



U.S. Citizenship  
and Immigration  
Services



D7

DATE: **OCT 10 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,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The petitioner has appealed the denial of a nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The Director, Vermont Service Center, denied the visa petition on April 13, 2011, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial capacity. The Administrative Appeals Office (AAO) will dismiss the appeal.

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 evidentiary requirements for this classification are set forth at 8 C.F.R. § 214.2(1)(3).

The petitioner, a Florida corporation established in 2003, engages in property management and house renovations. It claims to be a subsidiary of The Conquered Bear/Farey Partnership, located in the United Kingdom. The petitioner seeks to employ the beneficiary as a Department Manager for the purpose of creating and heading a new department in home renovations.

The sole issue addressed by the director is whether or not the beneficiary will be employed in a primarily managerial capacity as defined at section 101(a)(44)(A) of the Act. Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial capacity.

In a letter dated February 1, 2010 submitted with the initial petition, the petitioner provided the following description of the beneficiary's proposed position and job duties in the United States:

The Partnership is seeking to move the beneficiary to the United States to build a team of craftsmen that can be hired to renovate some of the many foreclosed homes that have been left in the central Florida area. . . . The aim will be to be able to offer an all in one price from start to finish, this will involve employing qualified craftsmen through to general labor as well as an on site supervisor, these people will be on the companies payroll and not subcontracted [*sic*].

On September 23, 2010, the director issued a request for evidence (RFE) instructing the petitioner to provide, *inter alia*, a comprehensive description for the beneficiary proposed position as well as for all the U.S. employees the beneficiary will be supervising. In response to the RFE, the petitioner clarified that its situation has changed slightly and stated the following:

The beneficiary is needed to remain in the United States in order to start a new department in the United States entity. Once approval is given to the request the beneficiary shall recruit 2 on site supervisors to oversee all work carried out by sub

contractors. Sub contractors will be used initially but be managed by the on site supervisors.

The Beneficiary shall then direct the on site supervisors and report directly to the general manager. He will be responsible for ensuring that budgets are kept and are set by the C.E.O via the general manager. He will be responsible for the department and shall be relieved of any non managerial duties by the on site supervisors. The on site supervisors shall be qualified in different aspects of the construction industry. As this is a new department and we have been waiting some 8 months to get started, no recruitment has been done as of today's date [sic].

On April 13, 2011, the director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily executive or managerial capacity or that the petitioner could support such a position. The director noted that the petitioner has not hired any individuals to perform the duties the petitioner stated would be performed by the beneficiary's subordinates.

In a letter dated May 18, 2011 submitted on appeal, the petitioner reaffirmed its goal of employing the beneficiary to "set up a permanent division of the company." The petitioner stated: "Once approval is given, he will recruit both Key personnel as well as skilled and unskilled workers to be placed on payroll." The petitioner provided a list of thirteen (13) proposed job duties and the percentage of time the beneficiary would allocate to each duty.

*The record, as presently constituted, shows that the petitioner currently has not created the department to be headed by the beneficiary nor hired any employees or sub-contractors subordinate to the beneficiary. The petitioner has clearly expressed that its plans to create the new department and hire contractors and employees for this department are future plans for which the beneficiary will be responsible. However, the petitioner's future plans are insufficient to establish eligibility for the benefit sought. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. Matter of Michelin Tire Corp., 17 I&N Dec. 248 (Reg. Comm'r 1978). In other words, the petitioner must have already reached the point where it can employ the beneficiary in a predominantly managerial position at the time it filed the petition. The petitioner failed to establish that, at the time it filed the petition, it had reached the point to where it can support the beneficiary in a primarily managerial position.*

The definition of "managerial capacity" has two parts. First, the petitioner must show that the beneficiary performs managerial responsibilities as defined in section 101(a)(44)(A) of the Act. Second, the petitioner must prove that the beneficiary primarily performs managerial responsibilities rather than spending a majority of his time providing the day-to-day functions of the operation. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). 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).

In the instant matter, the petitioner failed to establish that the beneficiary will primarily manage the department rather than primarily provide the services of home renovations. Since the petitioner has not yet hired any employees or sub-contractors for the proposed new home renovations department, the AAO must conclude that, at the outset, the beneficiary will be the only one performing the tasks necessary to provide the services and products for home renovations. Although the petitioner repeatedly states that the beneficiary will not be engaged in the day to day subordinate job duties, the petitioner failed to explain how it will be possible for the beneficiary not to do so if, at the outset, he will be the only employee in the new department.

Beyond the decision of the director, the record contains insufficient evidence to establish that the petitioner has a qualifying relationship with the beneficiary's foreign employer. 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).

The record contains inconsistencies regarding the claimed ownership of the U.S. and foreign companies. According to the Form I-129 Supplement L, the petitioner claimed it is a subsidiary of the beneficiary's foreign employer, [REDACTED] based upon common ownership. Specifically, the petitioner claimed that [REDACTED] and [REDACTED] each own 50% of the U.S. and foreign companies. In contrast, according to the petitioner's 2008 IRS Form 1120, U.S. Corporation Income Tax Return, and accompanying Schedule K, the petitioner claimed that it is not a subsidiary of any affiliated group or a parent-subsidiary controlled group. According to the petitioner's 2009 "For profit Corporation Annual Report," "Application for Registration of Fictitious Name," and "Fictitious Name Detail" reports filed with the Florida Department of State Division of Corporations, the petitioner claimed only one owner, [REDACTED]. Due to the inconsistencies in the record, the AAO is unable to conclude that there is a qualifying relationship between the U.S. and foreign companies.

In addition, the record contains insufficient evidence to establish that beneficiary was employed abroad with a qualifying organization within the last three years. The record is unclear whether the beneficiary was last employed by [REDACTED] or by some other legal entity whose exact ownership has not been documented. In a letter dated February 1, 2010, the foreign company stated that the beneficiary is the maintenance and renovation manager of a department which was "run as a subsidiary of the main partnership." According to the [REDACTED] Agreement, the business name of the venture is The [REDACTED] and the "exclusive purpose of the venture will be: Public House/Restaurant/Hotel." It therefore appears that the maintenance and renovation department which the beneficiary managed was a separate legal entity, rather than simply a department or operating division of [REDACTED]. Since the petitioner failed to demonstrate the ownership and control of the subsidiary maintenance and renovation component, the petitioner failed to establish that the beneficiary was employed by a qualifying organization abroad, as defined at 8 C.F.R. § 214.2(I)(1)(ii)(G).

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). Doubt cast on any aspect of the petitioner's proof may undermine the reliability and

sufficiency of the remaining evidence offered in support of the visa petition. *Id.* For these additional reasons, the petition cannot be approved.

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. 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.