



U.S. Citizenship
and Immigration
Services

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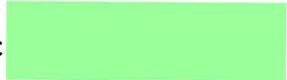


APR 30 2014

DATE:

Office: CALIFORNIA SERVICE CENTER

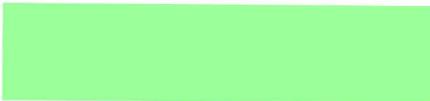
FILE:



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 (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
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The petitioner appealed the denial to the Administrative Appeals Office (AAO), and, on October 24, 2013, the AAO dismissed the appeal. The matter is now before the AAO on a motion to reopen and a motion to reconsider, in accordance with 8 C.F.R. § 103.5. The AAO will dismiss the motion.

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an 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 Kansas limited liability company, is self-described as an agriculture business specializing in the production of corn, wheat, and milo. It claims to be an affiliate of the beneficiary's foreign employer in Mexico based on common ownership by the same individual. The beneficiary was previously granted one year in L-1A classification in order to open a new office and the petitioner seeks to extend his status so that he may continue to serve as its Business Operations Director.

The director denied the petition on April 17, 2013, concluding that the petitioner failed to establish that the beneficiary will be employed in a managerial or executive capacity. In denying the petition, the director determined that based on the organizational structure described, the beneficiary would be assisting in the day-to-day non-supervisory duties of the business. The director further found that the description of the beneficiary's position did not contain sufficient specifics to demonstrate what the beneficiary does on a daily basis. With respect to the contracted workers, the director stated that the petitioner failed to provide sufficient evidence to establish the number of hours per month the beneficiary will be supervising the work of contracted services or to establish how they would otherwise relieve the beneficiary from performing non-qualifying duties. Finally, the director determined that the future hiring of employees has no bearing on whether the beneficiary's proposed duties will qualify as primarily managerial or executive.

The petitioner subsequently filed an appeal to the AAO and on October 24, 2013, the AAO dismissed the appeal concluding that the petitioner failed to establish that the beneficiary will be employed in a managerial or executive capacity. In its decision, the AAO found that the position descriptions provided by the petitioner were vague and do not convey a specific understanding of what duties the beneficiary will perform as Business Operations Director of a farm. The AAO further found that numerous duties (listed in its decision) relate to the sales and marketing of the petitioner's products and are not primarily managerial or executive in nature, particularly considering that the petitioner employs no other sales or marketing staff. The AAO further noted that the validity of the submitted job description for the beneficiary is in question as the petitioner specifically stated in a separate letter that it does not require a marketing strategy as its sole function is to provide products to [REDACTED]. The AAO also discusses the letter of [REDACTED] Ph.D. of the [REDACTED] as evidence of the beneficiary's specific duties being managerial in nature and finds that the position description provided to Professor [REDACTED] at the time the letter was written, was speculative based on the company's expected scope of operations and staffing level, and therefore, not probative in this proceeding.

The AAO further found that the beneficiary does not qualify as a personnel manager based on his supervision of an administrative assistant, the only other employee of the U.S. company at the time of filing the petition, as the position is not professional, supervisory, or managerial. The AAO references counsel's contention on appeal, that the beneficiary will be utilizing the work of contractors for services as shown on the organizational chart. However, the petitioner did not submit any additional information about the contracts or

the nature of the services provided to establish who will actually perform the daily first-line supervisory duties of the farm operations other than the beneficiary.

The petitioner subsequently filed the instant motion to reopen and motion to reconsider the AAO's decision dated October 24, 2013. The record is considered complete as presently constituted.

On motion, counsel for the petitioner addresses the AAO's findings by asserting that the beneficiary is "responsible for an essential function at a senior level with respect to the day to day operations of [the petitioner], and exercises [*sic*] discretion over the farm operations." Counsel contends that the AAO applied improper adjudication standards in finding that, because there are few employees, the beneficiary could not be working as a manager, and cites that functional managers are permitted under the law. Counsel further asserts that the beneficiary devotes more than half of his time to managerial duties. Counsel reiterates its response to the RFE and states that the beneficiary will spend 80% of his time on executive duties and 20% of his time on non-executive duties. Counsel lists the following duties as executive: conceptualize and implement strategic goals for the company; direct daily operations; review financial statements, sales reports, and performance data; create and monitor a budget; regularly monitor income and expenses; create and monitor procedures and controls for receiving and disbursing money; maintain records of paperwork; prepare all paperwork relating to business negotiations and contracts policies; compile tax reports relating to farm expenses; work with the company accountant to prepare monthly and yearly reports; develop and implement employee conduct handbook; interview, hire, fire, train, and evaluate the working progress of the new employees; set pay scales; connect with buyers and other interested parties; finalize purchasing agreements; determine crops to be sold, set prices and credit terms.

Counsel adds that the beneficiary has full discretionary authority, including the ability to make legal and financial decisions and to hire and fire employees. Counsel contends that several of the duties listed establish that the beneficiary manages a department of the organization and vests him with unlimited discretion, such as "setting price and credit terms; directing the marketing function for the company's products; [and] locate, acquire and enter into purchase agreements." Counsel also contends that the beneficiary's authority to exercise discretion over day-to-day operations is obvious from the job description. Counsel cites examples of the discretionary authority such as: analyze company budgets and allocate operating budgets; review sales activity and sales records to determine changes in sales strategies; direct and coordinate activities of IJH Farm Inc.; and review financial statements, sales and activity reports to measure productivity and goal achievement. Counsel closes by reiterating that the beneficiary is a high level functional manager and directs the operations of the farm.

On motion, counsel for the petitioner submits the following evidence:

- A document from [REDACTED] LLC listing 2013 Corn Silage from September 4, 2013 to September 15, 2013. This document does not clearly indicate what it represents. There are dollar amounts listed and a parenthetical reference to "farmer paying harvesting charges" but no indication that it relates to the petitioning U.S. company.
- Six handwritten Service Contracts between the petitioner and [REDACTED] for different services, all dated March 27, 2013.

- Two agreements between the petitioner and [REDACTED] LLC, where the petitioner agrees to purchase a specific product from [REDACTED] LLC for a set price. Both agreements are dated May 1, 2013 and are for different listed products.
- An Electric Service Agreement between the petitioner and [REDACTED], Inc. for electric power and energy needed for an underground power line to a new home, with a handwritten completion date of April 22, 2013 on the top left corner.
- A document described at the bottom as a contract where [REDACTED] LLC provides the petitioner with ground and aerial application on corn grounds, dated May 1, 2013.
- A sales contract, dated May 1, 2013, where the petitioner agrees to sell [REDACTED] LLC a set amount of corn grain between October 1, 2013 and November 30, 2013.
- A service contract between the petitioner and [REDACTED] dated October 4, 2012, where [REDACTED] assists the petitioner with decisions involving crop selection and other agronomic recommendations.

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.

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 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."

The instant motion consists of a statement by the petitioner's counsel and additional evidence listed above. First, counsel for the petitioner addresses the beneficiary's role in a position of a primarily managerial or executive capacity. Counsel relists the same vague list of duties for the beneficiary and contends that they are executive duties and that the beneficiary devotes 80% of his time to them. Counsel does not elaborate on any of the duties or break down further the beneficiary's time devoted to completing the listed tasks. Counsel simply states that the beneficiary's managerial and executive role at the U.S. company is obvious from the job description provided. 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 petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *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). Furthermore, the unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Here, counsel for the petitioner makes an unsupported claim, on motion, that the beneficiary manages an essential function at a senior level with respect to the day-to-day operations of the petitioner. Counsel contends that the beneficiary is a functional manager at the U.S. company and holds a senior level position. However, the petitioner failed to provide a breakdown of the beneficiary's job duties to support such a claim and failed to demonstrate that the beneficiary will allocate at least 51% of his time to managing an essential function of the U.S. company. In fact, neither counsel nor the petitioner claimed that the beneficiary is a function manager at the time of filing the petition or in response to the RFE. On appeal or motion, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). 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).

Counsel also addresses the AAO's focus on the petitioner's lack of employees and references an AAO non-precedent decision where it was found that a sole employee was an executive. The reference made by counsel is not relevant in this case as the AAO found that the beneficiary in this matter primarily performs non-qualifying duties and the petitioner lacks subordinate staff to relieve the beneficiary him from performing such non-qualifying duties. In this instance, the lack of employees hinders the beneficiary from primarily performing the duties of an executive or manager. 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).

Counsel for the petitioner further contends that, although the petitioner does not have additional employees to directly assist the beneficiary, it has hired contracted employees to carry out harvesting of the agricultural farm. The petitioner submits new evidence on motion to demonstrate that it has put service agreements in place with other agricultural companies to carry out this non-qualifying work. However, all but one of the service contracts and agreements submitted were put in place after March 2013, at least two months after filing the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

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 issued on October 24, 2013. Here, the petitioner has not adequately addressed the deficiencies and inconsistencies presented in the AAO's dismissal of the appeal. Therefore, the record on motion does not overcome those deficiencies or the AAO's finding that the petitioner failed to establish that the beneficiary will be employed in a qualifying managerial or executive capacity or as a function manager.

In addition, the regulation at 8 C.F.R. §103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." The petitioner's motion does not contain this statement. The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion does not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

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. Accordingly, the AAO's decision will be affirmed.

ORDER: The AAO's decision dated October 24, 2013 is affirmed.