



U.S. Citizenship
and Immigration
Services

[Redacted]

D7

Date: **NOV 05 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:

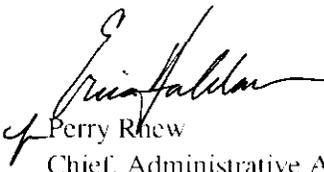
[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our 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 request 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 that any motion must 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 seeking to employ 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 corporation organized in the Commonwealth of Pennsylvania, states that it is involved in the design, fabrication, installation, and maintenance of filtration, separation and recovery equipment for the petroleum and chemical industry. On the Form I-129, *Petition for Nonimmigrant Worker*, the petitioner claims to have 50 employees and a gross income of around \$4,500,000. The petitioner asserts that it is a wholly-owned subsidiary of a [REDACTED]; the petitioner seeks to transfer the beneficiary to the United States as the manager of the U.S. subsidiary.

The director concluded that the U.S. entity could not be treated as a "new office," consistent with 8 C.F.R. § 214.2(l)(3)(v), specifying that the petitioner had been incorporated in the United States since 2005. In applying the Act, the director denied the petition concluding that the record did not demonstrate that the beneficiary would be employed in a primarily executive or managerial capacity. The director pointed to the fact that the U.S. employer had no employees, reasoning that there would be no one within the entity to relieve the beneficiary from performing day-to-day operations, and in turn, allow the beneficiary to primarily perform executive or managerial duties.

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 contends that the director failed to consider all documents and evidence in the record and erred in deciding that the beneficiary will not be acting primarily as an executive or manager.

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.

II. The Issues on Appeal

A. Whether the petition should be treated as a "new office" petition consistent with 8 C.F.R. § 214.2(1)(3)(v)

The first issue that must be addressed prior to analyzing the merits is whether the U.S. employer should be treated as a "new office" consistent with 8 C.F.R. § 214.2(1)(3)(v). As noted, the director declined to treat the U.S. employer as a "new office," since it had been incorporated in the United States since 2005. The issue is an important one, as it determines the petitioner's evidentiary burden in this matter. The AAO agrees with the director that the U.S. employer should not be treated as a new office consistent with 8 C.F.R. § 214.2(1)(3)(v).

The petitioner offers vague statements throughout the record suggesting that the U.S. employer will be a "new office." For instance, the petitioner readily admits that the U.S. employer has no employees, and that the lack thereof is, in part, due to the denial of the current petition. The petitioner also states, "Within three years, Huachangfeng USA will offer a full service from material procurement to products marketing, sales and services," and otherwise suggests in portions of the record that the U.S. employer will be a new venture. Still, the petitioner does not explicitly state in the record that it is applying as a "new office" consistent with 8 C.F.R. § 214.2(1)(3)(v), and in fact, requests a period of employment of two years in the petition, inconsistent with a one-year "new office" petition. See 8 C.F.R. § 214.2(1)(7)(i)(A)(3).

Contrary to the statements by the petitioner in the record suggesting that the U.S. employer will be set up as a "new office," numerous statements and documents in the record claim that the U.S. employer is already operating in the United States. As noted by the director, the U.S. employer has been incorporated in the Commonwealth of Pennsylvania since 2005. Further, the petitioner also suggests that the U.S. employer is already operating in the United States by submitting: 1) an IRS Form 1120, U.S. Corporation Income Tax Return, for the U.S. employer reflecting \$719,429.00 revenue in 2008; 2) documentation claiming ownership of a property since 2005 which is offered as the U.S. employer's place of business; 3) a business plan in response to the director's Request for Evidence that details already existing business in the United States; and 4) admissions in counsel's letter dated February 17, 2010 that the beneficiary and the president of the foreign employer have been managing the U.S. employer while on B-1 nonimmigrant business visas.

In short, there is ample evidence in the record to conclude that the petitioner is already doing business in the United States. 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). Also, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Therefore, the petitioner will not be treated as a "new office" petition consistent with 8 C.F.R. § 214.2(i)(3)(v) due to the overwhelming evidence in the record that the U.S. employer has been operating in United States for several years, and since the petitioner has not explicitly claimed to be a "new office."

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

The next issue to be addressed is whether the petitioner established the beneficiary would be employed in the United States in a qualifying 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.

The petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. For instance, in a letter supporting the original petition dated December 21, 2009 counsel states, [REDACTED] will employ [REDACTED] in an executive, managerial, or specialized knowledge capacity." A petitioner may not claim to employ the beneficiary as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

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). Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act.

The position description is included in the record of proceeding and will not be recited here. Upon review, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks do not fall directly under traditional managerial duties as defined in the statute. For instance, some of these non-qualifying duties include: "managing materials and parts purchase and providing help for Huachangfeng USA in import operation"; "conducting research on American and European market demand on filter separation product and providing information for new product development"; and "actively participating [*sic*] in petroleum, chemical, equipment and filter separation exhibitions." Based on the petitioner's failure to quantify the time the beneficiary spends on each duty, the AAO cannot determine whether the beneficiary is primarily performing qualifying managerial duties. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Regardless of whether the petitioner is claiming to be an executive or manager under the Act, the petitioner has not established the beneficiary will be functioning as either. In this matter, the proposed position of the beneficiary is manager of an industrial design and fabrication company consisting of the beneficiary, apparently as the sole employee or assisted by agents and contract staffing. The petitioner has not demonstrated that the beneficiary, as a 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 employs a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial duties. Indeed, the petitioner has readily admitted that it has no employees in the United States to be managed or to perform such non-qualifying 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 as required by section 101(a)(44)(B) of the Act. In fact, as offered by the petitioner, there is no current organizational hierarchy for the U.S. employer. Even if the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements.

Based on the limited documentation furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity.

With respect to the beneficiary's duties and the petitioning organization, the director requested additional evidence on January 5, 2010. Specifically, the director asked for the names of the U.S. employees, their position titles, and a description of their job duties. The director also asked for an organizational chart for the petitioning organization. In response, the petitioner revealed that it had no employees and declined to submit position descriptions for the proposed organization. Any 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 petitioner has now proffered additional evidence with the appeal, specifically a description of the petitioner's subordinate staff and a description of their proposed job duties. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

III. Conclusion

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.

The petitioner is not precluded from filing a new visa petition on the beneficiary's behalf that is supported by competent evidence that the beneficiary is now entitled to the status sought under the immigration laws.

ORDER: The appeal is dismissed.