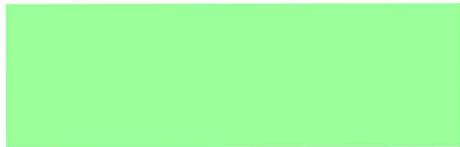




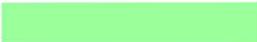
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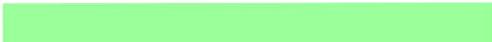


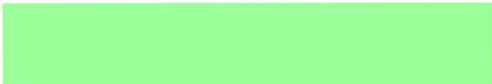
DATE: **JUN 05 2013**

Office: VERMONT SERVICE CENTER

FILE: 

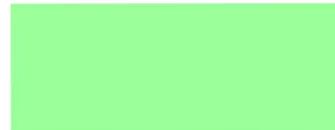
IN RE:

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 petition for a nonimmigrant visa. The petitioner filed an appeal with the Administrative Appeals Office (AAO), which the AAO denied. The petitioner filed the instant motion to reopen and reconsider. The motion to reconsider will be granted. The AAO's previous decision will be affirmed and the petition will be denied.

The petitioner seeks to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L). The petitioner, a corporation formed in the State of Alabama on December 31, 2009 operating as "[REDACTED]" engages in the retail/wholesale business. It claims to be a branch office of [REDACTED] located in [REDACTED] India. The petitioner seeks to employ the beneficiary as the president of its new office for a period of one year.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The petitioner filed an untimely appeal, which the director treated as a motion to reopen. The director reaffirmed the denial of the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director found in both instances that the beneficiary would likely be engaged in the non-managerial, day-to-day operations of the convenience store.

The petitioner then filed an appeal to the AAO. The AAO dismissed the petitioner's appeal. In dismissing the appeal, the AAO discussed the discrepancies regarding the petitioner's claimed staffing and organizational structure, and the petitioner's failure to submit a detailed description of the petitioner's staffing in response to the director's request for evidence (RFE). Based on the discrepancies and inadequacies in the record, the AAO concluded that the record does not support a conclusion that the beneficiary will be employed in a primarily executive or managerial capacity, or that the business can support such a position within one year. Beyond the director's decision, the AAO also concluded that the petitioner failed to meet the definition of a qualifying organization. The AAO found that, at the time of filing, the petitioner had not yet been incorporated in the State of Alabama, and as such, was actually the beneficiary doing business as a sole proprietorship with no authorized branch office of the foreign employer or legal entity in the United States.

The petitioner filed the instant motion to reopen and reconsider. On motion, counsel for the petitioner asserts that the petitioner's failure to provide detailed job duties for the U.S. employees did not preclude a material line of inquiry because "the jobs themselves are straightforward and the duties associated with them a matter of common knowledge." Counsel asserts that the critical element is that the beneficiary would be supervising managers, not what job duties the cashier or cook performed. Counsel provides three reasons for the discrepancies regarding the number of employees: the initial petition was prepared by someone who held himself out as qualified to practice law; the various documents described the number of employees over a two-year span, during which time a business would reasonably undergo changes; and because the petitioner is a new office, some of the documents related to proposed staffing while others pertained to current circumstances. Counsel cites to 8 C.F.R. § 214.2(i)(3)(v)(C)'s accommodation for the petitioner to submit *information*, not *evidence*, relating to the new office, and claims that the service incorrectly focused on the petitioner's operations as of the time of filing.

With regards to the qualifying relationship, counsel asserts that the petitioner should be considered a *de facto* corporation based upon the petitioner's bona fide and colorable attempt to incorporate the business prior to filing. Counsel asserts that "the documents necessary to incorporate the business were filed on October 27,

2009, including the articles of incorporation and the name reservation certificate,” but that the delay in formal incorporation was “attributable to failure on part of the incorporator to provide the probate court with the correct fee for recording the articles.” Counsel points to the petitioner’s application for a Federal Tax Identification number from the IRS in early November as additional proof of the petitioner’s attempt to formally incorporate. Counsel cites to *Hugh W. Brown, Jr. and Alabama MBA, Inc. v. W.P. Media, Inc.*, 17 So.3d 1167 (2009) and *Harris v. Stephens Wholesale Bldg. Supply Co.*, 54 Ala.App. 405, 408, 309 So.2d 115, 117 (1975) to support the assertion that the petitioner is a *de facto* corporation under Alabama law. To support the motion, counsel provides a copy of the petitioner’s electronic application for an Employer ID Number (EIN).

Counsel claims the petitioner was a “lawfully constituted company” under Alabama law, and therefore a distinct entity from the beneficiary, as of July 1, 2009, when the petitioner was licensed by the Alabama Department of Agriculture and Industries. Counsel cites to Alabama Code Section 34-27-2(5) to support this assertion. To support the motion, counsel provides a copy of a Food Safety Permit issued to [REDACTED] by the State of Alabama Department of Agriculture and Industries on July 1, 2009. The certificate states that [REDACTED] “is in full compliance with all applicable Alabama statutes and is authorized to engage in the activities and practices provided for therein.”

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 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.

Although the instant motion does not meet the filing requirements for a motion to reopen, it meets the filing requirements for a motion to reconsider. Counsel has stated the reasons for reconsideration and supported the motion with citations to precedent decisions. Therefore, the AAO will grant the motion to reconsider. However, upon review of the motion and the evidence in the record, the AAO will reaffirm its decision dismissing the appeal.

On motion, counsel for the petitioner asserts that the petitioner’s failure to provide detailed job duties for the U.S. employees did not preclude a material line of inquiry because “the jobs themselves are straightforward and the duties associated with them a matter of common knowledge.” Counsel asserts that the critical element is that the beneficiary would be supervising managers, not what job duties the cashier or cook performed. However, counsel’s assertions are unpersuasive. As the petitioner failed to provide job descriptions for all its employees, the petitioner failed to establish that the claimed managerial employees the beneficiary would be supervising would be actual managers other than in title only.

When examining the employment capacity of an employee, the AAO will look first to the petitioner's description of the employee’s job duties. An individual will not be deemed a manager simply because he or she has a managerial title. The actual duties themselves reveal the true nature of the employment. *See 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). Specifics are clearly an important indication of an employee's true employment capacity, otherwise meeting the requirements would simply be a matter of reiterating the regulations and/or giving employees inflated titles. *See Id.* Artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. The petitioner's failure to provide detailed job duties for the U.S. employees precluded a material line of inquiry into the true nature of the beneficiary's subordinate employees.

Counsel provides three reasons for the discrepancies regarding the number of employees: the initial petition was prepared by someone who held himself out as qualified to practice law; the various documents described the number of employees over a two-year span; and because the petitioner is a new office, some of the documents related to proposed staffing while others pertained to current circumstances. Counsel cites to 8 C.F.R. § 214.2(l)(3)(v)(C)'s accommodation for the petitioner to submit *information*, not *evidence*, relating to the new office, and claims that the service incorrectly focused on the petitioner's operations as of the time of filing. Again, counsel's assertions are unpersuasive.

Counsel's explanation that a business would reasonably undergo staffing changes over a two-year span is not consistent with the evidence in the record. The petitioner's Form I-129 specifically listed six *current* employees, while the organizational chart - concurrently submitted with Form I-129 - listed only four employees; this does not represent a fluctuation of employees over a period of time as counsel suggests. Furthermore, not only did the petitioner provide inconsistent information regarding the number of employees, the petitioner also provided inconsistent information regarding the titles of the employees. Specifically, the petitioner claimed in the organizational chart that it would employ a President, Vice-President, and two clerks, while it claimed in the business plan that it would employ the beneficiary, an assistant manager, and an unidentified number of cashiers. The petitioner has not offered an explanation for this inconsistency. 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.* The petitioner's failure to provide position descriptions for its employees renders the inconsistencies in the employees' job titles even more significant.

While the regulations provide certain accommodations for new offices, the regulations still require the petitioner of a new office petition to submit information describing its proposed organizational structure. 8 C.F.R. § 214.2(l)(3)(v)(C). The use of the term "information" as opposed to "evidence" does not absolve the petitioner of its obligation to submit accurate, truthful information. Moreover, the petitioner provided no information on Form I-129, the organizational chart, its response to the RFE, or elsewhere in the record to indicate or suggest that its claimed staffing represented proposed employees as opposed to actual, current employees. The petitioner also provided no documentary evidence to establish that it actually hired the six claimed employees. 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 Obaigbena*, 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).

Counsel's assertion that the initial petition was prepared by someone who held himself out as qualified to practice law is insufficient to overcome the discrepancies and insufficiencies in the record. There is no remedy available for a petitioner who assumes the risk of authorizing an unlicensed attorney or unaccredited representative to undertake representations on its behalf. *See* 8 C.F.R. § 292.1; *see also Hernandez v. Mukasey*, 524 F.3d 1014 (9th Cir. 2008) ("non-attorney immigration consultants simply lack the expertise and legal and professional duties to their clients that are the necessary preconditions for ineffective assistance of counsel claims"). The AAO only considers complaints based upon ineffective assistance against accredited representatives or counsel; even then, such claims can only be established through documentary evidence meeting certain criteria not provided nor met here. *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988) (requiring an appellant to meet certain criteria when filing an appeal based on ineffective assistance of counsel).

Regarding the qualifying relationship, counsel asserts that the petitioner should be considered a *de facto* corporation based upon the petitioner's bona fide and colorable attempt to incorporate the business prior to filing the petition. Counsel asserts that the petitioner was a *de facto* business as of October 27, 2009, the date it filed "the documents necessary to incorporate the business" including the articles of incorporation. Counsel cites to *Hugh W. Brown, Jr. and Alabama MBA, Inc. v. W.P. Media, Inc.*, 17 So.3d 1167 (2009) (holding that corporate existence begins when the articles of incorporation are filed, unless a later effective date is specified in the articles). However, counsel's assertions are unsupported by any probative documentary evidence. Although counsel asserts that the petitioner filed its articles of incorporation on October 27, 2009, counsel provides no evidence to support this assertion. In fact, counsel's claims are undermined by the evidence in the record, specifically, the petitioner's articles of incorporation signed and executed on November 2, 2009. The record contains only the petitioner's name reservation certificate dated October 27, 2009; this document does not establish that the petitioner actually attempted to file its articles of incorporation on the same day. Counsel also provides no evidence to support the assertion that the petitioner's articles of incorporation were rejected for failure to pay the correct recording fee.

Counsel asserts that the petitioner's application for a Federal Tax Identification number in early November is additional proof of the petitioner's bona fide and colorable attempt to incorporate the business prior to the date the petition was filed. Counsel cites to *Harris v. Stephens Wholesale Bldg. Supply Co.*, 54 Ala.App. 405, 408, 309 So.2d 115, 117 (1975) to support this assertion. However, counsel's assertions are unpersuasive and unsupported by the cited case. In *Harris*, the court held that the defendant company was not considered to be a *de facto* corporation prior to the day on which the articles of incorporation were filed, for there was no evidence in the record that an attempt was made to incorporate it, either bona fide or colorable. 54 Ala.App. at 409, 309 So.2d at 118. The court specifically found the defendant company's business license, business bank account, lease, bills, and construction bids – all obtained or performed prior to the corporation's filing of its articles of incorporation – "does not prove nor tend to prove that a bona fide and colorable attempt was made to incorporate [the company]. Therefore we must say there was no evidence of a *de facto* corporation." *Id.* Counsel fails to explain how the petitioner's application for a federal tax identification number would constitute a bona fide and colorable attempt to incorporate the business.

Finally, counsel's claim that the petitioner was a "lawfully constituted company" under Alabama law as of July 1, 2009, when the petitioner was licensed by the Alabama Department of Agriculture and Industries, is unpersuasive and unsupported by any legal authority. Foremost, the AAO observes that the Food Safety Permit was not issued to the petitioner but to [REDACTED]. Even assuming *arguendo* that the Food Safety Permit were issued to the petitioner, the petitioner fails to explain how a food safety permit

constitutes evidence of the petitioner's legal status as a lawfully constituted company under Alabama corporation law. Counsel's citation to Alabama Code Section 34-27-2(5) does not appear relevant to the issue at hand, as the cited provision pertains to real estate brokers.

Overall, the record does not support a conclusion that the beneficiary will be employed in a primarily executive or managerial capacity, or that the business can support such a position within one year. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The AAO's decision, dated September 20, 2012, is affirmed. The petition remains denied.