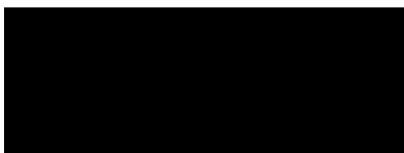


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



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DATE: JUN 21 2012 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:



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,

Perry Rhew
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 petition 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 North Carolina corporation established in 2009, intends to operate a financial consulting business. It claims to be a subsidiary of [REDACTED]

[REDACTED] The petitioner seeks to employ the beneficiary as the director of its new office in the United States for a period of one year.

The director denied the petition based on a finding that the petitioner failed to establish that it secured sufficient physical premises to house the new office, pursuant to 8 C.F.R. § 214.2(l)(3)(v)(A). In denying the petition, the director determined that the office space leased would not accommodate the number of employees the company anticipates hiring during the first year of operations.

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 miscalculated the number of employees to be hired during the first year of operations, and states that current premises are sufficient to accommodate the beneficiary, his assistant, an office manager, and a sales representative, who will spend the majority of his or her time outside of the office. Counsel emphasizes that the petitioner has minimal space requirements because it is strictly a service-oriented company with no need for equipment or inventory.

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) also provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or 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 involves 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. Physical Premises to House the New Office

The sole issue addressed by the director is whether the petitioner established that it has secured sufficient physical premises to house the new office, as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

A. Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on April 28, 2010. The petitioner stated on the Form I-129 that the beneficiary's worksite will be located at [REDACTED]

In support of the petition, the petitioner provided a copy of its commercial lease agreement executed on March 30, 2010. The lease agreement is for premises located at [REDACTED] and authorizes the petitioner's use of two offices on the second floor of the building, and the use of a conference room as needed. According to the terms of the agreement, the petitioner has a three-year agreement commencing on April 1, 2010, an annual rent of \$12,000, and may use the space for "typical office use." The petitioner provided copies of company checks issued to pay the first month's rent and the security deposit on the premises on March 30, 2010.

Along with the lease agreement, the petitioner submitted photographs of a "main office," "employee office," and "conference room" located at [REDACTED]

The petitioner's initial evidence also included an "introductory report" for the new office. The petitioner outlined its anticipated staffing plans as follows:

The firm will appoint three office assistants in June - 10 and one office manager in Sep - 10, hence in the first year the employed staff of company is of four persons. . . .

One more office assistant will appoint from June - 11 and one business analyst and two sales manager will be appointed from November -11 at salary rate of 25 USD/hr and 15 USD/hr respectively.

The director issued a request for additional evidence on May 10, 2010, in which he instructed the petitioner to provide: (1) its original lease agreement; (2) a statement from its lessor identifying the square footage and floor plan of the leased premises; and (3) photographs of the interior and exterior of all premises secured for the U.S. entity. The director noted that the photographs submitted as initial evidence were labeled "Suite 300" while the petitioner's lease indicates that it has leased suite 250.

The director also requested additional evidence pertaining to the employees to be hired during the first year of operation, including the number of employees, their proposed wages/salaries, and their job titles and duties.

In response to the request for evidence, the petitioner re-submitted its commercial lease, photographs identifying suite 250, and a letter from the petitioner's landlord, [REDACTED]. The landlord confirms that the petitioning company is leasing suite 250 and that its premises include a corporate office, an employee office, limited use of a conference room, and shared common bathrooms and break area for a total space of approximately 600 square feet.

The petitioner also provided a floor plan for the second floor of the building, which includes the petitioner's corporate office (210 square feet) with "attached storage" (96 square feet), an employee office (76 square feet), and a conference room (210 square feet). There are three additional rooms on the floor identified as "not in contract." The photographs submitted in response to the RFE indicate that the corporate office has an "attached private" that is 96 square feet, rather than an attached storage area.

In response to the director's request for additional information regarding the proposed staffing of the company, the petitioner stated that in 2010, it will employ one office assistant, one office manager and one sales executive, and that it will hire a business/financial analyst in January 2011. The petitioner indicated

that in 2012, it would add one additional office assistant and sales executive, for a total of six employees by the end of that year.

The director denied the petition on June 14, 2010, concluding that the petitioner failed to establish that it had secured sufficient physical premises to house the new office. In denying the petition, the director emphasized that the petitioner stated that it intends to employ four individuals in addition to the beneficiary, while the photographs submitted show that the company has only 286 square feet of space and two work stations.

On appeal, counsel asserts that the director's findings were factually and legally erroneous. First, counsel asserts that the director erred in concluding that there would be five employees during the first year of operations, as the petitioner stated in response to the request for evidence that the financial analyst will be hired in 2011. Counsel asserts that "while one can make the argument that at some point a financial analyst as well as other employees may be hired, it is at such times companies decide whether to move to another bigger, office space or expand the existing space." Counsel states that the submitted floor plan for the petitioner's suite shows three other spaces on the same floor which the petitioning company can lease if needed.

In addition, counsel asserts that, because there are no other tenants on the petitioner's floor, its use of the conference room is not limited. Counsel states that the room is equipped with a phone, fax and video conferencing equipment.

Thirdly, counsel asserts that the director "neglected to consider the nature of the Company's business and the nature of the Company's employees' positions." Counsel emphasizes that the petitioner is a service provider and notes that the beneficiary and the sales representative will rarely be in the office. Specifically, counsel asserts that the beneficiary "will be on the road trying to finalize establishing the company and the sales rep will be on the road trying to procure clients." Counsel indicates that the beneficiary and the office assistant will share the corporate office, while the office manager will use the employee office. Counsel further states that the "attached storage" was mislabeled by the landlord, describes this space as "a nominal area set aside for keeping stationary supplies." Counsel asserts that this space and the conference room will be used by the sales representative when he occasionally comes to the office to report to the beneficiary.

Counsel concludes there will be only three employees using the office during the first year of operation, and that the space is sufficient to serve the company's needs.

B. Discussion

Upon review, the petitioner has not established that it has secured sufficient physical premises to house the new office.

The petitioner's appeal is premised on the assertions that: (1) the company will hire only three employees in addition to the beneficiary, and not four as stated by the director; (2) that one of the petitioner's proposed employees does not require a formal workspace in the office; and (3) that the petitioner has the option to lease additional office space as needed due to vacancies in the building.

With respect to the petitioner's anticipated staffing levels, the AAO notes that it provided an "introductory report"/business plan at the time of filing and an explanation of its anticipated manpower needs in response to

the director's request for evidence. In both instances, the petitioner indicated that the company intended to hire four employees, in addition to the beneficiary, during the first year of operations. The petitioner's first year of operations would reasonably extend from May 2010 to May 2011, as the petition was filed at the end of April 2010. Specifically, the petitioner initially stated that it would be hiring three office assistants in June 2010 and one office manager in September 2010. In response to the RFE, the petitioner stated that it would hire an office manager, sales executive and office assistant in June or July 2010, and a financial/business analyst in January 2011. In either case, the petitioner stated that the number of employees to be hired during the first year of operations is in fact four, as determined by the director. Therefore, counsel's assertion that the financial/business analyst will be hired in "2011" and not during the first year of operations is unpersuasive.

Counsel explains that the beneficiary and office assistant will work in the petitioner's main 210 square foot office, and that the office manager will work in the 76 square foot "employee office." The petitioner has not accounted for any workspace for its sales executive or financial/business analyst. Rather, counsel indicates on appeal that the sales executive will primarily be "on the road" securing clients. 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).

There is nothing in the sales executive's position description which would suggest that the position is inherently peripatetic in nature. The petitioner indicated that the sales executive will spend 20 hours per week making telephonic sales calls, five hours per week on mass mailing and replying to inquiries, three hours per week compiling lists of potential clients, and five hours per week working with the business analyst/CEO. The petitioner has not explained how the sales representative would perform these duties from a conference room designated as "limited use" by the landlord, or from the area designated as either a "storage room" or a "private."

Even if the evidence did support counsel's assertion that the company can accommodate the sales executive, the petitioner has not explained where the financial/business analyst would work. 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)). Counsel simply asserts that this employee will not be hired during the first year of operations, notwithstanding the petitioner's statement that the beneficiary intends to hire and train this employee beginning in January 2011.

Finally, the AAO notes that the petitioner has not provided evidence, such as a letter from its landlord, to support counsel's assertion that other offices located adjacent to its suite are vacant and available to the petitioner should it need to expand beyond its current space during the first year of operations. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Based on the foregoing, the petitioner has not submitted evidence on appeal to overcome the director's determination. The AAO acknowledges counsel's assertion that the petitioner, as a financial consulting organization, does not require space to store equipment or inventory. The petitioner must still establish that it has sufficient space to accommodate its proposed office staff for the first year of operations. The petitioner has not done so. Accordingly, the appeal will be dismissed.

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

Beyond the decision of the director, the petitioner has not established that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position, as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

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.*

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.* Here, the petitioner failed to submit an adequate description of the proposed duties sufficient to establish that they would be primarily managerial or executive in nature within one year, and failed to provide a consistent explanation regarding the company's hiring plans for the first year of operations. As such, the AAO is unable to determine whether the beneficiary would be relieved from providing the company's services within one year of approval of the petition.

At the time of filing the petition, the petitioner submitted a letter dated April 20, 2010 from the petitioner's Indian parent company. The letter describes the beneficiary's proposed duties as the following:

- (a) Setting up the subsidiary as a legal entity
- (b) Filing all necessary papers with applicable governments;
- (c) Preparing the Operating Agreement for the [U.S. company];
- (d) Securing an office space for its operation;
- (e) Researching market conditions, potential clients, level of need for financing and availability of creditors;
- (f) Performing feasibility studies and preparation of such reports;
- (g) Sourcing collaborators, negotiating and finalizing collaboration agreements;
- (h) Assessing funds needed to support the U.S. operations and transferring the necessary funds from [the foreign entity] to [the U.S. entity].
- (i) Assessing personnel needed to support the US operations and hiring the necessary staff; and
- (j) Establishing the U.S. operation's internal policies, objectives, and short term as well as long term targets.

The foreign entity's director indicated that "most of the initial scheduled tasks have already been completed," and noted that the beneficiary would complete the remaining tasks and "develop the business during his stay in the USA."

As noted above, the petitioner submitted an "introductory report"/business plan in which it stated that it would hire three office assistants in June 2010 and an office manager in September 2010. The report indicates that

the company intends to hire a business analyst and two sales managers in November 2011, approximately 18 months after the petition was filed.

In the request for evidence issued on May 20, 2010, the director requested additional evidence regarding the proposed staffing of the U.S. company, and noted that the evidence should establish that the beneficiary would be relieved from performing the day-to-day operations of the company within one year. In addition, the director instructed the petitioner to "submit a breakdown of the number of hours devoted to each of the beneficiary's proposed job duties on a weekly basis."

The petitioner submitted a completely revised description of its proposed staffing plan, noting that the company would initially hire an office assistant, sales executive and office manager, and hire a financial analyst in January 2011. The petitioner indicated that the beneficiary would train the business analyst to manage the day-to-day operations of the U.S. office. The petitioner submitted position descriptions for the proposed employees but did not respond to the director's request for a detailed breakdown of the beneficiary's proposed duties. 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).

The only description of the beneficiary's proposed duties is that found in the foreign entity's letter, which consists primarily of duties that were completed prior to the filing of the petition. While the petitioner indicates that the beneficiary will be responsible for hiring employees and establishing the internal policies, objectives and goals for the company, the petitioner has not explained what the beneficiary would do on a day-to-day basis as the director of the U.S. office within one year of approval of the petition. 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 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).

Furthermore, the petitioner has not provided a consistent account of its proposed staffing levels. The petitioner's business plan indicates that the company would hire an office manager and office assistants during the first year of operations. While these employees would perform a number of administrative functions, based on the position descriptions submitted, neither the office manager or assistants would relieve the beneficiary from actually providing the company's financial consulting services or marketing and selling these services. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

The petitioner subsequently submitted a revised hiring plan in response to the request for evidence indicating that the company would hire an office manager, an office assistant, a sales executive, and a financial analyst within one year. The petitioner provided no explanation for the discrepancy between this plan and the business plan submitted at the time of filing the petition. 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).

Accordingly, as the petitioner has not provided a detailed description of the beneficiary's proposed duties or a consistent account of the company's proposed organizational structure, it has not met its evidentiary burden to establish that the beneficiary would be performing primarily managerial or executive duties within one year of the approval of the petition. For this additional reason, the petition cannot be approved.

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 reviews appeals on a *de novo* basis).

IV. Conclusion

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. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683 (9th Cir. 2003).

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.