



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **APR 29 2013** Office: VERMONT SERVICE CENTER FILE: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:
[Redacted]

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 classify 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 Georgia corporation established in 2010, states that it intends to operate a motel. It claims to be a branch of [REDACTED] located in Zimbabwe. The petitioner seeks to employ the beneficiary as the executive director 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 a motion to reopen. The director granted the motion and affirmed the previous denial.

On appeal, the petitioner asserts that the director made incorrect findings of law and fact and that the record establishes that it will employ the beneficiary in a qualifying managerial or executive capacity within one year of commencing operations.

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

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

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 Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that it would employ the beneficiary in a primarily managerial or executive capacity within one year of commencing operations in the United States.

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as

promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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 petitioner filed the Form I-129, Petition for a Nonimmigrant Worker. The petitioner indicated on the Form I-129 that will operate a hotel/motel development and maintenance company with an anticipated staffing level of eight to ten employees and an anticipated gross annual income of \$450,000. The petitioner submitted a letter in support of the initial petition stating that the beneficiary would serve as the president/executive director. According to the petitioner, the beneficiary would oversee property acquisitions, development, and directing corporate operations. Specifically, the beneficiary would perform the following duties: hiring and firing of managerial employees; developing and implementing company policies and business plans; formulating strategies to establish and develop the new enterprise; researching and developing plans to establish regional sales; functioning as a liaison between the petitioner and parent company; directing and overseeing the day-to-day operations of the business; and evaluating, assessing, and reviewing financial operations.

In the letter submitted in support of the initial petition, the petitioner stated that it "had negotiated a contract for the purchase of a motel" and that the seller "has agreed to assist the petitioner in obtaining a mortgage to finance 80%" of the purchase price. The petitioner included a copy of the sales contract for a purchase price of \$250,000 and earnest money of \$5,500. A copy of the petitioner's bank statement showed \$59,000 in funds as of the date of filing.

The director issued a request for additional evidence ("RFE") on May 9, 2011 in which he instructed the petitioner to submit, *inter alia*, the following: (1) a comprehensive description of the beneficiary's duties; (2) a complete position description of all proposed employees in the United States including the number of hours devoted to each duty on a weekly basis and whether the position required a college education; (3) a proposed organizational chart; (4) evidence establishing the size of the U.S. investment and ability to commence doing

business in the United States; (5) a copy of the foreign entity's bank statements for January and February of 2011; and (6) translations of the financial documents from the foreign organization based in Zimbabwe.

In response, the petitioner provided a position description for the beneficiary which included the following duties: planning, coordinating, and directing "procedures in place for delivery of guest services, food and beverage"; coordinating financial and accounting procedures; meeting with management staff; establishing and implementing company goals; allocating company tasks; controlling capital and operational expenditures; providing authorization for hotel furnishings; and hiring hotel staff. The petitioner stated that the beneficiary will spend 20% of his time on management duties and 80% of his time on executive duties.

In the response, the petitioner stated that it would provide descriptions for front desk/reception, maintenance, and housekeeping positions. In fact, position descriptions were provided for an assistant manager, housekeeping/maid services, administrative accounts manager, and sales/marketing manager. The petitioner did not provide the educational requirements or a breakdown of time to be spent on specific duties for any of the proposed positions.

The petitioner provided the requested business plan. In the plan, an organizational chart showed "senior management." Reporting to "senior management" were "lodging operations" and "administrative staff." Lodging operations appeared to include a receptionist and maid services. The administrative staff included "admin/account" and "sales-marketing."

The business plan also showed total debt financing needed of \$350,000. The first \$50,000 was to come from investor contributions, while banks and lenders were to contribute \$300,000. The petitioner also included an amortization schedule for \$50,000 but the statement does not show who the lender is or what the money will be used for. The petitioner did not provide the requested information regarding the translations of the foreign organization's financial documents or copies of the foreign entity's bank statements.

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. In denying the petition, the director found that the position descriptions submitted for the beneficiary and his proposed subordinates were overly vague and emphasized that the petitioner's failure to provide the requested information regarding the breakdown of proposed employee's job duties on a weekly basis as well as the educational requirements for the positions. The director further noted the petitioner's failure to provide the requested evidence regarding the source of the petitioner's funding, copies of the foreign entity's bank statements, and translations of the foreign entity's financial documents,

The petitioner filed a motion to reopen and reconsider the director's denial. The petitioner stated that the director erred as a matter of law and fact in reaching the decision. Specifically, the petitioner stated that it provided "documents which trace the investment" from the beneficiary. Furthermore, the petitioner asserted that a detailed history of the Zimbabwe currency was provided in response to the RFE. The petitioner attached documentation establishing that the foreign company is regularly engaged in business to the motion. Finally, the petitioner stated the following with regard to the beneficiary's duties:

In more specific terms, the beneficiary intends to acquire, develop and manage a range of what is known as limited-service accommodations...The petitioner in this case desires to transform the existing property it has purchased into a motel.

The director granted the motion and upheld the prior denial. The director found that the position descriptions for all proposed positions were generic and did not appear specific to the proposed motel business. Furthermore, the director noted that due to the business size and nature of the proposed business, it is likely that the beneficiary will be engaged primarily in the non-managerial, day-to-day operations of operating the motel.

On appeal, counsel for the petitioner asserts that the evidence established that a majority of the beneficiary's duties would be managerial in nature and that the beneficiary is a functional manager. Furthermore, counsel states that the proposed job descriptions for the beneficiary and his proposed subordinates were sufficiently specific. Finally, counsel states that the director failed to adjudicate the petition under the new office regulations.

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity within one year of approval of the petition.

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 and indicate whether such duties are in either an executive or a managerial capacity. *Id.*

The petitioner's description of the beneficiary's duties for the petitioner fails to establish that the beneficiary would be engaged in primarily managerial or executive duties. While the AAO does not doubt that the beneficiary will exercise discretionary authority over the United States entity, the petitioner has not submitted a detailed breakdown of how the beneficiary will allocate his time among specific responsibilities by the end of the first year of operations. The beneficiary's duties, as described by the petitioner, included such tasks as overseeing activities related to providing services; directing and coordinating financial activities; managing business operations; implementing company policies, goals, objectives and procedures; and determining staffing requirements. While such responsibilities generally suggest that the beneficiary is responsible for oversight of the business, the descriptions provide little insight into what specific duties he will perform or how he would actually allocate his time on a day-to-day basis. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. 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).

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary will perform the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and will not spend a majority of his 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 fact that the beneficiary manages a business does not

necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

Overall, the position description alone is insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity. When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed.

The petitioner has the burden to establish that the U.S. company would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period. *See* generally, 8 C.F.R. § 214.2(l)(3)(v)(C). In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to also disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

The petitioner failed to provide a consistent description regarding the organizational structure and employees of the proposed motel business. In response to the RFE the petitioner provides short position descriptions for the front desk/reception, maintenance, and housekeeping. The petitioner goes on, however, to provide extended descriptions for an assistant manager, housekeeping/maid service, administrative accounts manager, and sales and marketing manager. Furthermore, the organizational chart submitted in conjunction with the business plan shows a third combination of employees including a receptionist, maid services, admin/accounting, and sales/marketing. The chart shows staff reporting to "Senior Management" without any further detail of which employees will compose the senior management structure. 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).

Furthermore, the petitioner failed to provide the requested evidence regarding the breakdown of the proposed employees' job duties on a weekly basis. The job descriptions provided were generic and most did not appear to relate to the specific motel operations. 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 addition, the petitioner's business plan did not include any specifics regarding the timeline for hiring, source of salaries and remuneration, and amount of salaries to be paid for each of the proposed 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)).

Finally, in response to the RFE, the petitioner failed to provide the requested evidence regarding the financial status of the United States organization including the size of the U.S. investment. The petitioner also failed to provide the requested information regarding the petitioner's three bank account statements or translations of its financial documents. The petitioner does not otherwise show where the remaining \$300,000 of start-up funds required will come from as stated in the business plan. A general statement that the seller will co-sign for financing does not establish that the petitioner will in fact be able to obtain a bank loan. The petitioner has not provided sufficient evidence that it will in fact be able to garnish the \$300,000 in financing needed from investors or other sources. Without evidence regarding the source of funding, the petitioner cannot show that it will be ready to support the managerial position within one year of approval. 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. at 165. 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). As a result of these deficiencies, the petitioner has not corroborated its claims regarding the intended organizational structure.

Based on the omissions and discrepancies in the record regarding the petitioner's projected staffing levels for the first year of operations, the petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. See section 101(a)(44)(A)(ii) of the Act. Furthermore, the petitioner has not established that it will employ a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial duties. Regardless of the beneficiary's position title, the record is not persuasive that the beneficiary will function at a senior level within an organizational hierarchy.

On appeal, counsel for the petitioner claims that the evidence supports a finding that the beneficiary qualify as a function manager by the end of the first year of operations. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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 Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)). In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. Based on the evidence furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the appeal will be dismissed.

It is further noted that the petitioner has not submitted any evidence to establish that the foreign sole proprietorship continues to do business, as required at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). Although requested by the director, the petitioner failed to provide evidence that the foreign entity continued to do business. The petitioner now submits this information on appeal. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). 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).

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.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO conducts appellate review on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, 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.