



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAR 29 2013** Office: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker under Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

SELF REPRESENTED

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 subsequently filed an appeal. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal, affirming the director's decision to deny the petition. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's status as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Georgia corporation established in 2010, operates a convenience store in Alabama. The petitioner seeks to extend the beneficiary's employment in the position of President-Chief Executive Officer for an additional three years.

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 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 regulation at 8 C.F.R. § 103.5(a)(4) states, in pertinent part, that a motion that does not meet applicable requirements shall be dismissed.

In the instant case, the petitioner's motion does not contain any new facts and is unsupported by any statute, regulation or pertinent precedent decisions to establish that the prior decisions were based on an incorrect application of law or USCIS policy. Therefore, the motion will be dismissed in accordance with 8 C.F.R. § 103.5(a)(4).

In its decision dated July 16, 2012 dismissing the appeal, the AAO concluded that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. The AAO concluded that the petitioner's description of the beneficiary's job duties was vague, failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine, and failed to articulate the percentage of time spent on each of the beneficiary's managerial or executive duties. The AAO concluded that many of the beneficiary's stated duties included non-qualifying duties. The AAO also concluded that the petitioner failed to provide any evidence of its claimed "outsourced" accountant and five cashiers and clerks that are purportedly provided by a staffing company; specifically, the AAO noted that the petitioner provided invoices from the claimed staffing company, [REDACTED] but failed to provide a contract or other evidence to indicate that this company actually provided cashiers and clerks as claimed.

On motion, the petitioner asserts that USCIS erred in denying its application "by failing to consider depth and

scope of my business operations [sic].” Specifically, the petitioner asserts that it showed that it had four employees, including a professional operations manager and two assistant managers, as well as five contract employees through the staffing company [REDACTED]. The petitioner asserts that these contract employees “run the store” and sufficiently relieve the beneficiary from performing non-managerial duties.

Upon review of the record, the petitioner’s assertions are unpersuasive. The petitioner failed to overcome the AAO’s previous finding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity.

In the instant matter, the petitioner still failed to provide any credible documentation that it has five contract employees, who purportedly are the cashiers and clerks for the convenience store. In its decision dated July 16, 2012, the AAO found that the petitioner failed to submit evidence of a contract or other evidence to indicate that [REDACTED] actually provided cashiers and clerks as claimed. On motion, the petitioner submits no new evidence to support its claims that it utilized contract employees. Instead, the petitioner resubmits copies of the same invoices from [REDACTED] that the AAO previously found to be insufficient. These invoices, alone, are insufficient to establish that [REDACTED] actually provided five cashiers and clerks to work at the petitioner’s convenience store as claimed. Notably, according to the invoices, [REDACTED] is a “human resources consulting firm,” not a “staffing company.”² Moreover, a review of the petitioner’s bank statements from February through July of 2011 showed no debits or checks written for the amounts specified in the invoices from [REDACTED]. 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)).

The petitioner’s failure to establish its employment of contract cashiers and clerks is critical. Without any cashiers and clerks, it is not clear who will perform the non-qualifying, operational tasks inherent in operating a convenience store. Aside from the contract cashiers and clerks, the petitioner claims to employ only managerial employees, specifically, the beneficiary, an operational manager, and two assistant managers. As such, it must be assumed that the petitioner’s “managerial” employees will have to work as cashiers and clerks, are not actually employed in true “managerial” capacities notwithstanding their managerial titles, and do not actually perform all of the stated job duties as described by the petitioner. In short, while the petitioner has established that it employs four employees (including the beneficiary), the petitioner failed to establish the actual job duties for each of its employees.

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

² According to the public website of the Alabama Secretary of State, [REDACTED] is a registered business with the stated nature of business of “operate [retail] gas stations/convenience stores.” See: [REDACTED] (accessed March 18, 2013). This further undermines the petitioner’s claims that [REDACTED] is a “staffing company” that provides the cashiers and clerks to run the convenience store.

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 evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; 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. In the present matter, the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals. Instead, the record indicates that the beneficiary's subordinates perform the actual day-to-day tasks of operating the convenience store. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial or executive under the statutory definitions.

The AAO affirms its previous conclusion that the beneficiary will be involved in daily operational tasks necessary to conducting the petitioner's business. The AAO found that the job duties required of the beneficiary include non-qualifying duties such as entering into contracts with vendors, negotiating with clients and purchasers, preparing bids, and planning and directing sales programs to promote new markets. On motion, the petitioner does not dispute the AAO's findings that these duties are non-qualifying in nature, and concedes that the beneficiary "might be performing some non-qualifying managerial duties."

On motion, the petitioner fails to specify what proportion of the beneficiary's time is dedicated to non-qualifying duties. This failure of documentation is important because several of the beneficiary's daily tasks involve non-qualifying duties. For this reason, the petitioner failed to establish that the beneficiary is primarily performing qualifying duties. 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 *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

On motion, the petitioner asserts that as its operations grow and it hires additional employees, the beneficiary will be "completely relieved of non-qualifying duties." However, the petitioner's speculation of future growth and hiring is insufficient to establish eligibility at the time of filing. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

On motion, the petitioner cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, (5th Cir. 1989) and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988) to support the assertion that the statute was not limited to managers or executives who supervise a large number of persons or a large enterprise. While the petitioner is correct to interpret the statute and case law as prohibiting discrimination against small or medium-size businesses, consistent with both the statute and precedent decisions, the AAO has long

required the petitioner to establish that the beneficiary's position consists of primarily managerial or executive duties and that the petitioner will have sufficient personnel to relieve the beneficiary from performing operational and/or administrative tasks. Like the court in *National Hand Tool Corp.*, the AAO emphasizes that its holding is based on the conclusion that the beneficiary is not primarily performing managerial or executive duties, and that its decision does not rest on the size of the petitioning entity. 889 F.2d at 1472, n.5.

Finally, the AAO notes for the record the many discrepancies regarding the scope and nature of the petitioner's business operations. For instance, on motion the petitioner claims that it established operations in Ozark, Alabama by "purchasing and operating a convenience store." In the petitioner's "Executive Summary," the petitioner claimed it plans to own and operate at least three convenience stores by the end of the fourth quarter in year 2011, claiming that it has "conducted due diligence and made offers to the owners of several properties and expect to close on our initial investment soon."³ However, the petitioner submitted no evidence to establish that it actually purchased and owns the convenience store which it operates, or made any offers to purchase additional convenience stores at other locations. To the contrary, the petitioner submitted a copy of its commercial lease agreement in which it agreed to *lease* the premises upon which the convenience store is located upon for twelve months as of March 20, 2011. In addition, on Form I-129, the petitioner indicated that the nature of its business is "commercial investments in chain of fast food restaurants." The petitioner submitted no documentation regarding its investments in fast food restaurants.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591-92.

For the foregoing reasons, the AAO affirms its previous finding that the petitioner failed to establish that the beneficiary is employed in a primarily managerial or executive capacity.

III. Conclusion

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. The motion will be dismissed, the proceedings will not be reconsidered or reopened and the previous decision of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.

³ In the "Executive Summary," the petitioner also claimed that it intends to hire five store managers by the end of year 2010, hire at least ten store managers by the end of 2010, hire at least ten sales clerks by the end of 2012, and hire at least ten helpers & cashiers by the end of 2012.