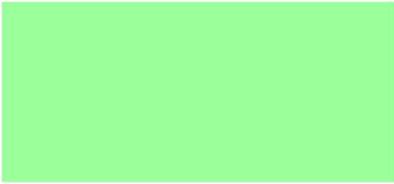


(b)(6)

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



U.S. Citizenship
and Immigration
Services



DATE: **FEB 06 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 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, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ 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 Georgia limited liability company established in October 2009, states that it is involved in the convenience store business. It claims to be an affiliate of [REDACTED] located in India. The petitioner seeks to employ the beneficiary as President for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the petitioner would employ the beneficiary in a primarily managerial or executive capacity. The director concluded that the record was not sufficient to show that the subordinates of the beneficiary would be supervisors, managers, or professionals to raise the beneficiary beyond that of a first-line supervisor. Additionally, the director concluded found that the record suggested the beneficiary would engage primarily in the provision of goods and/or services due to the petitioner's failure to establish subordinates performing non-qualifying duties. The director also concluded the provided duty description for the beneficiary as overly vague and recited statutory language. Further, the director pointed to the beneficiary's proposed salary and concluded it was not bona fide when compared to his subordinates.

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 asserts that the evidence clearly establishes that the beneficiary will act primarily in executive capacity. Counsel claims that the director erroneously considered the beneficiary's salary, high turnover of employees, lack of employees identified in provided photographs, and a lack of full-time employees within the organizational chart. Counsel also offers that the director further erred in concluding that all employees working in the same location must be performing the same duties; and in not considering the petitioner's offering of percentages of time spent on duties rather than director requested hours. Additionally, counsel argues that the director was wrong in concluding that all the beneficiary's subordinates must qualify as professionals under the Act in order for the beneficiary to qualify as an executive. Counsel states that subordinates can be also shown to be managers or supervisors to raise the beneficiary to the level of an executive, and asserts that the preponderance of the evidence on the record establishes certain of the beneficiary's subordinates as supervisors.

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.

II. The Issues on Appeal:

A. *Employment in the United States in a managerial or executive capacity*

As stated, the director denied the petition based on a finding that the petitioner failed to establish that the beneficiary will be employed in the United States in a qualifying executive or managerial capacity.

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.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. See *U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (discussing "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary will perform primarily executive or managerial duties with the petitioner as required by the Act, despite counsel illustrating certain errors made by the director in his decision.

On appeal, counsel argues that the director erred in concluding that the beneficiary salary was not "bona fide" when compared to his subordinates. Although the director is free to consider the salary of a beneficiary just as all other evidence on the record, salary is typically considered in the context of analyzing

whether a petitioner can remunerate the beneficiary given the company financial evidence presented on the record. In the instant case, the gross receipts (\$1,902,883.00) and profit (\$178,929.00) offered by the petitioner on the IRS Form 1065 partnership income return for 2010 do not suggest the petitioner would be unable to compensate the beneficiary the offered \$54,000.00 annually. Therefore, the director did err in concluding the beneficiary's salary alone suggested he was not an executive, and provided little explanation for such a conclusion. Indeed, as suggested by counsel on appeal, a salary much more than other employees offered in the organizational chart suggests an executive role more than it does not. Regardless, salary and title alone do not establish a beneficiary as an executive.

Further, the director also erred in making certain unsupported conclusions on the record. For instance, the director concluded that the petitioner had failed to show full-time employees and enough employees to support the beneficiary acting in an executive capacity. The petitioner claims on appeal to have six full-time cashiers and one full-time site manager. The number of employees, or their status as full-time or part-time, should not be conclusive as to whether the petitioner can support the beneficiary in an executive capacity. Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, 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. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. See *Systronics*, 153 F. Supp. 2d at 15. As such, an analysis of the beneficiary's duties is more relevant and consistent with the Act than unsupported conclusions based on the number of employees or their status as part-time or full-time, or a conclusion that all employees must be performing the same duties because they are working in the same location. All the facts on the record, duties and offered organizational structure included, should be analyzed in their totality when making a conclusion regarding the status of the beneficiary as an executive.

Therefore, 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(I)(3)(ii). The petitioner offered the following additional explanation of the beneficiary's duties in response to the director's Request for Evidence (RFE) which requested a more detailed description of duties, including the percentages of time spent on each task¹:

¹ The AAO notes that the director requested hours spent on each task as opposed to percentages of time. As a result of the petitioner's response with percentages as opposed to hours, the director found the petitioner non-responsive to the RFE. The AAO is not convinced as to this reasoning, as hours as well as percentages can be probative as to whether the beneficiary spends a majority of time on managerial or executive tasks. As such, the beneficiary's duties, percentages included, will be considered in adjudicating the decision without a finding on non-responsiveness on this issue.

- Develops and establishes company policies and implements long range goals in support of the company's business development plan; 25%
- Provides strategic guidance identifying new business opportunities; 15%
- Oversees the negotiation, approval and management of all budgets, contracts and capital expenditures involved in the acquisition and deployment of equipment and supplies to operate the business; 10%
- Reviews financial data; 10%
- Oversees the evaluation of supplier proposals, management of contracts and ongoing performance review of all suppliers; 5%
- Provides strategic guidance on developing plans aimed at optimizing business performance in such areas as cash flow, supplier relationships, performance and customer satisfaction; 5%
- Influences decisions relating to the selection of personnel; 5%
- Oversees the expansion of [petitioner] operations to open additional locations and start additional lines of business; 25%

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).

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. 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. For instance, the petitioner vaguely states that the petitioner: 1) will be responsible for developing and establishing company policies and implement long range goals in support of the company's business development plan; 2) provide strategic guidance identifying new business opportunities; and 3) provide strategic guidance on developing plans at optimizing business performance. However, no specifics as to the nature of these policies, goals, strategies, guidance, or plans are provided; nor details on how these broad policies plans and goals will be carried out as a primary part of the beneficiary's daily duties. The actual duties themselves will reveal the true nature of the employment. 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, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Indeed, the duty description simply recites the statutory language. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

On appeal, the petitioner indicates that the beneficiary performs as an executive and not as a manager. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a

complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* In the job duties provided in the present case, the petitioner has failed to establish that the beneficiary is primarily directing the management of the organization and not primarily focused on the day-to-day activities of the organization. In fact, as discussed above, the beneficiary is described as performing many operational and first-line supervisory tasks such as managing supplier relationships; reviewing budgets; negotiating all contracts; deploying all equipment and supplies for the business; and completing performance reviews on suppliers.

However, the AAO notes that a majority of the beneficiary's duties are offered as being related to the continued expansion of the business. But, the record does not support that the beneficiary could allocate the majority of his time scouting new businesses for purchase or operation. For instance, the petitioner has not offered any further specific plans related to expansion beyond generalities; nor capital available to support business expansion necessary for these duties to constitute a majority of the beneficiary's duties. 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)). Also, the organizational structure of the petitioner does not support the notion that the beneficiary could be creating policies, strategies, and goals for expansion, as he is the only individual offered as responsible for this facet of the business, and not dictating the function to other managers. Indeed, the petitioner has only offered one other manager on the record, that being a General Manager, claimed to be responsible for the day-to-day management of the business. Further, the petitioner has offered that it owns only one of the businesses provided on the record, the [REDACTED] in McDonough, GA, while the [REDACTED] location is offered as being rented from a landlord. As such, the record is unresponsive of the beneficiary's focus on continued business expansion. Additionally, given that this petition is not a "new office" petition, the AAO cannot consider prospective development to establish the beneficiary as an executive as of the date of the filing of the 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. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

Material discrepancies in the petitioner's provided organizational charts, when compared to the provided employment documentation, also calls into question the beneficiary's offered role as an executive. As stated, the petitioner is offered as operating two convenience stores, the [REDACTED] and as [REDACTED] in McDonough, GA. The petitioner further claims on appeal that it employs seven full-time employees, including one General Manager and six Cashiers/Customer Service Representatives. The petitioner provides detailed information on each of the six cashiers, and each is clearly offered as only

working at the [REDACTED]. Therefore, no employees are provided on the record as operating one of the petitioner's purported businesses, the [REDACTED]. A material discrepancy of this level casts serious doubt as to the function of the General Manager, who is the only offered manager reporting to the beneficiary, and raises the question whether the beneficiary primarily performs executive duties. In fact, the discrepancy leaves question as to whether there is any management for the beneficiary to direct, as required of an executive. 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 (BIA 1988).

The AAO concurs with counsel's argument that the director erred in finding that an executive's subordinates must be shown as professionals according to the Act. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. In the present matter, the petitioner is not claiming to be a personnel manager, but an executive. An executive may be shown on the record through credible evidence that a complex hierarchy exists to manage and managers to which the petitioner can dictate day-to-day functions and policy. However, the petitioner has claimed only one manager within the business, and given the level of the petitioner's operations and the aforementioned discrepancy in the organizational structure, it is unlikely the petitioner spends a majority of his time dictating the day-to-day operations of the business to other managers as required of an executive. Counsel offers on appeal that the organizational structure of the petitioner includes an additional store manager reporting to the offered General Manager. Also, counsel states that the petitioner plans on hiring an additional store manager to, presumably, manage the [REDACTED] location. A "proposed" organizational chart offered in support of the original petition offers this same structure. However, the record does not suggest the existence of these additional managers as of the date of the filing of the petition. In fact, the "current" organizational chart provided on the record suggests that no other managers, other than the General Manager, are employed as of the date of the filing of the petition. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As stated, 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).

The petitioner also provides an expert opinion on the record from a professor of management from the [REDACTED] in support of a finding that the petitioner is acting primarily in an executive or managerial capacity. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. See *Matter of Caron Int'l.*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. *Id.*; see also *Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated or is in any way questionable. *Matter of Caron Int'l.*, 19 I&N Dec. at 795.

Furthermore, merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Therefore, the totality of the evidence, including the prevalence of non-qualifying duties within the beneficiary's job duty description; the vagueness and unsupported nature of the beneficiary's provided qualifying duties; the level of the petitioner's operations; the lack of management necessary for the beneficiary to act as an executive; and the discrepancies in the petitioner organizational structure; leaves material doubt on whether the beneficiary will primarily act in a managerial or executive capacity. As such, the petitioner has failed to establish by the preponderance of the evidence that the beneficiary will act primarily in a managerial or executive capacity. Accordingly, the appeal will be dismissed.

III. Conclusion

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.