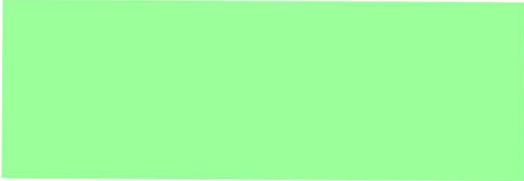




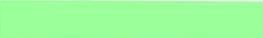
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAR 07 2014**

OFFICE: VERMONT 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, Vermont Service Center ("the director"), denied the petition for a nonimmigrant visa. The petitioner subsequently filed an appeal to the Administrative Appeals Office (AAO), which was dismissed. The matter is now before the AAO again on a motion to reopen and a motion to reconsider. The motion to reopen will be granted and the previous decision of the AAO will be affirmed. The petition will remain denied.

The petitioner, a North Carolina limited liability company established in 2013, states that it intends to operate a cosmetics distribution business. It claims to be a subsidiary of [REDACTED] located in Israel. The petitioner seeks to employ the beneficiary as the Director of U.S. Operations of its new office for a period of one year.

The director denied the petition, concluding that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity within one year of the approval of the new office petition.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. The AAO dismissed the appeal, and affirmed the director's decision to deny the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The AAO also found that the petitioner failed to establish that the beneficiary's foreign employer had employed the beneficiary in a managerial or executive position for one of the three years prior to his application for admission to the United States.

The petitioner subsequently filed the instant motion to reopen. On motion, counsel for the petitioner asserts that AAO erred in its decision and that the "shortcomings noted by the AAO in its determination have been remedied" and therefore the petition should be approved.

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 the following: (1) a statement from the petitioner's attorney; (2) a summary of the beneficiary's job duties in the United States and with the foreign employer; (3) evidence of the petitioner's employment with the foreign employer in December of 2011; (4) a letter regarding the beneficiary's employment date with the foreign employer; (5) the petitioner's organizational chart; and (6) a copy of the petitioner's cosmetics license for 2013.

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)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

II. The ISSUES ON MOTION

A. Managerial or Executive Capacity for the Petitioner

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 he would actually do on a day-to-day basis. The AAO found that the duties submitted in response to the RFE contained non-qualifying duties and the petitioner failed to provide the percentage of time that the beneficiary would spend on each of the listed tasks. The description, therefore, was unclear as to whether the beneficiary would be spending a majority of his time on qualifying duties. On appeal, the petitioner claimed that the beneficiary's managerial duties comprised three main areas including financial, company expansion, and execution of contracts. The petitioner, however, failed to show that it had anyone on staff or plans to employ anyone to perform the financial or marketing work associated with the claimed managerial duties.

Furthermore, the petitioner failed to provide the requested job descriptions, educational levels, or salaries for the beneficiary's subordinate employees. Pursuant to the petitioner's organizational chart, the petitioner had no plans to hire office support staff to assist the beneficiary with the oversight and administration of the company. Moreover, the petitioner indicated that the beneficiary would work at its kiosk location. The AAO found that without the requested position descriptions for the subordinates it is not clear how the duties of the beneficiary as manager of the U.S. Operations and the kiosk manager would differ.

On motion, counsel for the petitioner provides the requested job duties for the beneficiary's subordinates as well as the percentage breakdown of time the beneficiary would spend on each of his duties. Counsel asserts that the organizational hierarchy previously provided showed the job titles of the beneficiary's subordinates which in turn provided an "understanding" as to the nature of each individual's position. However, upon review of the descriptions of duties for the kiosk manager and the nail technicians provided on motion, the petitioner has not provided probative evidence showing that it has anyone on staff to perform the financial or marketing work associated with the beneficiary's claimed managerial duties. In addition, upon review of the broad descriptions of job duties of the beneficiary's subordinates and the beneficiary including the percentage of time the beneficiary will spend on his duties, the record does not include sufficient probative evidence establishing how the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

Upon review of counsel's assertions and the position descriptions 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. For the reasons discussed above, the petitioner has not met this burden. Accordingly, the petition will remain denied.

B. Employment Abroad in a Managerial or Executive Capacity

The next issue to be addressed is whether the petitioner has established that the foreign entity employed the beneficiary in a qualifying managerial or executive position, as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

In dismissing the petitioner's appeal, the AAO found that the petitioner's description of the beneficiary's duties contained non-qualifying duties and the petitioner failed to provide the percentage of time that the beneficiary would spend on each of the listed tasks. The description, therefore, was unclear as to whether the beneficiary spent a majority of his time on qualifying duties.

Furthermore, the petitioner failed to establish that the beneficiary had the required one year of full-time employment with the foreign employer. The AAO noted that the beneficiary had exactly twelve months of employment prior to his last admission into the United States on January 9, 2013. The record also shows that the beneficiary spent time in the United States in September and October of 2012, calling into question whether the beneficiary had one full year of employment with the foreign employer.

On motion, counsel for the petitioner provides the beneficiary's job duties for the foreign employer and the proportion of time the beneficiary spent on the job duties. The duties provided on motion, however, fail to establish that the beneficiary spent the majority of his time on managerial or executive duties for the foreign

employer. Every one of the sub-categories listed under the broad headings included as the beneficiary's job duties for the foreign employer contain non-qualifying duties such as developing account relationships, monitoring competition and developing action plans, negotiating supplier's contracts, researching new markets and products, developing and managing sales plans and budgets, serving as a representative in industry trade associations, managing relationships, and developing written account plans. As such, the petitioner's job description provided on motion fails to overcome the finding that the beneficiary did not function in a managerial or executive capacity in his position with the foreign employer.

The petitioner on motion now claims that the beneficiary began his employment with the foreign employer in December 2011, rather than January 2012, the date the petitioner initially identified as the beneficiary's start date in its letters in support of the petition. However, 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). Moreover it is not clear from the foreign employer's letter submitted on motion that the beneficiary's work in December 2011 in a probationary period included primarily managerial or executive duties.

Upon review of the totality of the record, the petitioner has not established that the beneficiary was employed by the foreign employer in a qualifying managerial or executive position for one year prior to his last application for admission to the United States. For this additional reason, the petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not sustained that burden.

ORDER: The AAO's decision dated November 25, 2013 is affirmed. The petition is denied.