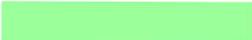




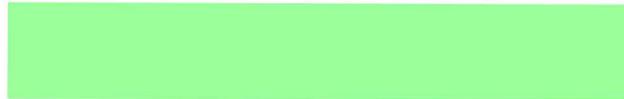
U.S. Citizenship
and Immigration
Services

(b)(6)

DATE **JAN 17 2013** 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:

SELF-REPRESENTED

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 petition for a nonimmigrant visa. 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 Florida corporation established in October 2010, is self-described as a company engaged in freight forwarding. It claims to be a subsidiary of the beneficiary's foreign employer, [REDACTED]. The petitioner seeks to employ the beneficiary as the president of its new office in the United States for a period of one year.

The director denied the petition concluding that the petitioner did not establish that the U.S. company would support a qualifying managerial or executive position within one year. In denying the petition, the director observed that the petitioner failed to provide a detailed and specific description of the beneficiary's day-to-day job duties, and failed to establish that the company employs a subordinate staff who would relieve the beneficiary from performing non-qualifying duties necessary for the operation of business.

The petitioner subsequently filed an appeal.¹ The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that it provided sufficient evidence of the company's business plans and anticipated expansion for the first year of operation to support the approval of the petition. The petitioner has submitted additional evidence 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.

¹ The AAO notes that the beneficiary signed the Form I-290B, Notice of Appeal, as a corporate officer of the petitioning employer. Although the petitioner was represented by counsel at the time of filing this petition, a new and properly executed Form G-28, Notice of Entry of Appearance as Attorney or Representative, has not been filed with the appeal. In accordance with the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 292.4(a) as well as the instructions to the Form I-290B, a new Form G-28 must be filed with an appeal filed with the Administrative Appeals Office. This regulation applies to all appeals filed on or after March 4, 2010. *See* 75 Fed. Reg. 5225 (February 2, 2010). Therefore, prior counsel has not been provided with a copy of this decision.

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. *Employment in the United States in a Managerial or Executive Capacity*

The petitioner must establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity within one year.

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 one-year "new office" provision is an accommodation for newly established enterprises, provided for by U.S. Citizenship and Immigration Services (USCIS) regulation that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first 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 low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

Accordingly, if 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. This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). 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.*

In a letter dated October 6, 2011, counsel for the petitioner submitted the following description of the beneficiary's proposed duties:

- Preside over Board of Director's meetings.
- The supervision of employees and future employees employed with the company that will be under his supervision.
- Training of employees (hiring and firing of employees) under his supervision;
- Managing the finances;
- Planning, developing and implementing company strategy;
- Developing and implementing policies and procedures for company operations;
- Developing policies and procedures for procurement of services;
- Oversee the negotiating of contracts with clients;
- Formulating pricing policies for sale of services;
- Review financial statements, invoices and insurance certificates;
- Plan business objectives, develop organizations policies and establish responsibilities and procedures for attaining objectives with the business operations of the internet services business;
- Review activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions;
- Direct and coordinate formulation of financial programs to provide funding of new or continuing operations to maximize returns on investments and increase productivity;
- Plan and develop industrial labor, and public relations policies designed to improve the business' image and relations with customers, the community and the public;
- Evaluate market for new profitable opportunities in order to attain established policies and objectives of the company;
- Approving budget for the company and determining allocation of funds;

- Plan and implementing new operating procedures to improve efficiency and reduce costs.

Counsel asserts that the petitioner will support the beneficiary's position within one year, "as it expects sales in the amount of \$500,000.00 and to hire 6 employees during its first year of operations. . ." The petitioner provided a copy of a bank statement indicating that it has approximately \$26,000 in the bank, but did not provide details such as its budget or anticipated costs associated with the growth of its business within the one-year timeframe. The petitioner submitted a copy of a sub-lease agreement with [REDACTED] for a business premises comprised of 200 square feet, located on [REDACTED] for the period from March through September 2011. The petitioner did not provide a business plan detailing the nature of the intended business in the United States or projected annual revenues, expenses and net profit.

The director issued a request for additional evidence (RFE) on October 25, 2011. The director instructed the petitioner to provide additional documentary evidence to establish that it has acquired premises of sufficient size to conduct business, noting that such evidence may include photographs of the interior and exterior of all premises secured for the U.S. company. In addition, the director instructed the petitioner to further explain the nature of the intended business in the United States and requested evidence to demonstrate how the company will grow to be of sufficient size to support a managerial or executive position. Specifically, the director instructed the petitioner to provide: (1) a copy of the foreign company's organizational chart; (2) a detailed description of the current or proposed staffing of the new office including the number of current or proposed employees, their wages or salaries, job titles, detailed position descriptions and educational levels or requirements; (3) a comprehensive description of the beneficiary's job duties; and (4) photographs of both the interior and exterior of the premises secured for the U.S. entity.

In response, the petitioner submitted photographs of the interior and exterior of all premises secured for the U.S. company and a copy of the foreign company's organizational chart. Counsel stated the beneficiary will directly supervise four proposed employees: a general manager, a financial manager, a sales manager and an exports manager. Counsel provided detailed descriptions of the positions, and stated that each position required a Bachelor's degree. In addition, Counsel for the petitioner stated that the beneficiary will perform the following duties in his position as president of the U.S. company:

managing the overall activities of the company, including administrative and financial aspects, working closely with the company's accountant, financial manager, financial consultant and attorney (30%); monitoring the activities of employees including managers and employees (20%); maintaining regular communications (via phone and e-mail) with the foreign parent company, including assisting at board meetings and phone conferences with the foreign board of directors on behalf of the U.S. company (15%); identifying new markets and developing new market strategies (10%); networking with businesses in the community to identify and cultivate new information sources, attending trade shows and other events to keep abreast of industry changes (5%); traveling worldwide to communicate with various electronics companies and manufacturers and attend trade related shows and expositions (5%);

preparing a budget for the new operations and marketing plan in conjunction with the company's CPA and financial consultant (5%); determining the start-up needs for the new entity, including the purchasing of office equipment and computer systems (5%); evaluating and reviewing the services to be provided by the company (5%).

The director concluded that the evidence failed to establish that the new company would grow to a sufficient size to support a managerial or executive position within one year. The director observed that the petitioner has not provided a timetable for the hiring of employees, and therefore the evidence does not support a conclusion that the beneficiary would be relieved from performing non-qualifying duties within one year of approval of the petition.

On appeal, the petitioner maintains that it has met its burden to demonstrate that it will be able to support a managerial or executive position within one year. The petitioner asserts on appeal that it will "target to hire no less than 12 employees by the end of our first year." However, the petitioner provides the names and descriptions for only five prospective employment positions: sales manager, operations manager, warehouse manager, warehouse person and administrative assistant. The petitioner states, "college degrees will be required for managerial positions, while all subordinate positions will be required a high school diploma." The petitioner's statement on appeal regarding the number of employees it anticipates hiring in its first year, their job descriptions and educational requirements is not consistent with the petitioner's statement of these first-year operational goals either at the time of filing this petition or in response to the director's RFE. For example, counsel stated at the time of filing this petition that the petitioner expects to hire six employees during its first year of operations, but did not provide position descriptions for the prospective hires. In response to the director's RFE, counsel stated the beneficiary will supervise four proposed employees, a general manager, a financial manager, a sales manager and an exports manager, respectively, and stated that each position required a Bachelor's degree. 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).

The evidence on appeal includes a curriculum vitae (C.V.) for the beneficiary's son, who is both the General Manager of the foreign entity and a prospective employee of the petitioner. The additional evidence also includes photographs of office space which the petitioner asserts it has secured for future use. Pictures of this office space have previously been submitted into the record. The petitioner further submits new documents, comprised of two photographs of an empty warehouse and a notarized statement dated February 10, 2012 from [REDACTED] stating that the petitioner is renting "1000 square feet" on [REDACTED], "including office spaces in order to build his business . . ." As stated above, the petitioner had previously submitted into the record a copy of a business sub-lease agreement with [REDACTED] regarding 200 square feet of space at the same premises for the period from March 1, 2011 through September 30, 2011. However, the petitioner has not submitted a copy of any lease agreement for business premises subsequent to September 30, 2011. 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)).

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 a managerial or executive capacity within one year.

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 either in an executive or managerial capacity. *Id.* Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's proposed organizational structure, the duties of the beneficiary's proposed subordinate employees, the petitioner's timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, 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 a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or 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 repeatedly described the beneficiary's proposed position in very broad terms, noting his development of goals and policies, establishment of objectives and broad authority in the decision-making process. The petitioner has repeatedly stated that the beneficiary "does not receive general supervision and direction from any other person and only reports to 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.).

Thus, while several of the duties generally described by the petitioner would generally fall under the definitions of managerial or executive capacity, the lack of specificity raises questions as to the beneficiary's actual proposed responsibilities. 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. 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.

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 indicates that it will operate a freight forwarding business and that the beneficiary will manage subordinate general managers. The petitioner simultaneously asserts on appeal that "college degrees will be required for managerial positions, while all subordinate positions will be required a high school diploma," and indicates that its initial staff will include a warehouse person and an administrative assistant.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above.

The petitioner has not provided position descriptions for any proposed subordinates such that the AAO could determine whether any of them could be considered professional positions. Nor has the petitioner provided credible evidence of a proposed organizational structure that would be sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. The record does not establish that the warehouse person and the administrative assistant would hold managerial or supervisory positions.

The AAO's analysis of this issue is severely restricted by the petitioner's failure to submit a business plan, although on appeal the petitioner asserts that it has submitted one. As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. See *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien

entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefore. Most importantly, the business plan must be credible.

Id.

In this matter, a review of the totality of the evidence submitted provides very little information regarding the number of employees to be hired, the timeline for hiring employees, the financial position of the U.S. company, the petitioner's anticipated start-up costs and financial objectives for the first year of operations, and the physical premises secured by the U.S. company. The petitioner's submission of a vague job description for the beneficiary, a bank statement showing approximately \$30,000 in an account, and the absence of a business plan, falls significantly short of meeting its burden to establish that the company will be able to support a primarily managerial or executive position within a twelve-month period. The regulations require the petitioner to present a credible picture of where the company will stand in exactly one year, and to provide sufficient evidence in support of its claim that the company will grow to a point where it can support a managerial or executive position within one year. As previously stated, 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 (citing *Matter of Treasure Craft of California*, 14I&N Dec. 190 (Reg. Comm'r. 1972)).

The AAO does not doubt that the beneficiary will have the appropriate level of authority over the petitioner's business as its president. The definitions of executive and managerial capacity, however, each 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 show that the beneficiary *primarily* performs these specified responsibilities and does 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).

Overall, the vague job description provided for the beneficiary, in light of the failure of the petitioner to provide its business and hiring plans for the first year of operations, prohibits a determination that

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the petitioner could realistically support a managerial or executive position within one year. Accordingly, the appeal will be dismissed.

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.