



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JUN 20 2013** Office: CALIFORNIA 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, California 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 a motion to reopen and reconsider. The AAO will dismiss the motion to reopen and grant the motion to reconsider, but affirm the underlying AAO decision after reconsideration.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its Managing Partner and Chief Executive Officer 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 partnership doing business in the State of California. The petitioner is engaged in the operation of a retail variety store and doing business as the [REDACTED]. The beneficiary was previously granted one year as an L-1A nonimmigrant intracompany transferee in order to open a new office in the United States. The petitioner now seeks to extend the beneficiary's employment in the United States for three additional years.¹

The director denied the petition, concluding that the petitioner had failed to demonstrate that the beneficiary would be primarily employed in a managerial or executive capacity. The director noted that the beneficiary's duty description was not sufficiently specific to ascertain the beneficiary's actual day-to-day duties. The director also reasoned that the organizational structure of the petitioner was not sufficient to elevate the beneficiary to a position higher than that of a first line supervisor of non-professional employees.

The petitioner subsequently filed an appeal. The AAO dismissed the petitioner's subsequent appeal and affirmed the director's determination. The AAO concurred with the director's conclusion that the petitioner had not established that the beneficiary was primarily employed as a manager or executive as defined by the Act. The AAO also noted the vague nature of the beneficiary's provided job duties, concluding that they did not provide meaningful insight into the beneficiary's actual daily activities. Further, the AAO rejected the petitioner's attempt to submit additional duties on appeal, stating that the petitioner could not now submit evidence on appeal which was previously requested by the director and not submitted. The decision also referenced contradictions on the record regarding the petitioner's operations, including inconsistencies regarding its stated employees and the date it claimed to commence operations. In sum, after considering the totality of the evidence, the AAO found that the petitioner's organizational structure was not sufficient to elevate the beneficiary to a position higher than a first line supervisor of non-professional employees. Lastly, beyond the decision of the director, the AAO found that the petitioner had not established a qualifying relationship between the petitioner and the foreign employer. The AAO referenced the lack of evidence on the record to establish that the petitioner existed as a legal entity in the State of California.

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

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.

¹ The AAO notes that a beneficiary's stay may only be extended for up to two years as an L-1A nonimmigrant intracompany transferee. See 8 C.F.R. § 214.2(l)(15)(ii).

The regulation at 8 C.F.R. § 103.5(a)(3) states:

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 [U.S. Citizenship and Immigration Services (USCIS)] 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.

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.

First, the AAO notes that the petitioner has not submitted any new evidence, but only submits counsel's brief and resubmits previously submitted evidence.² As such, the petitioner has not met the requirements of a motion to reopen. Therefore, the motion to reopen will be dismissed. 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."

However, the AAO will grant the motion to reconsider the case since the petitioner has met the minimum requirements for a motion to reconsider. Counsel provided several reasons for reconsideration. Counsel asserts that the AAO should have been more flexible and guided by the business reality of smaller businesses, noting that the AAO's application of the law was "purely academic." Counsel contends that the beneficiary's duties are sufficiently detailed. Counsel also asserts that the beneficiary qualifies as a function manager consistent with the Act and references case law and regulation in support of this assertion. Counsel maintains that the petitioner's organization is indeed sufficient to raise the beneficiary to the level of a personnel manager, or a manager of other managerial, supervisory, or professional employees. Further, counsel asserts that the AAO erred in concluding that there was no qualifying relationship between the petitioner and foreign employer, reasoning the AAO made this determination solely on the fact that the petitioner had not established that it was incorporated or organized as a limited liability company in the State of California. Counsel submits various licenses to do business in the State of California asserting that this supports a conclusion that the petitioner is a qualifying organization.

The AAO does not find counsel's arguments regarding the beneficiary acting as a manager or executive with the petitioner sufficiently convincing to reconsider this issue, but finds counsel's assertions related to qualifying relationship adequate to meet them minimum requirements of a motion to reconsider.

² 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).

Counsel references three cases asserting that they represent precedent upon which to overturn the AAO's finding that the beneficiary was not established as acting as manager or executive consistent with the Act. First, counsel references the *Matter of Vaillencourt*, 13 I.&N. Dec 654 (Reg. Comm'r 1970) contending the case is pertinent precedent for a beneficiary to be found a manager without discussion of the levels of subordinates below a beneficiary. Counsel also references *Matter of Bocris*, 13 I.&N. 601 (Reg. Comm'r 1970) noting that in the referenced case the beneficiary was found to be an executive without analysis of the duties of the beneficiary or discussion of his supervisory responsibilities. Lastly, counsel references an unpublished case *Matter of ___*, MIA-N-150729 Miami (Reg. Comm'r So. Reg. Jan 26, 1981) asserting that in this case the beneficiary was found to be an executive based upon the direction of contractors, assuring compliance with law, and the launching of advertising campaigns, despite a lack of subordinates. In sum, counsel uses the above cases to assert that the beneficiary qualifies as a function manager managing various "essential functions" such as "financial, marketing, and business development and operations and activities of the U.S. company."

Counsel's references to the aforementioned cases are not pertinent to establishing an error on the part of the AAO in its previous decision. First, the aforementioned *Matter of Vaillencourt* involved a beneficiary who was found act in a specialized knowledge role with the foreign employer, thereby fulfilling the requirement of employment abroad for one continuous year in a managerial, executive or specialized knowledge role prior to being granted status as a manager in the United States. As such, the case has no relevancy to the current matter since the beneficiary's employment with the foreign employer is not at issue in this case, and no claim is being made that the beneficiary qualifies as a transferee holding specialized knowledge. Further, in the *Matter of Bocris*, the commissioner did indeed overturn the director's decision, but only because the commissioner concluded that the director had erred in finding that the beneficiary's employment was not meant to be permanent. Again, the permanency of the beneficiary's employment in the United States is not at issue in this matter, but whether the beneficiary is found to be acting primarily in an executive or managerial capacity. Lastly, counsel's reference to an unpublished case is not relevant. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. The AAO's interpretation of law with respect to L-1A intercompany transferees is well established and includes close analysis, consistent with the Act, of the beneficiary's duties and organizational structure to determine whether the beneficiary primarily performs executive or managerial duties. See 8 C.F.R. § 214.2(l)(3)(ii). 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 (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988). Therefore, counsel's assertion that a beneficiary should be approved without analysis of a beneficiary's job duties or his supervisory responsibilities is not convincing. Indeed, the AAO previously provided a complete appellate decision, properly analyzing the beneficiary's duties and the organizational structure of the petitioner and concluded that given the totality of the evidence, the petitioner's organizational structure was not sufficient to elevate the beneficiary to a position higher than a first line supervisor of non-professional employees. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. See *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988).

However, counsel contends on motion that the beneficiary's originally provided duties are sufficiently detailed to establish him as a manager and executive consistent with the Act, and reiterates the beneficiary's duties. First, the AAO will not accept a complete restatement of the beneficiary's duties on motion. As noted in the AAO's previous decision, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide such evidence before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on motion. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director. As such, counsel's restatement of duties will not be considered on motion, but only those duties submitted in support of the original petition.

Further, the AAO does not find counsel's assertion that the duties are sufficiently detailed persuasive. In the previous decision, the AAO provided a complete and correct analysis of the beneficiary's duties, concluding that they lacked sufficient detail. For instance, the AAO noted vague duties such as: setting up and efficiently and profitably operating the business venture in the US; designing and causing to be implemented a marketing program directed towards achieving the budgeted revenue; focusing on building up customer base in the US; obtaining growth needed to substantially increase trade inflow and outflow from/to USA within next five years; and being responsible for financial performance of the business, including profit and loss. As correctly noted in the AAO decision, the duties provided for the beneficiary provide no specifics as to how the beneficiary would carry out the general tasks and goals as a part of his daily duties. For instance, the petitioner did not provide specifics, examples, or supporting documentation regarding, how the petitioner was specifically operated the business venture in the U.S.; marketing strategies the beneficiary implemented; or specific growth the beneficiary drive, to give the referenced job duties more credibility or probative value. Indeed, there is little in the duties to distinguish them from the duties of any executive or manager with any company, and it is not possible to discern from the duty description, due to the lack of specifics, the industry within which the beneficiary will operate. Again, 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 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). As such, the total lack of specificity or examples in the provided foreign duties casts doubt on their credibility. The AAO is tasked with assessing the credibility and probative value of provided job duties; and in the previous decision, the AAO correctly found that the duties were too vague to establish that the beneficiary primarily acted in a managerial or executive capacity.

Regardless, the AAO concurs that a beneficiary may qualify as a function manager in accordance with the Act. However, counsel's contention that the beneficiary qualifies as a function manager in the present matter is not convincing. The AAO has already properly adjudicated this issue. 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). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function.

An employee who “primarily” performs the tasks necessary to produce a product or to provide services is not considered to be “primarily” employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); *see also Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm’r 1988)).

As previously noted by the AAO, the petitioner has not provided sufficient evidence that the beneficiary manages an essential function. In fact, the petitioner alternatively offers that the beneficiary has three managerial subordinates to whom he delegates duties. Therefore, counsel’s assertion that the beneficiary is also a function manager is questionable, since a function manager does not supervise or control the work of subordinate staff. Further, a function manager manages an essential function *within* an organization, not the entire organization as supported on the record. Stating, as counsel has, that the beneficiary manages the petitioner’s “core business” or other general functions such as finance, marketing, or business development is not convincing in establishing that the beneficiary manages an essential function. Lastly, in order to establish a beneficiary as a function manager, one must also establish that the beneficiary primarily performs duties related to managing this essential function, which has not been asserted by the petitioner. In fact, counsel asserts various functions of the business, not one specific essential component of the business. As such, the AAO previous conclusion that the beneficiary did not qualify as a function manager was consistent with law and is affirmed.

Furthermore, counsel also suggests in his brief that the AAO improperly considered the number of the employees 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. In its previous decision, the AAO 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 as the insufficiently vague duties provided for the beneficiary; inconsistencies in the petitioner’s stated staffing and organizational structure; and the lack of managerial, supervisory, or professional subordinates reporting to the beneficiary necessary to raise him to a level beyond that of a first-line supervisor. 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 is again unconvincing.

The last issue to be discussed is that of whether a qualifying relationship was established between the foreign employer and the petitioner. In the preceding decision, the AAO concluded that a qualifying relationship had not been established based upon the petitioner’s failure to show that the petitioner existed as a legal entity in the State of California, therefore was not a viable importing employer. Counsel references 101(a)(28) of the Act, which defines an organization as a “partnership...whether or not incorporated” and asserts that the petitioner may be a qualifying organization if not incorporated or organized as a limited liability company.

Additionally, counsel submits on motion Indian Income Tax documentation and a Form 1065 U.S. Return of Partnership Income for 2011 that reflects ownership interests in both the petitioner and the foreign employer. Although the AAO agrees that a petitioner may be considered a qualifying organization in certain circumstances if not formally incorporated or organized as a limited liability company, evidence submitted on motion reflecting the ownership interests in the petitioner and foreign employer establishes that a qualifying relationship does not exist between the entities as defined by the regulations.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

* * *

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section

101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm'r 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

Although the AAO concedes that an unincorporated partnership could be deemed a qualifying organization if one the definitions of a qualifying organization set forth above were fulfilled, the petitioner still has not established that a qualifying relationship exists between the petitioner and the foreign employer. As reflected in a Form 1065 U.S. Return of Partnership Income for 2011, the petitioner is a partnership between [REDACTED] (controlling a 10% interest) and the beneficiary (controlling a 90% interest). The foreign employer is also stated to be a partnership. Part B of the Indian Income Tax Form No.3CD submitted on motion indicates the following partners of the foreign employer and their respective profit sharing ratios: [REDACTED] (10%), [REDACTED] (30%), [REDACTED] (50%) and [REDACTED] (10%). Based on the submitted evidence, the petitioner asserts that it is an affiliate of the foreign employer. However, the petitioner and foreign employer cannot be deemed affiliates as they are not subsidiaries controlled by the same owner or legal entities controlled by the same group of individuals. Indeed, there is nothing on the record to shown any commonality in ownership or control by and between the petitioner and the foreign employer. Therefore, the AAO's conclusion that a qualifying relationship had not been established between the foreign employer and the petitioner is consistent with law, and is affirmed.

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, although the movant has met the burden necessary to reconsider whether a qualifying relationship exists between the petitioner and foreign employer, the petitioner has not met the burden necessary to reopen the matter or reconsider whether the beneficiary is established as acting as a manager or executive as defined by the Act.

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 dismissed. The motion to reconsider is granted in part, but the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion to reopen is dismissed. The motion to reconsider is granted in part, but the underlying AAO decision is affirmed and the petition remains denied.