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

(b)(6)

DATE: JUL 25 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to 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 Texas corporation established on June 1, 2001, engages in the food service business. It is an affiliate of located in Mumbai, India. The petitioner seeks to employ the beneficiary as its Director of Operations for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity in the United States.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary will be employed in a primarily managerial or executive capacity in the United States. Counsel submits a brief and additional evidence in support of the appeal.

I. The Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Statement of Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on December 22, 2008. On the Form I-129, the petitioner indicated that it was established in 2001 and engages in the food service business. The petitioner indicated that it currently employs six employees on payroll, plus three profit taking employees. The petitioner specifically indicated on the Form I-129 that the beneficiary is not coming to the United States to open a new office.

In a letter accompanying the initial petition, the petitioner asserted that it is currently doing business and operating as The petitioner affirmed that it has been in operations since 2001 and "is therefore well established beyond initial stages." The petitioner asserted that the beneficiary will "perform

her duties with the ultimate responsibility" and control the overall organization, and will be supported by the minority stockholders/officers who will be there to provide "consultation, secretarial support and suggestions" to her. The petitioner listed the beneficiary's job duties as Director of Operations as the following:

- Direct, plan, and implement policies, objectives, and activities of [the petitioner] to ensure continuing operations, to maximize returns on investments, and to increase productivity (15%);
- Direct and coordinate the corporation's financial and budget activities to fund operations, maximize investments, and increase efficiency of the current food service operations (10%);
- Direct and coordinate overall operations and activities of the corporation including activities concerned with store operations, new business developments and investments, and implementation of them (15%);
- Set goals and policies for operational efficiency, target sales, and customer relations for the current food services operations and for potential expansion operations (15%);
- Establish expansion goals for [the petitioner], leveraging capital infusion to move to additional food service locations or to move into additional industries (15%);
- Confer with managers, and staff members to discuss issues, coordinate activities, and resolve problems (5%);
- Confer with managers to evaluate performance of its staff in meeting corporate objectives, and to determine areas of potential cost reduction, program improvement, and policy change (5%);
- Approve major contracts and agreements with suppliers, distributors, and vendors for current food service operations and any expansion operations (5%);
- Review reports submitted by managers (5%); and
- Appoint managers and assign or delegate responsibilities to them (10%).

In support of the petition, the petitioner submitted, *inter alia,* its business plan. The business plan affirmed the petitioner's statements that it currently operates a franchise restaurant. The business plan states: "The Company is currently in an established situation with one store and it has 6 full-time employees . . . [and] three officers." The business further states that the beneficiary, as Director of Operations, will "oversee the entire business operations of the business" and will be aided by the two other shareholders/officers: who will continue to be the President, and who will continue to be the Secretary.

The petitioner submitted the U.S. entity's organizational chart, depicting the beneficiary at the top, overseeing as President and as Secretary. Below them is Store Manager, who directly oversees two Shift Managers/Cashiers: and The shift managers oversee: Cashier; Store Assistant; and Store Assistant.

The petitioner provided position descriptions for all its U.S. employees. In pertinent part, the petitioner provided the following:

- President:

- Provide consulting support to the Director of Operations and majority share holder [*sic*] by advising her on business development and formulation of past company policies and operations;
- Confer with the company shareholders and vote on corporate resolutions;

– Secretary:

- Support corporate operations by facilitating the smooth operation of the company's formal decision making and reporting machinery and organizing share holder [*sic*] meetings, particularly at the request of the majority shareholder.

The director issued a request for evidence (RFE), in which he advised the petitioner that the beneficiary's job duties in the United States are unclear. The director instructed the petitioner to submit, *inter alia,* a comprehensive description of the beneficiary's duties and complete position descriptions for all U.S. employees.

In response to the RFE, the petitioner submitted, *inter alia,* an amended position description for the beneficiary as follows:

- Direct, plan, and implement policies, objectives, and activities of [the petitioner] to ensure continuing operations, to maximize returns on investments, and to increase productivity, all through the assistance and delegation of ministerial-details to Store Manager and to the corporate secretary, and with consulting support of the President (15%; 6 hours);
- Direct and coordinate the corporation's financial and budget activities to fund operations, maximize investments, and increase efficiency of the current food service operations- the coordination occurring with the Store Manager providing, to the Director of Operations, summarized financial data obtained from Shift Managers and outside accountants, and the direction occurring when the Director makes top-level decisions toward accomplishment of bottom line parameters (10%; 4 hrs);
- Direct and coordinate overall operations and activities of the corporation including activities concerned with store operations, new business developments and investments, and implementations of them- the coordination occurring with the Store Manager providing, to the Director of Operations, summarized operational data obtained from Shift Managers, outside advisory agents, and the direction occurring when the Director makes top-level decisions toward accomplishment of bottom line goals in investments and expansions (15%; 6 hrs);
- Set goals and policies for operational efficiency, target sales, and customer relations for the current food services operations and for potential expansion operations – with Store Manager analyzing performance metrics and presenting recommendations to the Director of Operations (15%; 6 hrs);
- Establish expansion goals for [the petitioner], leveraging capital infusion to move to additional food service locations or to move into additional industries- with outside financial and real-estate consultants providing analyzed data and presenting recommendations to the Director of Operations (15%; 6 hrs);

- Confer with managers, and staff members to discuss issues, coordinate activities, and resolve problems, allowing the store managers and shift manager to supervise the necessary corrections (5%; 2 hrs);
- Confer with managers to evaluate performance of its staff in meeting corporate objectives, and to determine areas of potential cost reduction, program improvement, and policy change, allowing the store managers and shift manager to supervise the personnel in enforcing changes (5%; 2 hrs);
- Approve major contracts and agreements with suppliers, distributors, and vendors for current food service operations and any expansion operations, based on analytical representations of Store Manager and Shift Managers and executive business judgment (5%; 2 hrs);
- Review reports submitted by managers, namely, Store Manager, and Shift Managers (5%; 2 hrs); and
- Appoint managers and assign or delegate responsibilities to them, the delegation being done to accomplish the top-level direction of the Director of Operations (10%; 4 hrs).

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. The director observed that the nature of the beneficiary's job duties is unclear, considering that the petitioner employs the beneficiary in addition to the three individuals who were officers of the U.S. entity as of 2008. The director also observed that the petitioner used a number of generalities to describe the beneficiary's duties.

On appeal, counsel for the petitioner asserts that the three officers in question "act in support of the Director of Operations- thereby in no way negating the executive character of the proffered position." Counsel emphasizes that the majority officers are there "to provide consultation, secretarial support and suggestions" to the beneficiary, and refers back to the position descriptions previously submitted. Counsel asserts that the director improperly applied a "professional" test to determine the nature of the beneficiary's job duties, and asserts that the director failed to consider the beneficiary's employment as a functional manager. Counsel asserts that the director committed other legal errors, specifically, by incorrect assuming that the petitioner was already working for the petitioner and failing to treat the petitioner as a "new office."[1] In support of the appeal, counsel submits a brief and evidence of the petitioner's recent business activities and acquisitions made after the date the instant petition was filed.

III. Analysis

The primary issue to be addressed is whether the petitioner established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

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[1] On appeal, counsel also asserts that the store manager is not the "sole source of revenue" for the petitioner. Counsel appears to have misread the director's decision, which referred to the restaurant as the sole source of revenue for the petitioner, not to the store manager as the sole source of revenue for the petitioner. In addition, on appeal counsel contests the director's decision to deny the petitioner's request for a change of status and an extension of stay. However, there is no appeal from the denial of an application for extension of stay filed on Form I-129 or I-539. 8 C.F.R. § 214.1(a)(5).

As a preliminary issue, the AAO finds that the petitioner cannot be treated as a new office. The evidence in the record – including the petitioner's incorporation date and its own statements that it has been in operations since 2001 and is therefore "well established beyond initial stages" – establishes that the petitioner has been doing business in the United States for more than one year at the time of filing. Therefore, the petitioner cannot qualify as a new office, regardless of when the beneficiary acquired the existing business. *See* 8 C.F.R. § 214.2(l)(l)(ii)(F) (defining a "new office" as "an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary *for less than one year* (emphasis added)"); 8 C.F.R. § 214.2(l)(l)(ii)(H) (defining "doing business" as the "regular, systematic, and continuous provision of goods and/or services"). Furthermore, the petitioner specifically indicated on the Form I-129 that the beneficiary was not coming to the United States to open a new office. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

As the petitioner does not, and cannot, qualify as a new office, the petitioner must establish eligibility at the time of filing. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). USCIS may not consider the petitioner's future plans to open new business locations, hire additional employees, or any other factors that were not in existence at the time of filing. USCIS may only consider the petitioner's business activities, organizational structure, staffing, and other factors as they existed at the time of filing. As such, the AAO will not further consider counsel's assertions that the director erred by failing to consider the petitioner as a new office, nor will the AAO consider any new evidence submitted on appeal regarding the petitioner's recent business activities and acquisitions made after the instant petition was filed.

Furthermore, while the AAO acknowledges counsel's assertion that the director incorrectly assumed that the petitioner was already working for the petitioner, counsel has not demonstrated that any harm resulted from this particular error. Counsel asserts that the director's error on this point deprived the petitioner of the more lenient treatment given to new offices. As discussed above, the petitioner does not qualify as a "new office."

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* 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 petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. The petitioner's evidence should demonstrate that there is an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(ii).

In the instant matter, the petitioner has repeatedly described the beneficiary's proposed position in the United States in very broad and vague terms. With the initial petition, the petitioner listed the beneficiary's job duties as including "[d]irect, plan, and implement policies, objectives, and activities of [the petitioner],"

[d]irect and coordinate the corporation's financial and budget activities," [d]irect and coordinate overall operations and activities of the corporation" and "[s]et goals and policies for operational efficiency, target sales, and customer relations for the current food services operations and for potential expansion operations." These duties merely paraphrase the statutory definition of managerial or executive capacity. *See* sections 101(a)(44)(A), (B) of the Act. 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.).

When instructed by the director to provide a more detailed description of the beneficiary's job duties, the petitioner responded by submitting the same job description with minor additions. The minor additions made to the beneficiary's job duties, however, did not elaborate on or give any meaningful detail into the beneficiary's proposed job duties; instead, the additional descriptions merely indicated that the beneficiary will delegate "ministerial" responsibilities to the Store Manager and Shift Managers and will coordinate with them to accomplish her goals, without elaborating on the actual duties to be delegated. The petitioner has failed to provide any additional detail or explanation of the beneficiary's activities in the course of her daily routine. 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 actual duties themselves will reveal the true nature of the employment. *Id.* 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. *Id.*

Thus, while several of the duties generally described by the petitioner would generally fall under the definitions of managerial or executive capacity, the lack of specificity raises questions as to the beneficiary's actual proposed job duties. Overall, the position descriptions alone are insufficient to establish that the beneficiary's duties will be primarily in a managerial or executive capacity. Accordingly, the totality of the record must be considered in analyzing the nature of the beneficiary's employment capacity.

In this matter, the evidence submitted provides very little information regarding the duties of the beneficiary's immediate subordinates, the President and the Secretary, both of whom are also shareholders of the U.S. entity. The petitioner's descriptions of the President and Secretary's job duties are overly broad and vague, such as "[p]rovide consulting support to the Director of Operations and majority share holder by advising her on business development and formulation of past company policies and operations" and "[s]upport corporate operations by facilitating the smooth operation of the company's formal decision making and reporting machinery and organizing share holder meetings." While the petitioner has repeatedly asserted that the President and the Secretary will provide "consultation, secretarial support and suggestions" to the beneficiary, the petitioner has not explained in any detail what these consultation and support services will consist of. As discussed above, the petitioner claimed that the beneficiary will delegate "ministerial" duties to them, but failed to elaborate on what actual duties will be delegated. As such, the record is unclear as to what actual job duties the President and Secretary will perform with respect to the U.S. entity, and in turn, what job duties the beneficiary will perform. Overall, the insufficiencies in the record prohibit the determination that the petitioner will employ the beneficiary in a primarily managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(ii).

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)).

On appeal, counsel asserts that the beneficiary qualifies as a functional manager because she "will be in charge of the Operational Directorship function over a relatively new operation in business only a few years and acquired as a new office by the Beneficiary only in the last few months." Counsel fails to establish that the beneficiary qualifies as a functional manager. Counsel has failed to identify the function with specificity and articulate the essential nature of the function. The beneficiary's overall responsibility over the "Operational Directorship function" of the U.S. entity does not constitute an essential function.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii).

Overall, based upon the vague and incomplete job descriptions provided for the beneficiary and the other officers of the U.S. entity, the petitioner has failed to establish that it will employ the beneficiary in a primarily managerial or executive position. Accordingly, the appeal will be dismissed.

Although the appeal will be dismissed, the AAO will withdraw a portion of the director's decision that was based upon an inappropriate standard. The director improperly concluded that the petitioner failed to establish that the beneficiary's job duties will be "professional" in nature. The AAO agrees with counsel's assertion that whether or not the beneficiary's job duties are "professional" in nature is "generally irrelevant to the intra company transferee who seeks employment as a manager or executive."

The petition will be denied and the appeal dismissed for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.