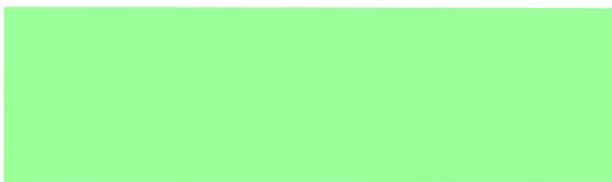




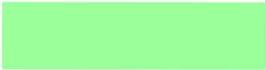
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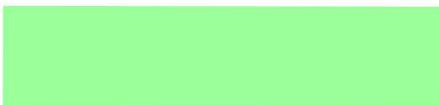
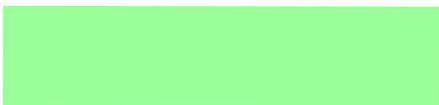
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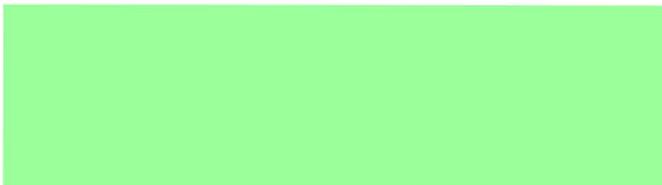
OFFICE: VERMONT SERVICE CENTER

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:



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 petitioner subsequently filed an appeal to the Administrative Appeals Office (AAO). The AAO dismissed the petitioner's appeal and affirmed its decision on motion. The matter is now before the AAO again on a second motion to reopen. The motion will be granted and the AAO will 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 engaging 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 petitioner subsequently filed a motion to reopen. The AAO granted the motion and affirmed its prior decision, determining that the petitioner had not overcome the grounds for dismissal of the appeal. The matter is now before the AAO on a second motion to reopen.

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 signed statement by the beneficiary listing the principal duties she performs in her role as senior manager; (2) a research paper on the textile and fabrication market in the United States prepared in conjunction with its initial new office petition; (3) letters from U.S. textile distributors stating the sale of the petitioner's products would not go forward; (4) a hotel broker agreement signed by the petitioner in 2010; (5) a financing proposal for the purchase of a motel the petitioner "was seriously considering" dated February 27, 2011; (6) a share certificate issuing the beneficiary a five percent interest in [REDACTED] LLC dated August 19, 2013 and copies of checks for payment of equity interest; (7) the beneficiary's job description for the position of Operations Manager for [REDACTED] the management company for a hotel owned by [REDACTED] LLC; and (8) the petitioner's IRS Form 940: Employer's Annual Federal Unemployment Return for 2013 and IRS Form 941, Employer's Quarterly Federal Tax Return, for the first three quarters of 2013.

Counsel explains the significance of the submitted evidence and asserts that such evidence is sufficient to overcome the AAO's findings on appeal. With respect to the beneficiary's employment capacity, the petitioner submits a new list of job duties for the beneficiary. Counsel states that the job duties show that the beneficiary supervises the managers who perform the actual administrative functions of the business. Counsel states that the prior list of job duties was intended to "show the scope of involvement in the business" and not the beneficiary's actual day-to-day duties.

With respect to USCIS' finding that the petitioner failed to establish that it was doing business during the year preceding the filing of the petition, the counsel states that the petitioner's activities during the relevant time period constitute "doing business" as the petitioner was "attempting to continue its textile business" or enter into an alternative business during the year following the initial new office approval. Counsel explains that the remaining evidence submitted on motion is intended to establish the petitioner's financial condition and business operation.

Upon review of the evidence submitted on motion, and for the reasons discussed herein, 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:

- (A) 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;
- (C) 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.

I. MANAGERIAL OR EXECUTIVE CAPACITY

The first issue to be addressed is whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity as those terms are defined at section 101(a)(44)(A) and (B) of the Act.

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 position 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 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 Subway stores.

In support of the previous motion, counsel for the petitioner asserted 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 emphasized 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 observed that the beneficiary's signature on the petitioner's lease and purchase agreements is evidence of her executive decision-making authority. In addition, the petitioner submitted a detailed statement of the beneficiary's "daily duties."

In support of the current motion to reopen, the petitioner submits a new list of job duties for the beneficiary. Counsel states that the prior list detailed "every activity that she might be involved in . . . regardless of whether the duty was part of her standard regular activities as a manager." Regarding the AAO's finding that a number of the beneficiary's duties were non-managerial, counsel stated that the list "was submitted to show the scope of involvement of the business."

The beneficiary's revised list of duties includes the following: supervises payroll run (10%); meeting with store manager and employees (10%); reviews monthly expenses (10%); contact with vendors (5%); supervises managers in making sure food safety guidelines are followed (5%); reviews maintenance and store safety procedures (1%); supervises maintenance of business records to increase sales (3%); review daily reports and review sales (5%); check inventory reports against cash register totals (1%); reviews inventory (2%); plans and sets business goals (10%); perform human recourse duties including payroll and benefits (10%); track local and national marketing initiatives (2%).

Upon review of counsel's assertions and the revised 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.).

Subsequent to the denial of the petition, the petitioner submitted a description of the beneficiary's actual daily tasks which reflected that her day-to-day duties are primarily non-qualifying in nature. Specifically, the job description provided on appeal indicates that the beneficiary is expected to perform inventory and routine daily accounting, 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 appeal 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 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). 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).

In support of the current motion to reopen, the petitioner submits a revised list of job duties for the beneficiary. The new job description indicates that the beneficiary oversees subordinate managers in performance of a number of duties instead of performing those duties herself. Counsel states that the new position description overcomes the AAO's finding there is some overlap between the position descriptions provided for the beneficiary and for the store manager position, and its finding that the beneficiary is solely responsible for a number of non-qualifying duties, none of which are delegated to subordinate personnel. Counsel states this list shows that the beneficiary is not involved in the day-to-day duties. On appeal or on 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).

Furthermore, a number of the beneficiary's duties under the second motion to reopen are non-qualifying duties including: performing human resources duties, such as payroll and benefits; setting up employee beneficiary; tracking local and national marketing initiatives and supporting them; and contacts with vendor.

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.

II. DOING BUSINESS

The next issue to be addressed is whether the petitioner 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. *See* 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'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.

In support of the previous motion, the petitioner submitted a newly prepared summary of its business activities during the first year of operation. The petitioner made new claims that it had begun 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 indicated 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 submitted financial information related to each of these businesses.

In support of the current motion, the petitioner documents its attempts to find a textile distributor, as well as further information regarding a loan for the potential purchase of a motel in North Dakota as evidence that it was conducting business prior to July 2011.

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

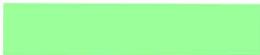
When a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). 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.

In support of the current motion, the petitioner continues to claim that the company immediately began exploring investment opportunities in other states beginning in September 2010. The petitioner now submits letters from textile vendors documenting its failed attempts. The petitioner reasserts its claims that it evaluated a potential motel investment in North Dakota. Nevertheless, the petitioner's 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). The petitioner has not submitted evidence on motion to overcome the AAO's finding. In fact, the letters from textile distributors serve as evidence that the petitioner was not doing business as it could not find a distributor to sell its products.

As evidence of the petitioner's financial status, the petitioner submits evidence regarding the beneficiary's purchase of a 5% investment in [REDACTED] LLC, a [REDACTED] and the beneficiary's job description as Operations Manager for [REDACTED] the management company for the new venture. The petitioner fails to show how the beneficiary's 5% investment in another company has any bearing on the financial status of the petitioning organization as of August 2011.

In addition, the petitioner has submitted additional evidence in support of its current operation of [REDACTED] franchises consisting of federal employment tax filings; however, as the petitioner cannot establish that it was doing business during the relevant time period between August 2010 and August 2011, 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).

Upon review of the totality of the record, the petitioner fails to show that it had been conducting business for the prior year. Accordingly, the petition will remain denied.

III. CONCLUSION

The AAO's previous decisions will be affirmed and the petition will remain denied for the above stated reasons. 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.

ORDER: The AAO's decisions dated April 29, 2013 and February 6, 2014 are affirmed, and the petition remains denied.