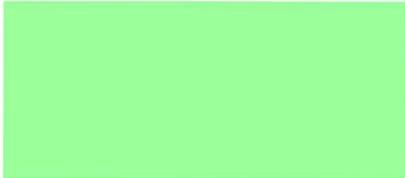


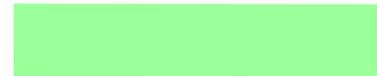


U.S. Citizenship  
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Services

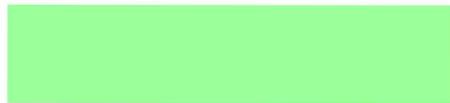
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DATE: **JUN 13 2013** Office: VERMONT SERVICE CENTER

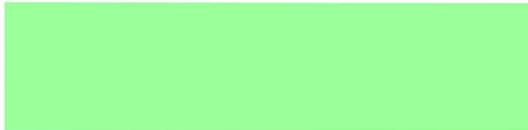


IN RE: Petitioner:  
Beneficiary:



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, and the Administrative Appeals Office (AAO) dismissed the petitioner's appeal. The matter is now again before the AAO on motions to reopen and reconsider. The AAO will dismiss both motions.

The petitioner was classified 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 is a Florida corporation established in 2007 and states that it operates an interstate freight transportation business. It claims to be a wholly-owned subsidiary of [REDACTED] located in Ecuador. The petitioner seeks to employ the beneficiary as an operations manager for three years.

The director issued a Notice of Intent to Revoke (NOIR) based upon information garnered from a consular interview with the beneficiary that revealed many inconsistencies related to the beneficiary's stated role as a manager or executive with the petitioner. Specifically, the director advised the petitioner that the beneficiary showed limited knowledge of his proposed duties; that his wages were inconsistent with a manager or executive when compared to his subordinates; and that he did not speak English as claimed in the I-129 Petition for a Nonimmigrant Worker. In response to the NOIR, counsel for the petitioner contended that: (1) the beneficiary was not fully aware of his duties with the petitioner because they were to be more fully explained to him upon entry; (2) he was not inconsistent in his explanation of duties in the consular interview but only explained different duties that made up his role; (3) his wages were consistent with a manager, as he was the second highest paid employee of the petitioner; and (4) his inability to speak English would not prevent him from performing managerial duties as 99% of the employees of the petitioner speak Spanish and he can read and write English.

The director revoked the approval of the petition, concluding that the petitioner's rebuttal failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. In revoking the approval, the director emphasized that the petitioner had not adequately addressed the beneficiary's lack of knowledge of the petitioner's business, or the inconsistencies apparent in the beneficiary's description of his job duties at the consular interview. The director also found that the beneficiary's inordinately low wage, incongruent degree in architecture, and lack of knowledge of the English language further prevented a finding that the petitioner intended to employ him 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. On appeal, counsel asserted that the director erred in revoking the petition approval and contended that the director ignored arguments and evidence submitted by the petitioner in response to the NOIR. In short, counsel asserted that the beneficiary would act in a managerial capacity with the petitioner through the supervision of subordinate dispatchers and therefore was eligible for the visa classification.

The AAO dismissed the petitioner's appeal, affirming the director's decision that the beneficiary had not established that the beneficiary would act primarily in an executive or managerial capacity with the petitioner. The AAO noted that the beneficiary's duties were vague and showed that the beneficiary was likely primarily to be engaged in non-qualifying day-to-day operational duties. The AAO also found that the beneficiary did not qualify as a personnel manager, as asserted by counsel, since his subordinates were not established as managers, supervisors, or professionals as defined by law. Specifically, the AAO pointed to the lack of

evidence to demonstrate that the petitioner had employees necessary to perform the day-to-day activities of the trucking business, such as drivers, maintenance workers, and dispatchers, which would allow the beneficiary's claimed managerial and supervisory subordinates to act in their asserted roles. In sum, in assessing the totality of the circumstances, the AAO found that the above referenced evidentiary shortcomings and certain discrepancies introduced by the beneficiary in a consular interview, led to a conclusion that the petitioner had not established that the beneficiary would be primarily employed in a managerial or executive capacity.

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.

On motion, counsel contends that the AAO inappropriately applied the law in the instant case and asserts that the beneficiary would indeed be employed in a managerial or executive capacity as defined by the Act. Counsel concedes that the beneficiary's previously submitted duties were too broad, stating that this insufficiency was due to a lack of understanding of the level of detail required in a description of job duties for the beneficiary. Counsel now submits on motion a more detailed description of the beneficiary's duties in an attempt to rectify this shortcoming. Further, counsel maintains that the AAO improperly used the number of the beneficiary's subordinates to conclude that the beneficiary was not an executive or manager. Additionally, counsel submits a more detailed organizational chart for the petitioner and asserts that the organization has sufficient supporting employees performing day-to-day trucking services to sustain the beneficiary and his subordinates in their managerial and supervisory roles.

First, the AAO notes that the petitioner has not submitted any new evidence, but only submits evidence it already had an opportunity to submit to the director.<sup>1</sup> In a request for evidence (RFE), the director asked the petitioner to provide an answer to the following questions:

- How many subordinate supervisors will be under the beneficiary's management?
- What are the job duties of the employees managed?
- How much of the beneficiary's time will be allotted to executive/managerial duties and how much to other non-executive/managerial functions?

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<sup>1</sup> The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . . ." *Webster's II New College Dictionary* 736 (2001)(emphasis in original).

However, in response, the petitioner submitted a vague and incomplete set of duties for the beneficiary which, according to the petitioner, represented only "some" of the beneficiary's duties. Indeed, counsel on motion concedes that the duties submitted in response to the director's RFE were "too broad" and takes responsibility for this lack of detail. Now, on motion, counsel asks that the AAO accept more detailed duties submitted for the beneficiary. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on motion. Consequently, the duties submitted for the beneficiary on appeal cannot be considered new evidence.

Further, the petitioner provides an updated organizational chart for the petitioner's organization on motion. However, 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). 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 such, the petitioner's current organizational structure in January 2013 is not relevant to determining the beneficiary's status as an L-1A intercompany transferee when the director issued a notice of intent to revoke approval of the petition in September 2011. In fact, the AAO holds *de novo* review of the record, and after reviewing the entire record in its previous decision, found that the beneficiary was originally found to be a manager or executive in error when the petition was originally approved on November 18, 2010. The AAO reviews each appeal on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). Therefore, the current organizational chart for the petitioner is not relevant to determining whether the beneficiary would likely act in a managerial or executive capacity over two years previous and cannot be considered new evidence.

Lastly, on motion, the petitioner submits a listing of what appear to be various trucking companies and "balances" for each. However, the relevancy of this document is unclear. The AAO presumes this is an attempt on the part of the petitioner to establish that it has sufficient day-to-day employees, such as truck drivers, dispatchers, and maintenance crew, presumably necessary to operate a trucking business. But, given the lack of explanation regarding the relevancy of this document, the AAO finds this evidence is insufficient to grant a motion to reopen the matter.

In conclusion, the petitioner has offered no statements or evidence which could be considered "new" facts for the purposes of a motion to reopen. For the reasons discussed above, the instant motion does not meet the regulatory requirements for a motion to reopen. The regulation at 8 C.F.R. § 103.5(a)(4) states, in pertinent part: "A motion that does not meet applicable requirements shall be dismissed." As such, the petitioner's motion to reopen will be dismissed.

The AAO will now analyze whether the instant motion meets the requirements for a motion to reconsider. 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>2</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 contends that the AAO erroneously applied the law by concluding that the beneficiary's duties were not sufficient to establish the beneficiary as an executive or manager, consistent with the Act. However, counsel admits that the beneficiary's duties were vague and attempts to submit more specific description of duties on motion. As such, the AAO cannot now find that it acted in error in the previous decision, when counsel concurs that the beneficiary's provided duties were insufficient to establish him as a manager or executive consistent with the Act. Additionally, as noted above, the newly provided duties cannot be accepted on motion.

Furthermore, counsel also suggests in his brief that the AAO improperly considered the number of the employees reporting to the beneficiary in determining that the beneficiary did not qualify as a manager or executive. 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. The AAO in its previous decision did not improperly consider size alone in making a determination that the beneficiary was not primarily performing executive or managerial duties, but pointed to various factors such

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<sup>2</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.

as the insufficiently vague duties provided for the beneficiary; the prominence of non-qualifying operational duties in the beneficiary's duty description and throughout the record; the petitioner's failure to establish that the beneficiary's subordinates were managers, supervisors or professionals as necessary to establish him as a personnel manager under the Act; and certain unresolved discrepancies introduced in the beneficiary's consular interview. As such, the AAO's previous conclusion was not based strictly on size alone, but properly on the totality of the circumstances. Counsel's contention that the AAO improperly focused on the size of the organization alone is not convincing.

Lastly, the petitioner 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 Service policy. For this reason, the motion to reconsider will be dismissed.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden.

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).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. As discussed herein, the motion to reopen is summarily dismissed. The motion to reconsider is granted, but previous decisions of the director and the AAO will not be disturbed.

**ORDER:** The motions to reopen and reconsider are both dismissed.