



U.S. Citizenship
and Immigration
Services



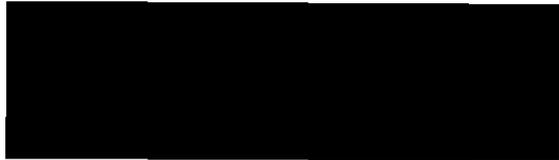
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DATE: **OCT 15 2012** OFFICE: VERMONT SERVICE CENTER FILE:

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 in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The petitioner filed a motion to reopen and the director granted the motion and affirmed his decision to deny the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

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 engaged in commercial and residential improvements. The petitioner claims to be an affiliate of [REDACTED] located in [REDACTED] Argentina. The petitioner has employed the beneficiary in the position of Operations Manager in L-1A status since December 2005 and now seeks to extend his status for one additional year.

The director denied the petition on June 2, 2009, concluding that the petitioner failed to establish that the beneficiary will be working primarily in a qualifying executive or managerial capacity. In denying the petition, the director emphasized that the petitioner failed to provide requested information regarding the beneficiary's job duties and the structure of the U.S. company in response to a request for evidence issued on November 17, 2008. As such, the director determined that the record contained no detailed description of the beneficiary's duties and insufficient evidence to establish that the beneficiary would be relieved from performing non-qualifying duties associated with the day-to-day operations of the petitioner's remodeling business.

On June 22, 2009, the petitioner filed a motion to reopen. The director granted the motion and affirmed the previous decision. The director concluded that the evidence of record, including the new evidence submitted on motion, did not establish that the beneficiary's duties are primarily managerial or executive in nature, that he functions at a senior level within the organizational hierarchy, or that he currently manages a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties necessary for the operation of the petitioning company.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review.

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.

Upon review, the AAO agrees with the director's decision and will affirm the denial of the petition. For the first time on appeal, the petitioner submits previously requested evidence for review. The submitted evidence will not be considered in this proceeding.

On November 17, 2008, the director put the petitioner on notice of the required evidence and gave a reasonable opportunity to provide it for the record before the visa petition was adjudicated. *See* 8 C.F.R. § 103.2(b)(8). Specifically, the director requested, *inter alia*: (1) a comprehensive description of the beneficiary's duties on a weekly basis; (2) evidence that the beneficiary will function at a senior level within an organizational hierarchy; (3) evidence that the beneficiary will be managing a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties; (4) a breakdown of the number of hours devoted to each of the beneficiary's proposed duties; and (5) an organizational chart for the United States entity, as well as complete position descriptions for the United States entity's employees. In response, the petitioner failed to provide the requested evidence. Instead the petitioner submitted a general statement by counsel that the beneficiary "will devote and does devote 100% of his time (at least 40 hours a week) to this business." Furthermore, counsel stated that the petitioner "will employ and retain the services of many and diverse technical or tradesman for various lengths of time."

The director denied the petition after noting that the petitioner failed to submit the requested evidence pertaining to the beneficiary's duties and the personnel structure of the company. The director acknowledged the petitioner's response in his denial, but found that the petitioner failed to sufficiently respond to the above-referenced requests. Although the director granted the petitioner's subsequent motion to reopen, the AAO notes that the evidence submitted of motion consisted primarily of corporate tax returns and counsel's explanation that the beneficiary is the company's sole full-time employee due to the intermittent and variable nature of the petitioner's work.

The regulation at 8 C.F.R. § 214.2(l)(3)(viii) states that the director may request additional evidence in appropriate cases. Although specifically requested by the director, the petitioner did not provide the requested evidence. The petitioner's failure to submit this information cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). The director appropriately denied the petition, in part, for failure to submit requested evidence.

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

Further, while the petitioner has now submitted evidence of its use of contract workers on appeal, the record remains devoid of the requested detailed position descriptions of the beneficiary's duties or those of the intermittently-employed contractors. 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)).

Based on the limited evidence of record, it is evident that the beneficiary himself is solely responsible for purchasing materials needed for construction and remodeling projects, as well as solely responsible for marketing and selling the petitioner's services and performing administrative and clerical tasks associated with the operation of the business. While the beneficiary may supervise subordinate workers at times within the scope of individual remodeling contracts and projects, the record does not support a conclusion that his duties are primarily managerial or executive in nature. Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). 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 visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Due to the failure to provide the requested evidence, the petitioner has not met its burden.

The petitioner is not precluded from filing a new visa petition on the beneficiary's behalf that is supported by competent evidence that the beneficiary is now entitled to the status sought under the immigration laws.

ORDER: The appeal is dismissed.