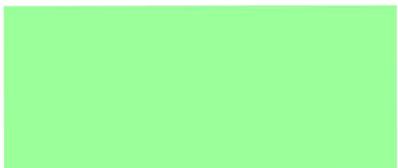


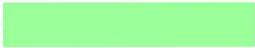
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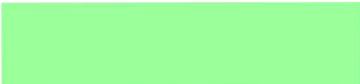
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



DATE: **DEC 13 2013** 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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the nonimmigrant visa petition. The petitioner subsequently filed an appeal that was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a combined motion to reopen and reconsider. The motion will be granted and the underlying petition will remain denied.

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary 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 corporation established in 2010, states that it will operate a convenience store. The petitioner seeks to employ the beneficiary as the President of its new office in the United States for a one-year period.

The director denied the petition, concluding that the petitioner did not establish that it would 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.

The AAO subsequently dismissed the appeal and concurred with the director's determination that the petitioner had not established that it would employ the beneficiary in a qualifying managerial or executive capacity. In dismissing the appeal, the AAO noted the petitioner's failure to demonstrate with sufficient evidence that it acquired its primary business, a gas station and convenience store called the [REDACTED] located in [REDACTED] TX. This office further concluded that the evidence failed to establish that the petitioner had imminent plans to acquire the [REDACTED] or that it would acquire additional retail stores as asserted. The AAO observed that there were various inconsistencies and other deficiencies in the submitted evidence pertaining to the claimed acquisition of the [REDACTED] including but not limited to: (1) two conflicting asset purchase agreements submitted on appeal related to its proposed purchase of the convenience store, (2) a failure to submit evidence of consideration paid for the convenience store business, (3) a closing date in the asset purchase agreement in January 2011 which was inconsistent with the purported closing of the purchase in April 2011, (4) the petitioner's filing a Texas assumed name certificate for [REDACTED] in December 2010 prior to its actual acquisition of the business in April 2011, and (5) the inclusion of a company called [REDACTED] in the petitioner's beverage sales permit. Furthermore, the AAO also concluded that the record contained insufficient evidence to establish that the petitioner has a qualifying relationship with the beneficiary's foreign employer. Specifically, the AAO found that the submitted stock certificates lacked credibility and that the petitioner failed to submit evidence that the foreign employer paid consideration for its claimed 900 shares of stock in the petitioning company.

The petitioner now files a motion to reopen and reconsider the AAO's decision.

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 pertinent precedent decisions, to warrant the re-opening or reconsideration of the AAO's decision to dismiss the petitioner's previous appeal.

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.

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.

This regulation is supplemented by the instructions on the Form I-290B, Notice of Appeal or Motion, by operation of the rule at 8 C.F.R. § 103.2(a)(1) that all submissions must comply with the instructions that appear on any form prescribed for those submissions.<sup>1</sup> With regard to motions for reconsideration, Part 3 of the Form I-290B submitted by the petitioner states:

Motion to Reconsider: The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions.

On motion, counsel submits additional evidence endeavoring to establish that the petitioner purchased the [REDACTED] in April 2011 and that it has hired five employees to support the business. For instance, the petitioner submits sales documentation, tax returns from the State of Texas, state and federal employer tax forms to support its payment of five asserted employees. Further, counsel offers explanations for the various apparent discrepancies on the record related to the petitioner's proposed acquisition of the [REDACTED]. Counsel states that there are two asset purchase agreements related to the purchase of the [REDACTED] one dated October 15, 2010 and another dated November 5, 2010, due to certain "landlord demands" which caused the petitioner and the seller [REDACTED] to re-execute the agreement. Counsel contends that the petitioner paid the purchase price for the business from loans it received from the owners of the foreign employer, including a \$200,000 loan from [REDACTED] which he garnered from a company called [REDACTED]. Counsel submits promissory notes and other loan documentation meant to support the receipt of these loans by the petitioner and consideration paid to [REDACTED] for the [REDACTED].

<sup>1</sup> The regulation at 8 C.F.R. § 103.2(a)(1) states in pertinent part :

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission.

Additionally, counsel explains that the company [REDACTED] is included on its sales and tax permit because it is common for a convenience store owners to contract with independent purveyors of alcoholic beverages to sell these goods at their location and share the proceeds. Counsel submits an alcoholic beverage concession and operating agreement to support its contractual relationship with [REDACTED]. In sum, counsel asserts that the petitioner has established by a preponderance of the evidence that it acquired the [REDACTED] and that it will employ the beneficiary in a qualifying managerial or executive capacity. Counsel further states that the AAO abused its discretion by requiring the petitioner to provide evidence that the foreign entity paid for its shares in the petitioning company.

The AAO will grant the motion to reopen with respect to the beneficiary's proposed employment in the United States since the petitioner has submitted new evidence not previously requested or considered by United States Citizenship and Immigration Service (USCIS).

However, the evidence submitted by the petitioner on motion introduces new discrepancies which leave further question as to whether the petitioner purchased the [REDACTED]. On motion, the petitioner asserts that it executed two asset purchase agreements with [REDACTED] for the purchase of the [REDACTED] one on October 15, 2010 for \$200,000 and another on November 5, 2010 for \$210,000. Counsel asserts that the execution of the second asset purchase agreement was completed "because the parties changed the terms of the contract due to landlord demands." However, counsel and the petitioner fail to explain the nature of these demands, the identity of the landlord, or the nature of these changes to corroborate this assertion. In fact, the petitioner failed to submit a lease for the convenience store property. Additionally, consistent with the most recent asset purchase agreement, the petitioner was to purchase the [REDACTED] from [REDACTED] for \$210,000. However, the petitioner submits on motion cashier's checks to [REDACTED] dated February 10, 2011 totaling \$212,000. Also, the petitioner and [REDACTED] later executed an amendment to the asset purchase agreement on April 29, 2011, after the purported payment in full on the part of the petitioner. However, this amendment questionably makes no mention of this petitioner's offered payment in full approximately two months previous, but only references a "payment of earnest" on the part of the petitioner in the amount of \$10,000.

Overall, although the petitioner has provided some supporting evidence suggesting that petitioner may own and operate the [REDACTED] the evidence of record remains inconsistent and incomplete. 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. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Regardless, even if the petitioner does own and operate the [REDACTED] this fact alone does not establish that the petitioner 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). In support of the Form I-129 Petition for a Nonimmigrant Worker, the petitioner described the beneficiary's duties as follows:

The Beneficiary will be employed as the President of the Petitioner, and she will be responsible for performing the following duties for the Petitioner; such duties to include, hiring and firing managers; supervising subordinate employees, overseeing preparation of sales and inventory reports, reviewing and analyzing sales data; establishing and implementing policies to manage and achieve marketing goals, review financial reports, review budgets and expense reports prepared by subordinate employees; managing the company; and overseeing marketing campaign developed by subordinate managers. Furthermore, the Beneficiary will also be responsible for locating and acquiring additional retail locations.

In the request for evidence (RFE), the director asked that the petitioner provide a more comprehensive description of the beneficiary's duties. Specifically, the director requested that the petitioner submit duties sufficient to demonstrate that the beneficiary would function at a senior level within the organization and to demonstrate that the beneficiary would manage a subordinate level of professional, managerial or supervisory staff necessary to relieve him from performing non-qualifying duties. In response, the petitioner provided essentially the same duty description set forth above, but included percentages of time the beneficiary would spend on these duties. The additional explanation also elaborated that the beneficiary would "be responsible for establishing sales and marketing goals by conducting market research and analyzing competitor prices in comparison to the organization." Further, the petitioner stated that the beneficiary would "be responsible for setting company policies relating to employment, productivity and financial matters" and "that she would be responsible for aiding in formulating and administering the policies of the organization, such as the number of employees required at each business location, their salary, and minimum requirements for the job." Lastly, the petitioner noted that the beneficiary would "also be responsible for reviewing new business locations by studying geographic locations and analyzing market needs, and giving recommendations to the Board of Directors on acquisitions or establishment of additional business locations." Despite this statement, the petitioner submitted a business plan with projections through 2015 which indicated that the business would consist entirely of one business location – the [REDACTED]

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).

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 duties offered by the petitioner, such as hiring and firing managers, supervising subordinate employees, reviewing and analyzing sales data, establishing and implementing policies to manage and achieve marketing goals, reviewing financial reports, managing the company, overseeing marketing campaign developed by subordinate managers and setting company policies relating to employment, productivity and financial matters are overly vague and provide little probative value as to the beneficiary's actual day-to-day activities. The duties, and the

record generally, include no specific examples or documentation to support the beneficiary's vaguely asserted duties in the United States. Further, the petitioner does not specifically describe the purported policies, goals, procedures and objectives that the beneficiary will establish. Indeed, to the extent that the petitioner does provide specifics, this is in relation to the proposed expansion of the business to other locations. As noted in this office's previous decision, the petitioner has submitted no supporting evidence to demonstrate that the petitioner has imminent plans or an ability to expand to other retail locations, such that this activity would occupy a majority of the beneficiary's time. 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. Overall, the petitioner has failed to provide any detail or explanation of the beneficiary's proposed 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).

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.

In the present matter, the petitioner asserts that the beneficiary oversees a manager and an assistant manager, who in turn oversee three cashiers. On motion, the petitioner submits Texas Wage Commission Employer's Quarterly Reports from 2011 and 2012 and IRS Forms W-2 from 2011 which support that the petitioner employed approximately five to six employees. However, the petitioner fails to specifically identify these employees within an organizational chart or delineate their positions. As such, it is not possible to verify whether the claimed subordinate managers perform managerial or supervisory roles. The petitioner submits no other evidence demonstrating that his claimed subordinate managers act in their purported positions as necessary to allow the beneficiary to primarily focus on qualifying duties related to the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). However, in the present matter, the petitioner has not submitted sufficient evidence to establish that the beneficiary has subordinate managers and professionals necessary to relieve her from primarily performing operational duties, beyond submitting tax documentation suggesting that it employs five to six employees in unverified capacities. 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)).

Therefore, in sum, the petitioner has not provided sufficient evidence and explanations in support of its motion to reopen to overcome the AAO's adverse findings. As such, the AAO affirms its previous

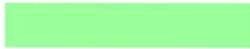
determination that the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or executive capacity. Further, on motion, the petitioner submits no new evidence relating to its qualifying relationship with the foreign entity.

Although counsel indicates that the petitioner is filing a combined motion to reopen and reconsider, counsel has not stated sufficient reasons for reconsideration supported by pertinent appropriate citations to statutes, regulations, or precedent decisions to establish that the AAO's decision was based on an incorrect application of law or USCIS policy. See 8 C.F.R. § 103.5(a)(3). In fact, counsel merely cites various cases without elaborating their significance to the current matter. For instance, the petitioner cites non-precedent case law relevant to whether the beneficiary qualifies as a function manager, but does not specifically contend that the beneficiary qualifies as a function manager. Also, counsel cites law to stand for the premise that supervision of independent contractors may qualify a beneficiary as a manager or executive, but does not assert that the petitioner will utilize the services of independent contractors.

Beyond this, counsel reiterates the statutory language of a manager and an executive and resubmits the duty description for the beneficiary and his subordinates. Further, counsel articulates that the petitioner must only establish the beneficiary's eligibility by a preponderance of the evidence. In this respect, the AAO does not disagree with counsel that the petitioner must establish the beneficiary's eligibility by a preponderance of the evidence. However, as discussed in this office's previous *de novo* review of the case, and as further discussed in this decision, the AAO finds that the petitioner has not met this burden due to unresolved discrepancies on the record, the beneficiary's vague duty description, and the petitioner's failure to corroborate that the beneficiary will have sufficient managerial, supervisory or professional subordinates to relieve him from performing non-qualifying duties.

Lastly, counsel states that the AAO abused its discretion when it required that the petitioner submit evidence that the foreign employer paid consideration for in exchange for 900 shares of the petitioner's stock. Counsel's assertion is not persuasive. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986). As previously noted, the petitioner failed to submit any additional evidence necessary to establish the foreign employer's ownership and control in the petitioner despite this office's previous finding that the evidence submitted was insufficient.

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).



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, the petitioner has not met that burden. Accordingly, the previous decision of the AAO is affirmed and the underlying petition is denied.

**ORDER:** The motion to reopen is granted. The underlying petition is denied.