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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: FEB 24 2014 Office: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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.

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa and a motion to reopen and reconsider. The petitioner filed an appeal with the Administrative Appeals Office (AAO), which the AAO dismissed. The matter is now before the AAO on a second motion to reopen and reconsider. The motion will be granted and the AAO's prior decision will be affirmed.

The petitioner seeks to extend the employment of the beneficiary as its Director/President as an L-1A nonimmigrant intracompany transferee pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L). The petitioner, a Texas corporation, claims to engage in the business of "Retail Gift Item, Cell phone accessories & Dryclean Pickup Point [*sic*]." It claims to employ nine employees and have an estimated gross annual income of \$485,000 for 2008. The beneficiary was initially granted a one-year period of stay in the United States in L-1A status in order to open a new office, and the petitioner seeks to extend the beneficiary's stay for an additional three years.

The director denied the petition, concluding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity.

The AAO dismissed the petitioner's appeal. In dismissing the appeal, the AAO found that the petitioner's description of the beneficiary's duties was vague and lacked adequate detail or explanation of the beneficiary's activities in the course of his daily routine. The AAO also found that the record contained several inconsistencies regarding the scope and nature of the petitioner's business activities, particularly the number of, locations, and types of businesses the petitioner engages in, as well as regarding the petitioner's personnel structure at each of its locations. Finally, the AAO found that the petitioner failed to meet the evidentiary requirements at 8 C.F.R. § 214.2(l)(14)(ii)(B) and (E) and determined that the petition could not be approved for these additional reasons.

Counsel for the petitioner filed a subsequent motion to reopen and reconsider. The AAO dismissed the petitioner's motion to reopen and reconsider pursuant to the regulation at 8 C.F.R. § 103.5(a)(4), based on a finding that the petitioner failed to satisfy the applicable filing requirements for either a motion to reopen or a motion to reconsider.

The matter is now before the AAO on a motion to reopen and reconsider. On motion, counsel objects to the dictionary definition of "new" used in the AAO's decision and asserts "nowhere in the instructions, statutes or regulations is there language requiring that the evidence [submitted on motion] must be something that could have been discovered [or] presented before." Counsel submits dictionary definitions of the words "plain" and "new" in support of the motion. Counsel asserts that the previous motion should have been granted and that the petitioner has established by a preponderance of the evidence that all requirements for the requested nonimmigrant visa classification have been met. The AAO will grant the motion in order to consider the evidence submitted in support of the previous motion.

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 specific evidentiary requirements for extending a petition involving a "new office" are set forth at 8 C.F.R. § 214.2(I)(14)(ii).

As a preliminary matter, counsel for the petitioner states that the director used the incorrect standard of proof requiring that the beneficiary "clearly show" eligibility for the benefit sought. The AAO notes that the director used the term "clearly show" in the limited capacity related to the nature of the staff member's positions. The director's decision, however, was not based upon this single application of a different standard, but upon the preponderance of the evidence.

The sole issue left for consideration is whether the petitioner established that it will employ the beneficiary in a managerial or executive capacity.

In dismissing the appeal, the AAO found that the petitioner's description of the beneficiary's duties was vague and lacked adequate detail or explanation of the beneficiary's activities in the course of his daily routine. The AAO also found that the record contained several inconsistencies regarding the scope and nature of the petitioner's business activities, particularly the number of, locations, and types of businesses the petitioner engages in, as well as regarding the petitioner's personnel structure at each of its locations. Finally, the AAO found that the petitioner failed to meet the evidentiary requirements at 8 C.F.R. § 214.2(I)(14)(ii)(B) and (E).

In support of the previous motion, the petitioner submitted a "sample of invoices" purportedly generated by the company's cell phone division and the petitioner's 2008 income statement in order to demonstrate that the company has been doing business for the previous year, as required by 8 C.F.R. § 214.2(I)(14)(ii)(B). The petitioner also provided a sworn affidavit from the beneficiary explaining his job duties, and a copy of a previously submitted list of the petitioner's employees and their job responsibilities.

As a preliminary matter, the petitioner's submission of the beneficiary's job duties including the percentage of time spent on each duty will not be considered on motion. The petitioner was put on notice of this required evidence and given a reasonable opportunity to provide it for the record 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 Obaighena*, 19 I&N Dec. 533 (BIA 1988). Further, the description of the beneficiary's subordinates was previously submitted in response to the director's request for evidence and considered on appeal and will not be reconsidered at this time.

As evidence that the petitioner was doing business in 2008, the petitioner submitted a number of invoices and an income statement for 2008. The invoices appear to have a number of inconsistencies, including missing invoice numbers, account numbers, and order numbers. The invoices are addressed to a work location at [REDACTED]. The petitioner previously submitted a lease for retail space in a shopping center at [REDACTED]. While the address on the invoice is also listed as the beneficiary's work location on the Form I-129, the petitioner has failed to show a lease or otherwise explain how this work location functions in conjunction with the retail space shown on the lease submitted with the initial petition. 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 submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Furthermore, the income statement is unsigned and unaudited. The petitioner has not provided any other documentation to verify the income statement such as 2008 Federal or State corporate income tax returns, evidence of sales to customers, business licenses, rent payments, bank statements, company advertising materials, or information to explain the discrepancies in work locations described above. The lack of this verifying information was also noted in the AAO's prior decision. For these reasons, the petitioner has failed to overcome the AAO's determination that the petitioner: (1) failed to establish that it had been doing business for the previous year; and (2) failed to provide sufficient evidence of its financial status. See 8 C.F.R. § 214.2(l)(3)(14)(ii)(B) and (E).

The AAO noted in its decision on appeal a number of inconsistencies regarding the number of work locations and business that the petitioner would operate. First, as described above, the petitioner's stated that the beneficiary would work at [REDACTED] but failed to describe what type of business operates at this location. The petitioner also submitted a lease for retail space in a shopping center at [REDACTED]. In response to the director's RFE, the petitioner stated that it is operating in four states. On appeal, the petitioner appeared to have abandoned its claim of four separate locations and indicated that it "owns and operates two retail outlets selling a variety of product."

On motion, counsel for the petitioner claims that the reference to the offices in four states was his fault as he "was assisting in articulating the job description" and "got this case confused with another one." 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). Furthermore, the record still lacks any evidence clarifying the nature of the beneficiary's worksite as stated on the Form I-129. This deficiency was noted in the AAO's decision on appeal.

Finally, the AAO notes that the petitioner failed to provide evidence that it employs workers who are available to perform the day-to-day duties of the organization. The petitioner previously provided information regarding payments to six additional individuals made during 2008 and described these individuals as the "lower echelon" of the workforce. The AAO noted, however, that the petitioner failed to provide position descriptions, job titles, or duties for these employees. Furthermore, the AAO noted that these employees appeared to be receiving higher pay than the petitioner's managers.

On motion to the AAO, counsel for the petitioner claims that these employees were not mentioned prior to the initial adjudication of the petition because they are not "employees" per se. Neither counsel nor the petitioner has provided job descriptions, contracts, or other evidence of the work these individuals performed for the petitioner or how the contracted individuals' work would be directed and controlled by the beneficiary or his alleged subordinate managers. Again, 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). 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)).

For these reasons, the petitioner has not overcome the AAO's finding that the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or executive capacity.

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 been met. Accordingly, the AAO will affirm its previous decision and the petition will remain denied.

ORDER: The AAO's previous decision is affirmed. The petition is denied.