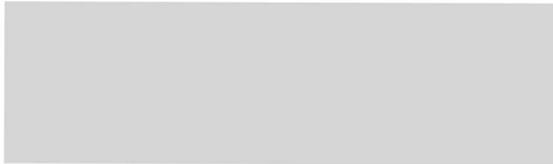




U.S. Citizenship
and Immigration
Services

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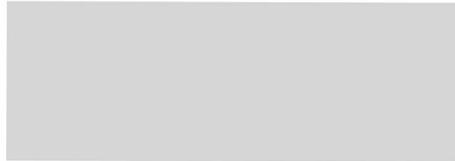
DATE: **MAY 08 2015**

PETITION RECEIPT #: 

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:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The petitioner appealed the denial to the Administrative Appeals Office (AAO), and, on September 18, 2014, we 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 motions will be dismissed.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, seeking to employ the beneficiary as a 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 Florida corporation established in [REDACTED] states that it engages in the export of industrial electrical supplies. The petitioner claims to be an affiliate of [REDACTED], located in Venezuela. The petitioner seeks to employ the beneficiary as its general manager for a period of one year.

The director denied the petition on October 29, 2013, on five alternate grounds, concluding that the petitioner failed to establish that (1) it has been and will continue to conduct business in the United States in accordance with the regulations; (2) the beneficiary will be employed in a primarily managerial or executive capacity in the United States; (3) the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity; (4) the foreign entity is doing business abroad in accordance with the regulations; and (5) it acquired sufficient physical premises to conduct its business in the United States. The director further determined that the petitioner has not supported its claim that it is a "new office" as defined in the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(F).

The petitioner subsequently filed an appeal to the AAO and on September 18, 2014, we dismissed the appeal, on four alternate grounds, concluding that the petitioner failed to establish that (1) the beneficiary will be employed in a primarily managerial or executive capacity in the United States; (2) the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity; (3) it acquired sufficient physical premises to conduct its business in the United States; and (4) it has a qualifying relationship with the beneficiary's foreign employer. Although the appeal was dismissed, we found that the petitioner is not a new office, as defined in the regulations, and is doing business in the United States as required and that the foreign entity is also currently doing business, thus withdrawing the director's decision with respect to both of those issues.

In finding that the beneficiary will not be employed in a primarily managerial or executive capacity in the United States, we found that the petitioner failed to submit sufficient information detailing the beneficiary's duties at the U.S. company to demonstrate that these duties qualify him as a manager or executive. We further found that the petitioner's plans for the future hiring of an assistant manager, an administrator, and a sales person cannot be considered as the petitioner is not a new office and must establish eligibility at the time of filing the nonimmigrant petition. The petitioner also did not submit any information about the positions for the beneficiary's claimed subordinates, including education requirements and position descriptions, to demonstrate that the beneficiary will have sufficient subordinate staff to relieve him from performing non-qualifying operational and administrative tasks.

In finding that the beneficiary was not employed by the foreign entity in a qualifying managerial or executive capacity, we found that the petitioner failed to define the beneficiary's listed duties sufficient to demonstrate what he actually does on a routine basis or that he performs any qualifying duties. We noted that the petitioner indicated that the beneficiary receives commissions in addition to his salary, which indicates that he

is involved in sales to some extent. However, the petitioner failed to indicate where the sales duties fall in terms of the beneficiary's time devoted to qualifying and non-qualifying duties. We also noted that the briefly described job duties for the beneficiary's subordinates' positions do not support a finding that these positions are professional, managerial, or supervisory positions.

In finding that the petitioner failed to establish that it acquired sufficient physical premises to conduct its business in the United States, we found that, although the petitioner is not a new office, it must show that it possesses sufficient physical premises to conduct its business and validate the employment offered to the beneficiary. We noted that the petitioner's lease specifically states that the premises are to be used solely for residential purposes and may only be occupied by two persons. We also noted that, although the lease is for property located in Florida, it contains references to the Virginia Residential Landlord and Tenant Act. On appeal, the petitioner failed to address the above findings and simply stated that it may lease new premises or amend the current lease to include additional employees. We further noted a discrepancy in the description of the premises in the lease and photos submitted by the petitioner, claiming to illustrate the actual physical premises leased.

In finding that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer, we found that, although the petitioner continuously claims that the beneficiary owns 70% of the ownership interest of its U.S. company, it failed to submit any primary evidence of the actual ownership, such as share certificates, stock ledger, meeting minutes, etc. The petitioner did submit its IRS Form 1120 for 2009, 2010, and 2011, each indicating "no" where asked if any individual or estate owned directly 20% or more, or owned, directly or indirectly, 50% or more of the total voting power of all classes of the corporation's stock entitled to vote for the corresponding years. This, in combination with the lack of evidence as to the actual ownership of the U.S. company, raised doubts as to the validity in the petitioner's claim that the beneficiary owns 70% of the ownership interest of the petitioning U.S. company.

The petitioner subsequently filed the instant motion to reopen and motion to reconsider the AAO's decision dated September 18, 2014. The record is considered complete as presently constituted.

On motion, the petitioner addressed our findings relating to the beneficiary's proposed employment in the United States by stating that it has not hired any employees as it is awaiting the beneficiary's arrival. In the meantime, however, the beneficiary will serve in the U.S. as a "functioning manager." The petitioner goes on to describe the beneficiary's duties as a functioning manager as follows:

Preparation of annual operating and capital budgets, business plans and financial projections in order to grow the business and be able to hire the two additional employees that he needs (10% of week); hire and train the appropriate staff in order to grow the business in the estimated manner (15% of week) implementing budgets and business plans; represent the business in business dealings with other parties (30% of week), negotiate contracts on behalf of the business and sign contracts that have been approved (30% of week); and doing all other things necessary or advisable to ensure that the business is carried out properly and legally and in the best interest of the JV (15% of week).

On motion, the petitioner addresses our findings relating to the beneficiary's employment abroad by stating that the beneficiary's direct subordinates abroad, the sales manager and the administrator, each have two direct

subordinates that report directly to them, attempting to establish that the beneficiary has been employed by the foreign entity in a qualifying managerial capacity because he supervises two supervisory positions at the foreign entity.

On motion, the petitioner addresses our findings relating to its physical premises' sufficiency to conduct its business in the United States by simply stating that the beneficiary was not aware that the lease specifically states that it is for residential purposes only and "is working on repairing this point."

On motion, the petitioner addresses our findings relating to its qualifying relationship with the beneficiary's foreign employer by stating that the beneficiary is 70% owner of the U.S. company and that this is the first time the beneficiary is made aware of the contradicting information referenced in its IRS tax filings as he did not file the taxes himself. The petitioner states that it "is working towards fixing these mistakes and assure [us] that [the beneficiary] is the owner of the company in 70% of its stocks."

On motion, the petitioner submits duplicate copies of the foreign entity's organizational chart, job descriptions for the beneficiary's position abroad and those of his subordinates, and the beneficiary's resume.

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 and duplicate copies of evidence previously submitted to the record. First, the petitioner acknowledges that it has not hired any employees to relieve the beneficiary from performing non-qualifying duties at its U.S. company and makes an unsupported claim, on motion, that the beneficiary is a "functioning manager." The petitioner does not define what a "functioning manager" is, but provides a new list of job duties with accompanying percentages of time the beneficiary devotes to those duties weekly. However, 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).

Second, the petitioner simply makes a statement describing the foreign entity's organizational chart and states that the beneficiary's subordinates are supervisors according to the chart. However, the job descriptions submitted for their positions, which were previously submitted and considered in our decision, do not list any supervisory duties for the allegedly supervisory positions. 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)). 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).

Third, the petitioner simply states that the beneficiary was not aware that the leased premises are for residential use only and is working on correcting the issue. The petitioner did not address the discrepancy between the lease's description of the premises and the photos submitted as evidence of the same listed premises. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). 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).

Fourth, the petitioner simply states that the beneficiary owns 70% of its U.S. company stock and was unaware of the mistakes made in its IRS Form 1220 for 2009, 2010, and 2011. The petitioner states that it is working towards fixing the tax return filings. Again, 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)). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). 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).

Our 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 our decision issued on September 18, 2014. Here, the petitioner has not adequately addressed the deficiencies and inconsistencies presented in our dismissal of the appeal. Therefore, the record on motion does not overcome those deficiencies or our finding that the petitioner failed to establish that (1) the beneficiary will be employed in a primarily managerial or executive capacity in the United States; (2) the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity; (3) it acquired sufficient physical premises to conduct its business in the United States; and (4) it has a qualifying relationship with the beneficiary's foreign employer.



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, our decision will be affirmed.

ORDER: The AAO's decision dated September 18, 2014 is affirmed.