



U.S. Citizenship
and Immigration
Services



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DATE: DEC 19 2012

Office: CALIFORNIA SERVICE CENTER

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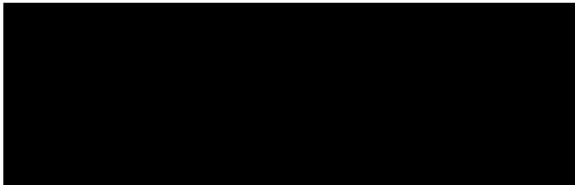
Petitioner:

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, California 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 petition seeking to extend the beneficiary's employment 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 Colorado corporation, engages in the business of marketing and business management services. It claims to be an affiliate of Neocom C.A. (the "foreign entity"), located in Venezuela. The beneficiary was previously granted L-1A status for a one-year period in order to open a new office in the United States. The petitioner now seeks to extend the beneficiary's status and employment as its Chief Executive Officer (CEO) for three additional years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. In denying the petition, the director concluded that the beneficiary has been and will be performing many aspects of the day-to-day operations of the business, noting that the beneficiary is the petitioner's sole employee.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner asserts that the director erred by failing to consider the foreign entity's employees under the beneficiary's supervision. Counsel asserts that the director erred in concluding that the beneficiary's actions to create an enterprise and bring it to substantial revenue are not executive or managerial in nature. Counsel also asserts in the alternative that the beneficiary "be afforded the opportunity to be given one more year in L-1A status as a start-up office enterprise." Counsel submits a brief and additional evidence on 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 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(I)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (I)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (I)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

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.

II. The Issue on Appeal

The sole issue to be addressed is whether the petitioner established that the U.S. entity will employ the beneficiary in a primarily managerial or executive capacity.

Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on September 26, 2011. In a letter accompanying the petition, counsel for the petitioner described the nature of the petitioner's business as a "Marketing and Business Management Services Company . . . [which] works with small and medium sized business clients to develop concrete, practical, short-term action plans that deal directly with their need for marketing and management skills." In the same letter, counsel stated that the beneficiary is "currently the only employee of the business," although counsel asserted that the petitioner "plans to hire a sales person and a customer representative to fulfill [the petitioner's] internal needs for customer support, sales and marketing initiatives and other long-term goals of the company."

With the initial petition, the petitioner submitted an undated letter listing the following job duties for the beneficiary in the United States:

1. Maintain and develop organizational culture, values and reputation in its markets and with all staff, customers, suppliers, partners and regulatory/official bodies;
2. Sales organization planning and development;
3. Import/export development;

4. Negotiating and administration of purchasing contracts. Rent or buy policy evaluation and decision/recommendation;
5. Appropriate administration, budgeting, monitoring, reporting, communication and liaison;
6. Maintain and develop existing and new customers through appropriate propositions and ethical sales methods, and relevant internal liaison;
7. Maintain and develop relations with Colorado's most relevant Chambers and business associations, professional related organizations and non-profits;
8. Liaise and attend meetings with other service providers; and
9. Develop and manage the marketing agency offerings and proposals.

Accompanying Form I-129, the petitioner submitted an organizational chart showing the beneficiary as the head of both the U.S. and foreign entities. With regards to the foreign entity, the chart indicated that the beneficiary directly oversees a client development representative, an administrative supervisor, a graphic and web designer, a production supervisor, and a sales and marketing representative. With regards to the U.S. entity, the chart indicated the beneficiary will directly oversee a client development representative, an administrative assistant, and a creative department employee, with the following notation: "A sales person and costumer rep [*sic*] should be hired before the year ends. The rest will follow."

On October 5, 2011, the director issued a request for additional evidence ("RFE") in which she requested, *inter alia*, the following: (1) a more detailed description of the beneficiary's duties in the United States, including the percentage of time required to perform the duties of the managerial or executive position; (2) a detailed organizational chart and description, depicting all the organization's current hierarchy and staffing levels and listing all employees subordinate to the beneficiary by name, job title, summary of duties, educational level, and salary; and (3) copies of the U.S. company's State Quarterly Wage Report for the 2nd quarter of 2011.

In a response dated November 16, 2011, counsel for the petitioner submitted, *inter alia*, the following: (1) a letter from [REDACTED] regarding the nature of the work performed by the beneficiary; (2) invoices for some of the petitioner's recent sales; (3) a list of suppliers contacted by the beneficiary "showing his marketing and promotional efforts"; (4) a list of potential clients in Denver contacted by the beneficiary; and (5) a list of Colorado Business Community connections which the beneficiary has made. Regarding the director's request for State Quarterly Wage Reports, counsel stated: "Currently [the petitioner] does not directly employ any employees. Therefore they have not submitted State Quarterly Wage Reports for the Second quarter for 2011." Counsel also stated the following:

This is a start-up sales, sourcing, marketing, promotional specialty products business. To go forward staff will be necessary almost immediately to support the present business plan projecting nearly twice the sales of the first ten months. In essence, U.S. products were located and sold through the affiliated company structure for distribution in Venezuela resulting in substantial revenues brought to the U.S.

The director denied the petition on December 2, 2011, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. In denying the petition, the director observed that the beneficiary has been and will be performing many aspects of the day-to-day operations of the business, as the beneficiary is the petitioner's sole employee. The director observed that several of the beneficiary's proposed duties comprise of marketing tasks, including the tasks of sales marketing and development, negotiating and administration of purchasing contract, maintaining and developing existing and new customers, and developing and managing the marketing agency offerings and proposals. The director concluded that these marketing tasks constitute the tasks necessary to provide a service or produce a product. The director also concluded that the beneficiary cannot be deemed a "functional manager" because the petitioner has not shown that the beneficiary manages the function rather than performs the tasks associated with the function.

The petitioner filed Form I-290B, Notice of Appeal or Motion, on January 3, 2012. On appeal, counsel for the petitioner asserts that the director erred by failing to consider the foreign entity's employees who continue to be under the beneficiary's supervision. Counsel cites to an unpublished AAO decision, [REDACTED] (AAO Dec. 15, 2011), in which the AAO considered the alien's management of subordinate staff located at the foreign entity's office in Chile to find that the alien qualified as a function manager. Counsel also asserts that the director erred in concluding that the beneficiary's actions to create an enterprise and bring it to substantial revenue are not executive or managerial in nature. Counsel cites to another unpublished AAO decision, *Matter of Irish Dairy Board, Inc.*, A28 845 421 (AAU Nov. 16, 1989), to support the assertion that the beneficiary's activities of organizing a legal entity, preparing his business to live and breathe in the U.S. market, doing necessary research, implementing a marketing plan, supervising the launch of the petitioner's website, creating important business contacts in the community and a strong customer base, and executing a mailing campaign, are all executive in nature. Finally, counsel asserts in the alternative that the beneficiary should "be afforded the opportunity to be given one more year in L-1A status as a start-up office enterprise."

Discussion

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. Therefore, the director properly denied 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 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 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 AAO affirms the director's determination that the beneficiary is primarily engaged in providing the day-to-day operations of the business. The record reflects that the petitioner is engaged in the business of providing sales, sourcing and marketing of promotional specialty products. Inherently, the petitioner's day-to-day operations involve the duties of direct sales, sourcing, and marketing, all of which are directly performed by the beneficiary. In specific, the beneficiary's listed job duties include: sales organization planning and development; maintaining and developing existing and new customers; maintaining and developing business relations; liaise and attend meetings with service providers; and developing the marketing offerings and proposals. These types of direct sales, sourcing and marketing duties constitute performing the tasks necessary to provide the services of the petitioner. The petitioner provided no evidence to support its assertions that direct sales, sourcing, and marketing duties are executive or managerial in nature. An employee who "primarily" performs the tasks necessary to produce a product or to provide services, or other non-qualifying duties, 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).

The petitioner provided no evidence to support its assertion that the beneficiary's activities to "create an enterprise and bring it to substantial revenue," including the duties of organizing a legal entity, preparing his business to "live and breathe in the U. S. market," conducting market research, and finding clients and business contacts, are all executive in nature. Rather, these describe the types of normal operational tasks associated with the start-up of any new business. The L-1A nonimmigrant visa is not an entrepreneurial visa classification that would allow an alien a prolonged stay in the United States in a non-managerial or non-executive capacity to start up a new business. The petitioner cannot reasonably assert that the operational tasks necessary to start up and develop a new business to the point where it can support a managerial or executive position inherently qualify as managerial or executive tasks.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by 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. After one year, USCIS will extend the validity of the new office petition only if the entity demonstrates that it will support the employment of an alien in a primarily managerial or executive position. 8 C.F.R. § 214.2(l)(3)(ii).

On appeal, counsel cites to an unpublished AAO decision, *Matter of Irish Dairy Board, Inc.*, A28-845-421 (AAU Nov. 16, 1989), to support the assertion that the beneficiary's duties are executive or managerial in nature. However, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Counsel submitted no evidence to establish that the petitioner in this case is a complex business with numerous highly specialized organizational departments and utilizes outside contractors to perform all of its necessary functions, among other factors. See *Matter of Irish Dairy*

Board, Inc., [REDACTED]. Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. *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); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO acknowledges counsel's assertion that pursuant to section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. However, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). As discussed above, the petitioner has not established that the beneficiary spends the majority of his time on qualifying managerial or executive duties.

On appeal, counsel asserts that the director failed to consider the beneficiary's supervision of the foreign entity's four employees. Counsel cites to an unpublished decision, [REDACTED] (AAO Dec. 15, 2011), to support the assertion that subordinate staff located at the foreign entity's office can be considered in the petitioner's corporate hierarchy. Again, counsel failed to provide any evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Counsel provided insufficient evidence establishing the existence of the subordinate employees in Venezuela, that the beneficiary would continue to supervise the employees in Venezuela, and that he would continue to have discretionary authority over personnel actions related to said employees.

To the contrary, the initial list of the beneficiary's job duties in the United States included no supervisory duties. The initial documentation confirmed that the petitioner had no employees other than the beneficiary, and that the petitioner planned to "hire a sales person and a customer representative to fulfill [the petitioner's] internal needs for customer support, sales and marketing initiatives and other long-term goals of the company." The documentation submitted in response to the RFE again emphasized the petitioner's plan to hire an administrative assistant and four new employees for every \$250,000 worth of sales in order to meet the petitioner's needs. In the letter dated November 16, 2011, counsel for the petitioner stated: "To go forward staff will be necessary almost immediately to support the present business plan" Similarly, Stephan Andrade asserted in his letter that he advised the petitioner to "seek sales and revenue first and to add staff and outside services as the revenue is realized." None of the submitted documentation made any specific reference to the beneficiary's continued duties to supervise the overseas staff.¹

¹ The AAO acknowledges that the petitioner has consistently referenced its sale of \$143,000 worth of U.S. products to the foreign entity, which in turn resold the products to Venezuelan customers. In addition, the petitioner's business plan, submitted with the initial petition, stated that the petitioner would "outsource to its

In summary, the record before the director was devoid of any specific reference to the beneficiary's continued supervisory duties over the foreign entity's staff while the beneficiary is in the United States. It was not until the instant appeal that the petitioner asserted the beneficiary would continue to supervise the foreign entity's employees while in the United States. On appeal, a petitioner cannot materially alter the beneficiary's job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Therefore, the petitioner failed to establish that the director erred by not considering the foreign entity's employees.

In addition, while the organizational chart indicates that the beneficiary directly oversees five employees in the foreign entity, counsel asserts on motion that the beneficiary directly oversees four employees. The petitioner has not offered any explanation for this discrepancy. 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).

Finally, on appeal counsel asserts in the alternative that the beneficiary should "be afforded the opportunity to be given one more year in L-1A status as a start-up office enterprise." However, the regulations prohibit such a request from being granted. As discussed above, the L-1A nonimmigrant visa is not an entrepreneurial visa classification that would allow an alien a prolonged stay in the United States in a non-managerial or non-executive capacity to start up a new business. The regulations allow for a one-year period for a U.S. petitioner to commence doing business and develop to the point that it will support a managerial or executive position. The only provision that allows for the extension of a "new office" visa petition requires the petitioner to demonstrate that it is sufficiently staffed to support a managerial or executive position, which the petitioner failed to demonstrate in this instance. 8 C.F.R. § 214.2(l)(14)(ii). By allowing multiple petitions under the more lenient standard, USCIS would in effect allow foreign entities to create under-funded, understaffed or even inactive companies in the United States, with the expectation that they could receive multiple extensions of their L-1 status without primarily engaging in managerial or executive duties.

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.

Venezuelan operations web and back office contract fulfillment tasks when necessary for cost purposes." However, other than these broad references to the foreign entity, the petitioner provided no specific reference to the beneficiary's continued supervision over the foreign entity's staff.