



U.S. Citizenship
and Immigration
Services



D7

DATE: **DEC 20 2012**

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:

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 approval of 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 Florida corporation, states that it intends to operate a remodeling and construction business and as an exporter of construction materials. It claims to be a wholly owned subsidiary of G & P Constructores, S.A. located in Venezuela. The petitioner is seeking an initial approval of one year for the beneficiary so that she may serve as President and General Manager of the new office.

The director denied the petition on December 19, 2011, concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity or that the new office will support such a position within one year of approval of the petition.

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 evidence of record establishes that the beneficiary will function in a qualifying managerial or executive position. 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 the 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)(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 (I)(I)(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.

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

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. FACTS AND PROCEDURAL HISTORY

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on July 13, 2011. The petitioner indicated that it operates a remodeling and construction business with zero employees and a projected gross annual income of \$210,000 for the first year of operation.

In an undated letter, the petitioner stated that the company intends to provide services and products to the "U.S. construction industry" and that it will be involved in real estate services for residential and commercial units to include "remodeling services, painting, tile installation and general carpentry." The petitioner also stated that it would "export construction material using its parent company" for distribution purposes. The petitioner indicated that the beneficiary, in her proposed position as President and General Manager, would be responsible for the "general and active discretionary decision making of the business." The petitioner further stated that the beneficiary's duties would include the following:

[P]reside all the meeting of the shareholders and all the meetings of the board of directors; shall execute bonds, mortgages and other instruments; shall sign certificates of stock; manage the short and long term financial planning; hire and fire employees; establish general guidelines which must be followed by employees; negotiate and approve agreements with

providers (products and services), dealers and clients, represent all the interest of [the petitioner].

The petitioner provided a business plan dated June 2011. The petitioner stated that its mission is to "provide top quality interior and exterior residential and commercial painting services." The petitioner also provided a hiring plan, stating that by the end of the first year of operations, the petitioner intended to hire a marketing manager, an administrative assistant, and "no less than three workers with skills in remodeling." The accompanying "personnel plan" spreadsheet shows that the petitioner has budgeted to hire two painters, one contracting and sales employees, and one administrative assistant by the end of the calendar year. The petitioner's business plan also references the company's intention to create positions for an inventory coordinator, expeditors and project managers; however, none of these positions is listed on the petitioner's personnel plan spreadsheet for the first four years of operation.

The director issued a Request for Additional Evidence "RFE" on July 5, 2011, requesting *inter alia*, the following: (1) the job titles and duties with percentage breakdown of time spent performing each for the United States employees; and (2) a description of the proposed management and personnel structure of the office.

The petitioner provided the job titles, duties, and educational requirements for all proposed positions in the United States for the first year of operations. The proposed duties for the beneficiary were as follows: plan and control activities for Board of Directors' Meeting and executive decisions including developing policies and resource management - 4 hours; develop long range goals and objectives - 6 hours; review and approve annual budget, quarterly, semi-annual, and annual financial statements - 2 hours; negotiate and approve agreements with providers - 2 hours; negotiate financing strategies - 2 hours; direct and coordinate activities and strategies to maximize efficiency- 6 hours; negotiate financing strategies - 4 hours; direct human resources activities- 2 hours; hire employees- 2 hours; manage short and long term financial planning - 6 hours; review transactions and monitor budget - 4 hours.

The petitioner also provided the requested descriptions for the subordinate positions of marketing manager, "sales representatives (workers)," and administrative assistant. The duties of the marketing manager included the following: determine the demand for products and services - 10 hours; develop pricing strategies- 12 hours; oversee product development or monitor trends - 6 hours; develop marketing strategies- 12 hours. The duties for the sales representatives included, among other duties, the following: contact regular and prospective customers - 4 hours; recommend products to customers - 6 hours; answer questions about products, prices, durability - 4 hours; meet with customers - 4 hours; and complete sales contracts or forms - 2 hours. The administrative assistant was to confer with customers to receive orders, complete contract forms, resolve billing or service complaints, and "direct and coordinate supportive services within the organization."

The director denied the petition on December 19, 2011. The director found that the petitioner failed to establish that the beneficiary would be employed in a managerial or in an executive capacity or that the new office would support such a position within one year of approval of the petition. The director determined that

given the size and structure of the anticipated staff, the beneficiary would not be relieved of performing the day-to-day operational and first-line supervisory functions of the business.

On appeal, the petitioner states that the record supports a finding that the beneficiary will be employed in a managerial or executive capacity. Specifically, the petitioner asserts that since company does not have a large number of employees, it requires a managerial position to ensure that the company can run successfully. Furthermore, due to the economic circumstances, the petitioner states that it is "understandable" that the company will "resort to sub-contracting in order to slash expenses and remain profitable.

III. DISCUSSION

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.

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 definitions of executive and managerial capacity 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). 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").

The initial description of the beneficiary's duties, described in the petitioner's undated letter, was broadly drawn. Duties such as "general and active discretionary decision making," managing "the short and long term financial planning," and presiding over "all the meetings of the shareholders" did not provide sufficient information regarding what the beneficiary would do 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 has failed to provide any detail or explanation of the beneficiary's proposed activities in the course of her 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).

In response to RFE, the petitioner submitted a slightly more detailed list of the beneficiary's duties with hours to be spent performing each. However, the AAO notes that most of the position description was essentially the same as the vague position description submitted at the time of filing and thus not responsive to the

director's request for a "comprehensive" description that would assist USCIS in determining the beneficiary's actual duties. The petitioner stated that the beneficiary's duties would include developing long range goals and objectives, directing the activities of human resources, managing the short and long term financial planning of the business, and directing and coordinating activities and strategies. These duties do not provide a clear picture of what the president of a construction/remodeling and export company would do on a day-to-day basis. One duty was even listed twice. Specifically, "[n]egotiate financing strategies" with financial institutions, was listed for both two hours of work and again for four hours of work under a different line item.

These duties provided little or no additional insight into what the beneficiary will primarily do on a day-to-day basis or how she will carry out her objectives as President and General Manager. 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)). 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).

Thus, while several of the duties described by the petitioner would generally fall under the definitions of managerial or executive capacity, the lack of specificity found in the beneficiary's job description, raises questions as to the beneficiary's actual proposed responsibilities. None of the beneficiary's duties, either in the initial description or in response to the RFE, reflect any of the construction or exportation activities of a general contractor, remodeling, painting, or construction material exportation business. The petitioner has failed to describe what the beneficiary will do within the context of the business the petition intends to operate.

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. *See generally*, 8 C.F.R. § 214.2(l)(3)(v)(C).

The record is unclear and inconsistent with respect to describing and documenting the number and types of subordinates to be supervised by the beneficiary by the end of the first year of operations. In the petitioner's business plan, the petitioner stated that it intends to hire a marketing manager, an administrative assistant, and "no less than three workers with skills in remodeling real estate units." On the petitioner's table entitled "Personnel Plan," the petitioner shows budget line items for two painters, a contracting and sales person, and an administrative assistant, but no marketing manager.

In response to the RFE, the petitioner provided position descriptions for all proposed employees including the President and General Manager, Marketing Manager, Sales Representatives (Workers), and Administrative Assistant. The petitioner did not provide the requested position description for the painters as described in the initial petition and no longer claimed that it would employ any workers to carry out the remodeling, painting and other construction-related services described in the company's business plan. The inconsistencies between the personnel plan found in the petitioner's business and the information provided in response to the request for evidence raises questions as to how many and why types of workers the petitioner actually intends to hire. 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 position descriptions for the Sales Representatives do not appear to relate to the general construction or painting work of the petitioner as stated in the initial letter and business plan. Based on these inconsistent descriptions of the petitioner's organizational structure, the AAO cannot determine who the beneficiary will actually supervise or what type of business the petitioner intends to conduct. 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). Without a clear understanding of whom the beneficiary actually supervises, the AAO is unable to determine that the beneficiary directs and controls the work of subordinate managers, supervisors or professionals. See section 101(a)(44)(A) of the Act.

On appeal, the petitioner claims that due to the "type of business" and "current economic circumstances" the petitioner will utilize sub-contractors. The petitioner, however, fails to state with any specificity how these sub-contractors will relieve the beneficiary of non-qualifying duties and how they will otherwise fit into the petitioner's overall organizational hierarchy. 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)).

Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. The job descriptions submitted by the petitioner do not establish that any of the employees subordinate to the beneficiary would be professional-level employees. Even assuming, *arguendo*, that the beneficiary will supervise and control the work of the marketing manager, the petitioner's projected staffing plan for the first year of operations does not support a finding that this position will be supervisory or managerial in nature. The business plan showed that the petitioner intends to hire no other marketing personnel during the first year of operations.

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'r 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 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. In the instant case, the petitioner has not established that a bachelor's degree is required for any of the positions subordinate to the beneficiary's.

The marketing manager's proposed duties, as stated in response to the RFE, do not provide enough specificity to support a conclusion that this position is professional in nature. Duties such as "[o]versee product development or monitor trends," "develop pricing strategies with the goal of maximizing the firm's profit," and "[d]evelop marketing strategies, based on knowledge of establishment policy," are vague and do not explain with sufficient specificity what the marketing managers duties are with respect to either the construction, painting, or export business functions claimed by the petitioner. The lack of specificity in the job duties raises questions as to the actual proposed responsibilities. Therefore, the position description alone is insufficient to establish that the position of marketing manager is a professional-level position.

Based on the foregoing, the petitioner has not supported a claim that the beneficiary will be primarily responsible for supervising subordinate managers, supervisors or professionals. The record does not clearly define the beneficiary's duties, the proposed structure of the organization, the number and types of employees to be supervised by the beneficiary, or the proposed nature and scope of the petitioner's business.

The proposed position of the beneficiary is a President and General Manager of a construction business to be composed of four to five employees other than the beneficiary by the end of the first year of operations. The petitioner has not demonstrated that the beneficiary, as a personnel manager, 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. Further, 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.

Finally, as discussed above, the record does not clearly define the proposed nature and scope of the petitioner's business. The petitioner initially claimed that the petitioner will provide painting and remodeling services to local clients and also export construction materials to Venezuela, but it has not indicated any plans to actually staff both components of the business. As noted above, the "workers" originally described in the record as painters or remodeling specialists were described as "sales representatives" in the petitioner's

response to the RFE. As such, the AAO cannot determine what types of employees will be hired or whether they would sufficiently relieve the beneficiary from performing non-qualifying duties associated with a remodeling and export business. For these reasons, the petition may not be approved and 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, the petitioner has not met that burden.

ORDER: The appeal is dismissed.