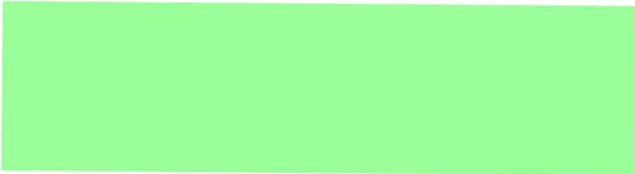


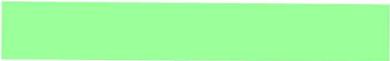


U.S. Citizenship
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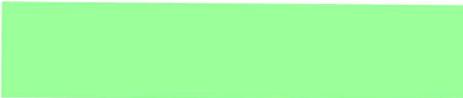
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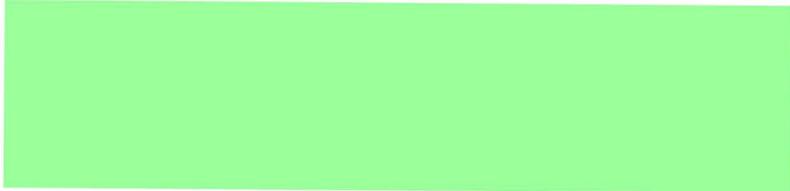


IN RE: Petitioner:
Beneficiary:



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:



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, Vermont Service Center, denied the nonimmigrant visa petition. The director dismissed the petitioner's motion to reopen the decision. The petitioner subsequently filed an appeal to the Administrative Appeals Office (AAO), which was dismissed. The matter is now before the AAO on a motion to reopen. The AAO will grant the motion and affirm its previous decision. The petition will remain denied.

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary 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 New York corporation, is self-described as a company engaged in investment and restaurant operations. The petitioner claims to be an affiliate of [REDACTED] located in India. The beneficiary was previously granted one year in L-1A status in order to open a new office in the United States and the petitioner now seeks to extend the beneficiary's status for three additional years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying executive or managerial capacity. The director also found that the petitioner had not provided sufficient evidence of its financial status and had not established that it had secured physical premises for its business. The director dismissed the petitioner's subsequent motion to reopen.

The petitioner subsequently filed an appeal. The AAO dismissed the appeal, concluding that the petitioner: (1) failed to establish that the beneficiary would be employed in a managerial or executive capacity; and (2) failed to establish that it had been doing business for the previous year, as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The AAO further found that the petitioner submitted insufficient evidence of its financial status to establish that it was doing business at the time of filing. The AAO withdrew the director's finding that the petitioner did not maintain physical premises for its business.

The matter is now before the AAO again on a motion to reopen. On motion, counsel for the petitioner asserts that the AAO's rationale for dismissing the appeal was contrary to law. Counsel states that the dismissal of the appeal was based primarily on a "perceived lack of probative evidence on certain key points," and requests consideration of additional evidence submitted on motion.

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."

In support of the motion, the petitioner submits additional evidence, the majority of which pertains to the petitioner's acquisition and operation of two Subway franchises located in Texas. Counsel explains the significance of the submitted evidence and asserts that the petitioner has established that it purchased and has operated the Subway stores since July 2011. With respect to the AAO's finding that the petitioner failed to establish that it was doing business during the year preceding the filing of the petition, the petitioner explains that it reviewed various potential investment opportunities between September 2010 and June 2011, including motels in Montana and North Dakota, and a liquor store in Mississippi. The petitioner submits a statement from the beneficiary who explains that the asking price was too high for the motel properties, while the liquor store investment was not possible because the petitioner was unable to obtain a liquor license based on "visa limitations." With respect to the beneficiary's employment capacity, counsel asserts that the evidence establishes that the beneficiary will be employed in an executive capacity and will not be involved in the day-to-day operations of either Subway store.

Upon review of the evidence submitted on motion, the petitioner has not overcome the grounds for denial of the petition and dismissal of the petitioner's appeal.

I. THE LAW

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (IV) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- I A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

II. MANAGERIAL OR EXECUTIVE CAPACITY

The first issue to be addressed is whether the petitioner has established that it will employ the beneficiary in a qualifying managerial or executive capacity.

In dismissing the petitioner's appeal, the AAO found that the petitioner submitted an overly broad description of the beneficiary's duties that failed to convey what she would actually do on a day-to-day basis. Further, the AAO found that the submitted duty description included duties which could not be considered managerial or executive in nature, such as direct involvement with vendor relationships, marketing, supply issues, and hiring low-level staff. The AAO acknowledged the petitioner's claim that the beneficiary would supervise two store managers with their own subordinates, but emphasized that the petitioner failed to provide adequate descriptions for the

subordinate managers, and thus did not establish that they would relieve the beneficiary from performing non-qualifying functions associated with the day-to-day operations of the company's two [REDACTED] stores.

On motion, counsel for the petitioner asserts that "the Beneficiary's primary activities revolve around the financial responsibilities associated with [the petitioner's] operations, including, without limitation, searching for additional investment opportunities." Counsel emphasizes that the beneficiary is the majority owner of the business and therefore receives only general supervision and exercises discretion in the operation of the business. Counsel states that the beneficiary's signature on the petitioner's lease and purchase agreements provide evidence of her executive decision-making authority.

In addition, the petitioner submits the following statement of the beneficiary's "daily duties":

- [The beneficiary] has many daily duties, especially if she owns more than one franchise.
- These are just a few of your "sub-roles", depending on the type of situation.
- Duties include employee duties, inventory, ordering and accounting.
- It may even include working behind the counter and customer service though most [REDACTED] stores have managers and plenty of employees.
- She must be involved in the daily workings of her store(s); she must be the jack-of-all-trades and know how to do everyone's job.
- She must have good self-control when dealing with [REDACTED] customer complaints.
- At some point during the day, [the beneficiary] runs the daily reports and review[s] sales.
- She may need to forward sales reports to the [REDACTED] franchise company, depending on the set up . . .
- She checks inventory against cash register totals. This helps her keep track of what is in stock and when she should order more.
- At least once a week, she should be taking a thorough count of what is in her inventory (for food, plastic goods, paper goods), though she will probably give it a cursory look every day, to be sure she does not run out of product.
- [The beneficiary] must also perform human resources duties, such as payroll and benefits.
- She is in charge of hiring and firing personnel.
- She gets the payroll ready, and either sends it to a bulk payroll company or cuts the check himself [*sic*].
- This is generally a once-a-week duty, but she may check time cards on a daily basis.
- She will also set up employee benefits such as health insurance.
- This may not be on a daily basis, unless she has many stores with many people coming and going, but it must still be done during the course of the day, when needed. She must hold employee meetings, sometimes a weekly group meeting, or, if needed, on a one-to-one basis.
- [The beneficiary] does not usually work behind the counter, but is expected to perform those duties if she is short-handed that day.
- She performs the bulk of her customer service duties on days when she works behind the counter, but she may also deal with customer complaints and other customer issues on a daily basis.
- [The beneficiary] refer certain customer problems or customer input . . .
- It is essential to be able to organize all of your responsibilities so that everything gets done accurately and in a timely manner.

The petitioner indicates that the beneficiary spends two days per week working at each [REDACTED] location, while she spends her remaining workday looking for potential new [REDACTED] locations or visiting one of the two stores. In addition, the petitioner indicated that the beneficiary performs the following duties "regularly": running payroll bi-weekly; monthly meeting with store managers and employees; attending quarterly [REDACTED] franchise development owners' meetings; tracking monthly bills; contacts with vendors; tracking cash and credit sales with the stores and the bank; supervising staff to ensure that food safety guidelines are met; store safety and security; maintaining business records store-by-store and day-by-day as outlined in the [REDACTED] Operation Manual; planning and setting business goals; resolving in-store issues; tracking local and national marketing initiatives; recruiting and terminating staff; and identifying and contacting prospective customers to promote sales and to plan special events and promotions

Upon review of counsel's assertions and the additional position description submitted on motion, the petitioner has not overcome the AAO's prior determination. The evidence of record does not establish that the beneficiary would be employed in a qualifying managerial or executive capacity as those terms are defined at sections 101(a)(44)(A) and (B) of the Act.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). Prior to the denial of the petition, the petitioner submitted only a vague description of the duties the beneficiary performed during the first year of operations, and a broad overview of the duties she would perform under the extended petition. For example, in response to the director's request for a comprehensive description of the beneficiary's proposed duties, the petitioner stated that the beneficiary "oversees at an executive level all areas of the business, from the hiring and firing a staff of eleven people in the United States . . . while maintaining a successful operation in all respects." The petitioner further asserted that the beneficiary is "in charge of the company's profitability and long range growth," and for seeking new business opportunities. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

On motion, the petitioner has submitted a description of the beneficiary's actual daily tasks which reflects that her day-to-day duties are primarily non-qualifying in nature. Specifically, the newly-submitted job description indicates that the beneficiary is expected to perform routine daily inventory and accounting tasks, order supplies, work behind the counter as necessary, deal with customer complaints, run daily sales reports, prepare the payroll, check time cards, and set up employee benefits. The statement of duties submitted on motion indicates that the beneficiary's actual duties include many administrative and operational functions that cannot be classified as managerial or executive in nature. Further, the job description is inconsistent with the petitioner's previous claims that the beneficiary primarily oversees the company's main functions, rather than being directly involved in the day-to-day operations of the stores.

The petitioner's description of the duties the beneficiary performs "regularly" also contains a number of non-managerial duties, including tracking monthly bills, "contact with vendors," "tracking cash and credit sales," overseeing staff to ensure compliance with food safety guidelines, maintaining business records according to

Operational Manual, focusing on in-store issues, supporting marketing initiatives, and planning and promoting special events and promotions. While the petitioner indicates that the beneficiary "plans and sets business goals," meets with store managers, and sometimes spends one day per week looking for potential new businesses, it has not established based on this detailed description of duties that the beneficiary performs primarily managerial or executive functions. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. 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).

Counsel emphasizes that the petitioner established that it had eight other employees at the time of filing, including a store manager and three subordinates in each store. The statement submitted on appeal reveals that there is some overlap between the position descriptions provided for the beneficiary and for the store manager position, possibly reflecting that the beneficiary performs this role on the managers' days off, given that the stores are likely open seven days per week. However, the newly submitted position description also indicates that the beneficiary is solely responsible for a number of non-qualifying duties, none of which are delegated to subordinate store personnel, and may even be responsible for working behind the counter as necessary. The petitioner did not establish that the beneficiary spends a significant portion of her time engaged in the supervision of subordinate supervisors, rather than to the performance of the routine functions of the store.

Finally, counsel emphasizes the beneficiary's executive-level authority as the majority owner of the petitioning company. The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The beneficiary may exercise the appropriate level of authority as the petitioner's senior manager and majority owner; however, the petitioner must still establish that her actual duties are primarily managerial or executive in nature. For the reasons discussed above, the petitioner has not met this burden. Accordingly, the petition will remain denied.

III. DOING BUSINESS

The next issue to be addressed is whether the petitioner has established that it was doing business for the previous year, as required by 8 C.F.R. § 214.2(l)(14)(ii)(B).

Doing business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States. 8 C.F.R. § 214.2(l)(1)(ii)(H).

The petitioner's new office petition was approved for the period August 31, 2010 until August 30, 2011. The record reflects that the petitioner was incorporated in New York and originally planned to develop a textiles business in line with the operations of its foreign affiliate.

The petitioner indicated in response to the director's request for evidence that the beneficiary pursued opportunities in the textile business in New York "for some time" but did not hire additional employees. It further stated that most of the company's activities while in New York "involved locating a suitable location and business to maximize the [REDACTED] investment and the beneficiary's managerial skills." Finally, the petitioner explained that it became evident that it could not establish a textile business in New York City in the current economic environment, so it decided to invest in [REDACTED], which has a "pre-established model."

The petitioner's first documented attempt to conduct business as reflected in the record occurred in July 2011 when the petitioner claims that it purchased two [REDACTED] sandwich shops. However, as noted above, 8 C.F.R. § 214.2(l)(14)(ii) requires specific evidence to be submitted when requesting an extension of a new office petition. In pertinent part, this regulation requires that a new Form I-129, be accompanied by evidence that the United States entity has been doing business for the previous year and evidence of the financial status of the United States operation. The petitioner provided no evidence that it conducted any business in a regular, systematic and continuous way for the first ten or more months of the new office petition. For this reason, alone the AAO determined that the petition must be denied.

On motion, the petitioner submits a newly prepared summary of its business activities during the first year of operation. The petitioner now claims that it began reviewing a number of potential investment opportunities between September 2010 and June 2011, when it located the [REDACTED] investment opportunity in Texas. Specifically, the petitioner indicates that the company considered investing in hotel/motel properties in Montana and North Dakota, as well as a liquor store located in Mississippi. The petitioner submits financial information related to each of these businesses.

Upon review, the new evidence does not establish that the petitioner was doing business during the year preceding the filing of the petition.

When a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.* After one year, USCIS will extend the validity of the new office petition only if the entity demonstrates that it has been doing business in a regular, systematic, and continuous manner "for the previous year." 8 C.F.R. § 214.2(l)(14)(ii)(B).

Upon review of the current petition, it is apparent that the petitioner was not prepared to commence doing business upon approval of its initial new office petition. The petitioner consistently asserts that it established the company in order to operate a textile business in New York. While the petitioner previously indicated that it pursued this avenue of business for "some time," there is no documentary evidence to establish that the petitioner ever progressed beyond paying rent for a small office in New York.

Further, the new claims and evidence submitted on motion raise questions as to whether the petitioner pursued its textile business as planned. The beneficiary was granted L-1A status on August 31, 2010 and the petitioner now claims that the company immediately began exploring investment opportunities in other states beginning in September 2010. Nevertheless, the petitioner's claimed attempts to locate potential investment activities do not constitute "doing business" as that term is defined at 8 C.F.R. § 214.2(l)(1)(ii)(G). A textile company would be expected to have identified potential customers and be ready to import and sell clothing, and a company that intends to invest in an existing business would reasonably be expected to have secured or at least identified and documented its planned investment at the time of filing a new office petition. In this case, the petitioner took at least 10 months to commence any qualifying business activities. The petitioner has not submitted evidence on motion to overcome the AAO's finding.

In addition, the AAO determined on appeal that the petitioner provided insufficient evidence of its current financial status and business operations to establish that it had actually acquired the two [REDACTED] franchises in July 2011, as claimed. The petitioner has submitted additional evidence in support of its claimed ownership and operation of the [REDACTED] franchises on motion; however, as the petitioner cannot establish that it was doing business for the previous year, the petition cannot be approved. Even if the petitioner established that it was doing business at the time of filing, it could not meet the regulatory requirements for a new office extension at 8 C.F.R. § 214.2(l)(14)(ii)(B). Accordingly the AAO's prior decision will be affirmed and the petition will remain denied.

IV. CONCLUSION

The AAO's previous decision will be affirmed and the petition will remain denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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 petitioner has not met that burden.

ORDER: The motion is granted. The AAO's decision dated April 29, 2013 is affirmed and the petition remains denied.