic plan to advance the company's mission and objectives," "[i]dentifying acquisition and merger opportunities and direct implementation activities," "[d]irecting and coordinating the company's financial and budget activities to fund operations, maximize investments, and increase efficiency," and "[d]irecting and coordinating activities of businesses or departments concerned with the production, pricing, sales, or distribution of products, contracting with vendors for supplies, reviewing sales reports." Such descriptions merely repeat or rephrase the language of the statute, and fail to give any meaningful insight into what the beneficiary does on a daily basis at the retail outlet. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Id.*

Critically, the petitioner has not identified any employees who work at the retail outlet and who would perform the daily operational duties needed to run the store. As a retail store of men's and women's clothing, the tasks necessary to carry out the petitioner's daily operations would reasonably include sales and other

² It is not clear how the petitioner operated the convenience store during the third quarter of 2011 with no employees.

customer service, as well as purchasing duties. Since the beneficiary is the sole employee working at the retail clothing store, the AAO must conclude that he performs all the tasks necessary to carry out the petitioner's daily operations. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Similarly, the petitioner's description of the beneficiary's duties at the retail store is not entirely plausible. The petitioner describes the beneficiary's duties in entirely executive and broad terms, i.e., to oversee and direct the financial operations of the business, and to oversee the productivity of the other executive staff. The petitioner made no mention of the beneficiary performing the daily operational tasks necessary to execute the retail business. It is not plausible that the petitioner would only employ the beneficiary in a purely executive capacity without employing any other employees to perform the operational tasks necessary to conducting the business, such as providing sales and types of customer service.

On motion, the petitioner submits a new list of job duties for the beneficiary as "Executive President," which the AAO finds to be of uncertain credibility and relevance. Foremost, the petitioner fails to specify whether this new list of job duties pertains to the convenience store or the retail store. In addition, the new list of job duties indicates that the beneficiary will spend 25% of his time on duties including approving and signing all contractual agreements for "vendor services for the hotel and restaurant." The petitioner did not submit any evidence establishing that it currently owns or manages any hotels or restaurants. The petitioner failed to establish the relationship between this particular duty and the beneficiary's duties at either the convenience store or retail store. The new list also indicates that the beneficiary will spend 15% of his time "coordinating the entire operation of the management staff during scheduled hours" and another 10% of his time on "managing subordinates and overseeing management staff." Again, the petitioner failed to establish the relevance of these duties to the beneficiary's duties at either the convenience store or retail store, as the petitioner failed to establish that it employs a "management staff" or any subordinate employees at either location.

For the foregoing reasons, the petitioner failed to establish that the AAO erred in dismissing the appeal. The record fails to establish that the beneficiary is employed in a primarily executive capacity at either the convenience store or the retail business. Accordingly, the petitioner's motion to reopen and reconsider is dismissed.

Although the motion will be dismissed, the AAO withdraws its prior findings that the petitioner failed to establish that it has been engaged in the regular, systematic, and continuous provision of goods or services in the United States, and that it has secured sufficient physical premises to house its anticipated import business. The record contains sufficient evidence to establish that the petitioner is doing business as and has secured physical premises for its retail clothing store. Nevertheless, the AAO observes for the record that the petitioner has not established that it is doing business and has secured physical premises for its other claimed operations, i.e., the petitioner's claimed convenience store or its claimed expansion into the wholesale and import/export business.

Qualifying Employment

Although not previously discussed in prior decisions, the AAO finds that the petitioner failed to establish that it has a qualifying relationship with [REDACTED] which purportedly was the beneficiary's foreign employer.

According to Form I-129, [REDACTED] owns a controlling 50% interest in the petitioner.³ However, the petitioner submitted no documentary evidence to support this claim. To the contrary, the petitioner's Articles of Organization states that its members, i.e. owners, are [REDACTED] and [REDACTED]. The petitioner submitted no evidence to establish that it subsequently amended its Articles of Organization to reflect that [REDACTED] is a member (owner) of the petitioner.⁴ In addition, the petitioner's 2009 IRS Form 1065, U.S. Return of Partnership Income, and accompanying schedule K-1, reflect that the beneficiary and [REDACTED] are 50/50 partners. The petitioner submitted no explanation or evidence to reconcile these discrepancies.

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. at 591-92. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

Qualifying Employment Abroad

Even if the petitioner were to establish that it has a qualifying relationship with [REDACTED] the petitioner nevertheless failed to establish that the beneficiary had at least one continuous year of full-time employment abroad with the foreign employer within the three years preceding the beneficiary's initial application for admission into the United States.

The petitioner claims that the beneficiary was employed by [REDACTED] as a Managing Director for several years prior to his initial admission into the United States in 2006. However, the petitioner

³ In the initial documentation submitted with Form I-129, counsel asserted that the petitioner "is a 50/50 joint venture between a Jordanian company, [REDACTED] (50%) d/b/a [REDACTED] and Partners, [REDACTED] and [REDACTED] d/b/a [REDACTED] (50%). Counsel's assertion that the petitioner is a "50/50 joint venture" between five companies, including the petitioner, is not factually possible.

⁴ According to the Texas Secretary of State's public website, the owners of an LLC are called "members." A member can be an individual, partnership, corporation, trust, and any other legal or commercial entity. See: <http://www.sos.state.tx.us/corp/businessstructure.shtml> (accessed March 13, 2013).

submitted no initial documentation to support this claim. To the contrary, the foreign entity's "List of Employees Names," which the petitioner submitted as initial evidence, does not name the beneficiary as an employee.

The only document submitted to support the petitioner's claim that the beneficiary was employed in a qualifying capacity abroad is a letter dated July 15, 2005 from [REDACTED] Production Manager/Partner, submitted for the first time on motion. However, this letter is not entirely credible. This letter states that the beneficiary "oversees the entire production department" and provides a lengthy list of job duties, none of which are specifically related to the production department. Moreover, as discussed above, the petitioner was initially formed as a limited liability company between two individuals, [REDACTED] and [REDACTED] not the foreign employer.

Lastly, the July 15, 2005 letter from [REDACTED] referred to the joint venture agreement between the foreign entity and the beneficiary regarding the "the opportunity to expand our services into the U.S. market." The petitioner then submitted only one page of the joint venture agreement, which contained no dates, signatures, or any background information to give any context to the agreement. The petitioner failed to establish the relevance of the joint venture agreement made between the beneficiary and [REDACTED] whose relationship to the U.S. petitioner remains unknown. The petitioner submitted no other evidence to confirm the beneficiary's employment abroad with [REDACTED] and if employed, the nature of his employment there.

III. Conclusion

Motions for the reopening or reconsideration 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. *See 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. The motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decision of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.