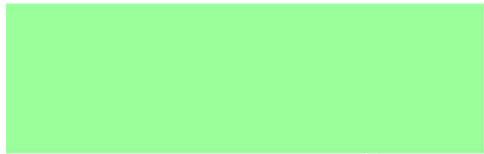




U.S. Citizenship
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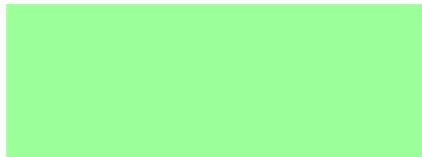


DATE: **APR 18 2013** Office: VERMONT SERVICE CENTER FILE:

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 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa 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 employ 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 Texas corporation established in 2010, is a supply management company specializing in facilities maintenance products. The petitioner claims to be a wholly owned subsidiary of [REDACTED] located in Chihuahua, Mexico. The petitioner seeks to employ the beneficiary as its President/COO for a period of three years.

The director denied the petition, finding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. The director also determined that the petitioner failed to establish a qualifying relationship with the foreign entity.

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. On appeal, counsel for the petitioner asserts that the beneficiary will be employed in an executive capacity, and that the director committed errors of law and fact. Counsel submits a brief in support of the 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) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended

(b)(6)

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

* * *

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

II. The Issues on Appeal

The primary issue to be addressed is whether the petitioner established that the beneficiary will be employed in the United States in a primarily executive capacity.¹

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on February 6, 2012. In a letter dated February 2, 2012, the petitioner summarized the beneficiary's proposed duties in the United States as to "direct, administer and manage the U.S. company's operations where he will supervise all employees and oversee all business operations." The petitioner also stated the following:

[The beneficiary] will come to the U.S. company to direct the company and function at a senior executive/management level as President/COO. He will establish goals and policies for all administration, research, product planning, and investment. [The beneficiary] will exercise wide latitude in discretionary decision-making to ensure conformance with general policies mandated by the Board of Directors and the corporate charter. He will establish business policies and will have full authority to hire, fire, and evaluate the performance of all employees, in compliance with corporate policies and standards.

In his capacity as President and member of the Board of the U.S. company, [the beneficiary] will receive only backing based on a quorum from the Board of Directors. He will establish and monitor management procedures, information systems, budgets and organizational procedures. He will direct resource planning activities and approve all changes in management control, procedures and budgetary limitations. In addition, he will evaluate the impact of U.S. facilities maintenance products supply management regulations on present and future operations. [The beneficiary] will attend meetings with industry associations to keep apprised of current and prospective regulatory changes and will have the ultimate authority to negotiate and execute all U.S. Company contracts. [The beneficiary] will further be responsible for directing, managing, supervising, controlling and coordinating all aspects of company investments, sales, and product development and will be responsible for overseeing and directing all company managers and supervisors within the numerous in-house departments.

[The beneficiary] will be responsible for the establishment of both annual and monthly objectives in coordination with the Company's business plan as well as to provide an annual Sales Plan and quarterly updates, revisions and modifications to the Plan to the Board of Directors. [The beneficiary] will direct and coordinate the specific objectives of the Business Plan with all of the functional departments of the company. He will oversee and coordinate and interact with all project disciplines based on feasibility and cost effectiveness.

The petitioner provided an organizational chart for the U.S. company depicting the beneficiary at the top of the chart. Directly below the beneficiary is the Chief Financial Operations, [REDACTED]

¹ In its RFE response and on appeal, the petitioner clarifies that the beneficiary will be employed in an executive, not managerial, capacity. Therefore, the AAO will only analyze the beneficiary's employment in an executive capacity.

who directly supervises an Administrative Manager, [REDACTED] Sales Manager, [REDACTED], a Regional Sales representative, [REDACTED] and a Warehousing Manager, [REDACTED]. The Sales Manager is depicted as directly supervising a Logistics Manager, [REDACTED].

The director issued a request for evidence ("RFE"), in which he instructed the petitioner to submit, *inter alia*, the following: (1) a more detailed description of the staff of the U.S. office to include the job titles and duties with the percentage of time dedicated to each duty; (2) a complete position description for all U.S. employees, including a breakdown of the number of hours devoted to each of the employee's duties on a weekly basis; and (3) evidence of the financial status of the U.S. organization, including a copy of the petitioner's Form 941, Employer's Quarterly Tax Return, for the second, third, and fourth quarters of 2011. The petitioner was advised that if a document in any language other than English was submitted, a complete translation of the foreign document must also be submitted.

In response to the director's RFE, the petitioner largely reiterated the same job description for the beneficiary as previously submitted, with the exception of one additional job duty: "will be responsible for estimating, bidding and contract negotiations, through planning, detailing and purchasing." The petitioner asserted that the beneficiary will spend 100% of his time on executive duties.

The petitioner submitted a list of the U.S. employees with accompanying position descriptions, including the following duties:

1. [REDACTED] Chief Financial Officer: directs, administers and manages all financial transactions of the corporation and functions at a senior executive/management level; establishes goals and policies for all administration, research, product planning, and investment;
2. [REDACTED] Administrative Manager: general administrative responsibilities including budget development and implementation, purchasing, human resources, fiscal accounting, printing, records, payroll, space management, health and safety and responsibility for day to day running of the company; manages a range of budgets;
3. [REDACTED] Sales Manager: all commercial operation and administration of company sales; inventory control; estimates; procure new sales and manage existing clients; create sales packages and ability to price and manage inventory; identify potential customers; develop pricing strategies; oversee product development and monitor trends; prepare weekly, monthly, quarterly, and annual reports to CFO; search for new business; trains staff and approves all contracts; manages sales contracts for all inventories; presents purchasing solutions to clients and services repeat business;
4. [REDACTED] Regional Sales: develops new regional business while also develops, manages, and mentors the direct sales team's performance and achievement;
5. [REDACTED] Warehousing Manager: directs, coordinates, and plans the storage and distribution of all products and materials; accountable for all activities of the warehouse staff such as receiving, storing, and testing the products; manages the layout and set up of the warehouse; maintains and oversees the shift allocations and workings of warehouse staff; sets and allocates targets to warehouse staff and organizes staff training activities; audits daily labor and all billing statements; coordinates and negotiates with logistics and customs; and

6. [REDACTED] Logistics Manager: manages, directs and supervises logistics/supply chain operation; manages periodic process reviews for each client; maintains performance statistics and ensures accurate record keeping of all operational documents; plans and monitors daily staffing schedules; develops a business plan and goals for department; prepares and analyzes management and financial reports, budgets, expense reports and forecasts for department; manages and oversees administrative functions; ensures freight is moved safely and timely; maintains a clean, professional, and safe working environment by inspecting and scheduling maintenance; ensuring all office and warehouse equipment is properly accounted and in safe working condition; trains and certifies new employees; conducts annual performance reviews for all staff within department; keep abreast of emerging technology changes; networking and participation in professional organizations.

The petitioner submitted its Forms 941, Employer's QUARTERLY Federal Tax Return, for the first, second, and third quarters of 2011, all showing that the petitioner employed five employees. The petitioner submitted some pages of its Form 941 for the fourth quarter of 2011, but failed to submit the page reflecting the number of employees for that quarter.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. The director concluded that the evidence was insufficient to establish that the beneficiary's proposed subordinate employees would be supervisors, professionals, or managers. The director observed that many of the job duties of the beneficiary and his subordinates were identical and overlap with each other. The director concluded that since it was not clear who would consistently provide the goods and services of the U.S. operations, the petitioner failed to establish that the beneficiary would be relieved from performing the non-qualifying, day-to-day duties of the business. The director also concluded that it was not clear whether the petitioner was a subsidiary or an affiliate of the foreign entity, and that the submitted documentation included non-translated Spanish language documents.

On appeal, counsel affirms that the beneficiary will be employed in an executive capacity 100% of the time. Counsel asserts that the director "completely ignored" the submitted evidence establishing that the beneficiary primarily directs a major component or function of the organization, and that he is the most senior and highest paid of all the employees. Counsel asserts the director erred in analyzing the beneficiary's employment in a managerial capacity, and asserts that the beneficiary is not required to supervise personnel in his executive capacity. Counsel asserts that the director erred in concluding that the petitioner must establish that the beneficiary will be relieved from performing non-executive services within one year, as the petition is not for a new office or a new office extension. Counsel asserts that the director erred in concluding that the beneficiary and his subordinates have identical duties. In this regard, counsel asserts that each of the U.S. employees has "unique duties and responsibilities," and none share the beneficiary's responsibility to direct, administer and manage all business transactions of the corporation, establish goals and policies for all administration, research, product planning, and investment, exercise wide latitude in discretionary decision making, establish business policies, or have full authority to hire, fire, and evaluate the performance of all employees.

On appeal, counsel asserts that the beneficiary's detailed job description establishes that his job duties are primarily executive in nature. Counsel states:

While the Beneficiary will undoubtedly be required to apply his expertise to perform some higher-level operational tasks, the Petitioner has shown by a preponderance of the evidence that the Beneficiary's subordinates in the United States and at the foreign entity will carry out the majority of the day-to-day non-executive tasks required to operate the organization. The Petitioner need only establish that the Beneficiary will devote more than half of his time to executive duties. The Petitioner has met that burden.

Counsel asserts that the director erred in concluding that the record was unclear as to whether the petitioner was a subsidiary or an affiliate of the foreign entity, and that the submitted documentation included non-translated Spanish language documents. Counsel asserts that the petitioner is a "100% wholly owned U.S. subsidiary" of the foreign entity and that it submitted, *inter alia*, the foreign entity's Articles of Incorporation and its English-language summary translation.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed by the United States entity in an executive capacity.

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). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary. *Id.* Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed executive capacity of the beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. The petitioner's evidence should demonstrate that there is an actual need for an executive who will primarily perform qualifying duties. See generally, 8 C.F.R. § 214.2(l)(3)(v).

In the instant matter, the petitioner has described the beneficiary's job duties in very broad terms, noting his duty to "direct, administer and manage the U.S. company's operations . . . and oversee all business operations," "establish goals and policies for all administration, research, product planning, and investment," "exercise wide latitude in discretionary decision-making," "establish business policies," and "receive only backing based on a quorum from the Board of Directors." These duties merely paraphrase the statutory definition of executive capacity. See section 101(a)(44)(B) of the Act. 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.).

In the RFE, the director requested the petitioner to provide a more detailed description of the beneficiary's job duties with a breakdown of the percentage of time to be dedicated to each duty. In response, the petitioner largely reiterated the same description as previously provided except for one additional job duty, and asserted that the beneficiary will spend 100% of his time on executive duties. The petitioner's response still failed to

provide any type of breakdown of the percentage of time the beneficiary will spend on each duty. The petitioner's response failed to fully comply with the RFE, and failed to provide any detail or explanation of the beneficiary's actual activities in the course of his daily routine. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Id.* The actual duties themselves reveal the true nature of the employment. *Id.* In addition, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In response to the RFE, the petitioner asserted that the beneficiary will be responsible for purchasing, and estimating and bidding on contracts. On appeal, counsel acknowledges that the beneficiary will "undoubtedly" perform some higher-level operational tasks, but asserts that the beneficiary will devote "more than half of his time" to executive duties. These assertions are significant in two respects.

First, the petitioner failed to document what proportion of the beneficiary's time would be spent on the particular duties of purchasing, and estimating and bidding on contracts, even though this information was requested in the RFE. This failure of documentation is important because these duties do not fall directly under traditional executive duties as defined in the statute, and thus, constitute non-qualifying duties. If these particular duties take up more than half of the beneficiary's time, they would preclude the beneficiary from being considered "primarily" employed in an executive capacity. 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988). Because the petitioner failed to quantify the time the beneficiary spends on these duties, the AAO cannot determine whether the beneficiary is primarily performing executive duties.

Moreover, in response to the RFE, the petitioner also asserted that the beneficiary will spend 100% of his time on executive duties. The petitioner failed to explain how the beneficiary can both spend 100% of his time on executive duties, while also performing some operational tasks. 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). 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. *Id.*

In denying the petition, the director observed that several of the job duties for the beneficiary and his subordinates are identical or overlay each other. On appeal, counsel asserts that each U.S. employee has "unique duties and responsibilities," and that none share the beneficiary's responsibility to direct, administer and manage all business transactions of the corporation, establish goals and policies for all administration, research, product planning, and investment, exercise wide latitude in discretionary decision making, establish business policies, or have full authority to hire, fire, and evaluate the performance of all employees.

However, counsel's assertions on this point are unpersuasive and contrary to the evidence in the record. In particular, the position description for the Chief Financial Officer reflects that she, like the beneficiary, will establish goals and policies for all administration, research, product planning, and investment, and will

function at a “senior executive/management level.” According to the petitioner’s organizational chart and position description, it is the Chief Financial Officer, not the beneficiary, who will directly supervise all of the subordinate employees (except for the logistics manager, who reports directly to the sales manager). In addition, the beneficiary and the administrative manager both share purchasing duties, and the beneficiary and the sales manager both have authority to approve all contracts. The logistics manager and administrative manager both appear responsible for managing administrative functions. The petitioner failed to explain and overcome the director’s conclusion that several of the job duties for the beneficiary and his subordinates are identical or overlay each other.

The position descriptions for the U.S. subordinates are not entirely credible for other reasons as well. For example, the position description for the regional sales representative indicates that he “manages and mentors the Direct Sales team’s performance and achievement.” Nowhere in the record does the petitioner indicate that it employs a “Direct Sales team” or any employees subordinate to the regional sales representative. Similarly, the position description for the warehousing manager indicates that he “maintains and oversees the shift allocations and workings of all warehouse staff” and “sets and allocates targets to warehouse staff.” Nowhere in the record does the petitioner indicate that it employs any other employees in the warehouse other than the warehousing manager. The position description for the logistics manager states that he will “mentor direct reports” and “conduct[] annual performance reviews for all staff within department.” Nowhere in the record does the petitioner indicate that it has a logistics department or any employees who report directly to the logistics manager. Considering the lack of a consistent, credible explanation of the petitioner’s true staffing and organizational structure, the director did not err by concluding that it was not clear who would provide the goods and services of the U.S. operations. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Id.* Here, the petitioner failed to resolve any of the inconsistencies regarding the petitioner’s U.S. employees. Doubt cast on any aspect of the petitioner’s proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

Overall, the vague job description provided for the beneficiary and the lack of a credible, consistent description of the petitioner’s staffing and organizational structure prohibits a determination as to whether the beneficiary will be employed in a primarily executive capacity. Accordingly, the appeal will be dismissed.

The second issue to be addressed is whether the petitioner established that it has a qualifying relationship with the foreign entity. Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner failed to establish that it is a subsidiary or affiliate of the foreign entity.

The petitioner’s Articles of Incorporation reflects that its two owners are the beneficiary and [REDACTED] each owning 500 shares. Based on the petitioner’s Articles of Incorporation, the record fails to establish that the petitioner is a “100% wholly owned U.S. subsidiary” of the foreign entity as claimed. See 8 C.F.R. § 214.2(l)(1)(ii)(K) (defining a “subsidiary” as a corporation or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity); 8 C.F.R. § 214.2(l)(1)(ii)(l) (defining a “parent” as a firm, corporation, or other legal entity which has subsidiaries).

A thorough review of the record fails to reflect that the petitioner submitted an English translation of the foreign entity’s Articles of Incorporation, as claimed. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner’s

claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. Absent evidence establishing the identity of the owners of the foreign entity and their respective percentage of ownership, the petitioner failed to establish that it qualifies as an “affiliate” of the foreign entity. See 8 C.F.R. § 214.2(l)(1)(ii)(L) (requiring “affiliates” to be owned and controlled by the same parent or individual, or the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity).

In light of the above, the record fails to establish that the petitioner has a qualifying relationship with the foreign entity. For this additional reason, the appeal will be dismissed.

Although the appeal will be dismissed, the AAO withdraws several portions of the director’s decision relating to the beneficiary’s employment in a managerial capacity. The petitioner made clear in its response to the RFE that the beneficiary will only be employed in an executive capacity. In addition, the AAO withdraws the portions of the director’s decision referencing the petitioner’s request to extend the beneficiary’s L-1A status and whether the beneficiary would be relieved from providing non-qualifying duties after one year of operation. As counsel correctly notes on appeal, the beneficiary has not previously been granted L-1A status, and the instant petition is neither a new office petition nor a new office extension. Nevertheless, counsel has not demonstrated that any harm resulted from the director’s errors. The AAO emphasizes that the regulation relating to a new office allows for a more *lenient* treatment of managers or executives, as opposed to the strict language of the statute for established petitioners.

The petition will be denied and the appeal dismissed for the above stated reason, with each considered as an independent and alternative basis for the decision. 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.