



U.S. Citizenship
and Immigration
Services

[REDACTED]

D7

DATE: **OCT 18 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)

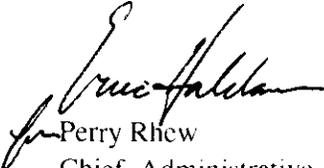
ON BEHALF OF PETITIONER:
[REDACTED]

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 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 July 8, 2011, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The petitioner filed an appeal on Form I-290B, Notice of Appeal or Motion, on August 8, 2011. 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(l)(3). As the petitioner indicates that it has established a "new office" as defined at 8 C.F.R. § 214.2(l)(2)(ii)(F), the petitioner must satisfy the applicable regulatory requirements for new office petitions, found at 8 C.F.R. § 214.2(l)(3)(v).

The petitioner, a Florida corporation established in 2010, is "established for the express purpose of acquiring businesses involved in marketing, retail, and distribution of automotive, gas, and household products." It claims to be a subsidiary of Golden Auto Services, located in Mumbai, India. The petitioner seeks to employ the beneficiary as its President/CEO for an initial period of one year.

The sole issue addressed by the director is whether the beneficiary will be employed in a primarily managerial or executive capacity as defined at section 101(a)(44) of the Act within one year of approval. 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 or executive capacity as defined at section 101(a)(44) of the Act.

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 proposed organizational structure, the duties of the beneficiary's proposed subordinate employees, the petitioner's timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, 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 petitioner's 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 described the beneficiary's proposed duties as president and CEO as follows:

[The beneficiary] will be a key person who has the ability to shape [the petitioner's] future and [the petitioner's] future investments in the United States. She will continue to oversee other managers who supervise day-to-day operations of [the petitioner] and its investments. In this capacity, [the beneficiary] will be a key U.S. contact for the parent company and will oversee and direct all executive functions of the US company. [The beneficiary] will establish goals, policies and procedures for [the petitioner] and its further diversification into the U.S. consumer market. In sum, [the beneficiary] will have the overall responsibility of planning and developing the U.S. investment, executing or recommending personnel actions, placing a management team to run the operations, determining [the petitioner's] next investment, conducting feasibility and market studies of future investments, advising owners of the Parent Company on where to further invest, supervising all financial aspects of the company and developing policies and objectives for the company. [The beneficiary] will accomplish these goals while Golden Auto retains complete control over its financial and managerial decisions.

The petitioner further indicated that the beneficiary's time would be allocated as follows:

Management Decisions	30%
Company Representation	15%
Financial Decisions	20%
Business Negotiations	25%
Organizational Development of Company	10%

In the instant matter, counsel and the petitioner have repeatedly described the beneficiary's proposed responsibilities in vague and broad terms. For example, the petitioner addressed the beneficiary's responsibility to "oversee and direct all executive functions of the US company," "establish goals, policies and procedures for [the petitioner] and its further diversification into the U.S. consumer market" and her "overall responsibility of planning and developing the U.S. investment." The petitioner's description does not clearly identify the managerial or executive duties to be performed with respect to the daily functions of the proposed operation. 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).

Similarly, although the petitioner provided a breakdown of how the beneficiary's time would be allocated among her various responsibilities, this description was even more vague, indicating that the beneficiary would devote her time to "management decision," "company representation," "financial decisions," "business negotiations," and "organizational development of the company." The AAO cannot accept an ambiguous position description and speculate as to the related managerial or executive duties to be performed. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Thus, while several of the duties generally described by the petitioner would generally fall under the definitions of managerial or executive capacity, the lack of specificity raises questions as to the beneficiary's actual proposed responsibilities. Overall, the position description alone is insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity.

Beyond the beneficiary's position description, the AAO must review the totality of the record including descriptions of the beneficiary's subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

After examining the totality of the record, the AAO concludes that the petitioner failed to establish that it 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. The petitioner failed to credibly establish its business and hiring plans, which are critical factors particularly in the case of a new office petition, which is dependent on evidence that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity.

First, the petitioner failed to credibly establish its business plan, i.e., how it proposes to do business in the United States within its first year. At the time of filing, the petitioner sought to rely upon its intended imminent acquisition of an existing retail business, [REDACTED], as evidence that the company was prepared to commence doing business in the United States. Specifically, counsel stated the following:

To meet the aggressive goals of our U.S. entity, [the beneficiary] is already negotiating the acquisition of [REDACTED] engaged in operation of retail gas station and convenience store doing business as [REDACTED]. The deal is in the 90-day feasibility period. [The beneficiary] intends to purchase this location after the feasibility period. *Please see the proposed organizational chart, positions, tax returns, employment returns, recent invoices, and detailed business plan attached herein as **Exhibit 4**.*

However, the petitioner failed to submit credible, objective evidence supporting its claim that it was "negotiating the acquisition" of [REDACTED]. The record is devoid of any legal documents related to the purported negotiations, such as evidence of an offer to sell the business and an offer to purchase the business. The petitioner submitted no documents related to the purported "90-day feasibility period." The petitioner submitted no documents from the owner and/or director of [REDACTED] to corroborate the petitioner's claim that he or she was negotiating the sale of the business to the petitioner. The petitioner's business plan makes no mention of [REDACTED]. The petitioner's submission of [REDACTED] Inc.'s tax returns, employment returns, and recent invoices show nothing more than that [REDACTED] is an existing retail business; these documents in no way establish or suggest that the owner of [REDACTED]

██████████ was negotiating the sale of the business to the petitioner at the time the petition was filed. Since the petitioner failed to establish that it had plans to imminently acquire ██████████ or any other retail locations at the time of filing, the petitioner failed to establish how it would realistically grow to support the beneficiary in the intended managerial or executive capacity.

Second, the petitioner failed to credibly establish its anticipated staffing. The petitioner provided conflicting claims regarding how many employees it has hired or projects to hire. According to Form I-129, the petitioner stated that it had ten "projected" employees. With the initial petition, the petitioner submitted a proposed organizational chart depicting a total of ten positions, with all but one of them (the beneficiary's position) apparently vacant. In contrast, the petitioner claimed in its business plan, submitted with the initial petition, that it "currently employs seven employees." On October 4, 2010, the director issued a request for evidence (RFE) instructing the petitioner to submit, *inter alia*, a list of the petitioner's U.S. employees by name and title, as well as complete position descriptions for each employee. In response to the RFE, counsel for the petitioner submitted a letter, dated November 17, 2010, reaffirming that the petitioner "currently has 7 employees and projects to employ additional 10 fulltime employees within that end of two-year period." Counsel then further confused the matter by listing and providing general position descriptions for a general manager, accountant, retail-manager, bookkeeper, assistant manager, and cashier/stocker, but failing to provide any names of actual employees or any specific duties performed by each employee. By failing to provide a consistent, credible picture of the petitioner's actual and anticipated staffing, the petitioner precluded the AAO from understanding the true scope of the petitioner's intended operations 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).

In the petitioner's response to the RFE, the petitioner submitted an "evaluation" of the beneficiary's positions for the foreign entity and the petitioner, prepared by ██████████ of the University of Maryland. ██████████ In the letter, ██████████ makes conclusions and offers opinions regarding the beneficiary's eligibility under the immigration statute and regulations. However, the AAO gives little weight to the opinion letter. The petitioner failed to establish that ██████████ who is a ██████████ is qualified to be considered an expert in the field of immigration law. The submission of a letter from an expert of business law supporting the petition is not presumptive evidence of eligibility. *Matter of Caron Int'l*, 19 I&N Dec. 791, 795 (Comm'r. 1998). The textbook or common understanding of business terms will not supersede the statutory definitions of "manager" and "executive" as found in sections 101(a)(44)(A) and (B) of the Act. Although USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id*; see also *Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated or is in any way questionable. *Matter of Caron Int'l*, 19 I&N Dec. at 795.

Counsel for the petitioner relies heavily on general descriptions of the gas station and convenience store industry, citing statistics about major companies such as 7-Eleven, Exxon Mobile and BP. However, these general descriptions have no bearing on an assessment of the nature of the beneficiary's duties within the context of the petitioning company's business, and the petitioner cannot satisfy its evidentiary burden by relying on such descriptions. The regulations require the petitioner to submit a detailed description of the beneficiary's actual duties within the context of the petitioner's business. 8 C.F.R. § 214.2(1)(3)(ii). The actual duties themselves 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).

On appeal, counsel for the petitioner asserts that the petitioner has now acquired 51% ownership of [REDACTED]. Counsel further asserts that with the acquisition, the beneficiary "will assume the position of President/CEO" of [REDACTED]. As proof of the purported acquisition of [REDACTED], the petitioner submits an "Agreement to Purchase Stock," dated August 30, 2011, stating that, for the consideration of ten dollars, [REDACTED], agrees to sell, assign, transfer, and set over to the beneficiary 51% of the common stock of [REDACTED] represented by stock certificate "No. 1500 through 2000." The petitioner submits a "Stock Transfer," dated August 30, 2011, confirming the transfer of 51% share of the common stock as represented by certificate "no. 1500 through 2000." The petitioner also submits the "Articles of Amendment to Articles of Incorporation of [REDACTED]" reflecting that on August 31, 2011, the beneficiary was added as the Secretary of the corporation.

The documents the petitioner submits to prove its claimed majority interest in [REDACTED] are not credible. First, the "Agreement to Purchase Stock" and the "Stock Transfer" are not credible or sufficient to corroborate the petitioner's claimed ownership interest in [REDACTED]. The "Agreement to Purchase Stock" and the "Stock Transfer" failed to clearly identify to whom the shares were issued; both documents ambiguously state that the shares were issued to [REDACTED] even though the petitioner is a separate and distinct legal entity from the beneficiary. The petitioner failed to submit a copy of stock certificate "No. 1500 through 2000," although this stock certificate is referenced in both documents. The petitioner failed to explain why [REDACTED] issued stock certificate "no. 1500 through 2000" to the petitioner, when [REDACTED] had only one owner, and when the corporation's total number of authorized shares is 1000. The petitioner failed to submit [REDACTED] stock certificate registry or ledger, corporate bylaws, the minutes of relevant annual shareholder meetings, and any other relevant documentation to establish the total number of shares issued to the exact number of shareholders, in order to verify each shareholder's actual percentage of ownership. The petitioner submitted no evidence of its payment of \$10.00 to [REDACTED] in exchange for the issuance of shares.

In addition, the "Articles of Amendment to Articles of Incorporation of [REDACTED]" itself does not indicate the corporation's ownership or name its shareholders. Therefore, this document is not evidence of the petitioner's claimed ownership interest in [REDACTED]. Finally, the "Articles of Amendment to Articles of Incorporation of [REDACTED]" reflects that the beneficiary was added as the Secretary of the corporation. This undermines counsel's assertion that the beneficiary "will assume the position of President/CEO" upon the acquisition of [REDACTED].

Even assuming *arguendo* that the petitioner established that it has acquired an ownership interest in [REDACTED], the petitioner failed to credibly establish that it would realistically develop to the point where it could, and would, employ the beneficiary in a primarily managerial or executive capacity within its first year.

The record shows that in 2009, [REDACTED] had only employee: its [REDACTED]. The petitioner submitted [REDACTED] IRS Forms 941 for all four quarters of 2009, reflecting that the company consistently employed only one employee: [REDACTED]. The petitioner submitted the 2009 Form W-2 for [REDACTED] issued by [REDACTED] which corroborates the above Forms 941. Considering that [REDACTED] has employed only one employee for the entire year immediately preceding the filing of the instant petition, the petitioner failed to credibly establish that the beneficiary would primarily perform managerial or executive duties within one year. The AAO is not persuaded by the petitioner's claims that it plans to hire or has hired seven to seventeen employees to operate a retail business that has been operated by one employee in the past.

For all of these reasons, the petitioner has not established that it would employ the beneficiary in a primarily or executive capacity within one year. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer, [REDACTED].

According to the Form I-129 Supplement L, the petitioner claimed it is a subsidiary of the beneficiary's foreign employer based upon the foreign entity's 100% ownership and control over the petitioner. The only document the petitioner submitted to support this claim was a "Minutes of Reorganizational Meeting," dated August 9, 2010, stating that the petitioner "will issue 100% (1000) of its authorized stock to [REDACTED] and that the beneficiary "is elected as the President and CEO" of the petitioner."

The "Minutes of Reorganizational Meeting" is not credible. The petitioner's Articles of Incorporation clearly states that the petitioner is authorized to issue a total of 5000 shares. Therefore, the statement in the Minutes of Reorganizational Meeting that the petitioner will issue 1000 shares totaling 100% of its authorized stock is inconsistent with the petitioner's Articles of Incorporation. The petitioner submitted no other evidence of the foreign entity's purported 100% ownership of the petitioner, such as stock certificates, a stock ledger or registry, or evidence of the foreign entity's payment in exchange for the issuance of shares.

Based on the foregoing, the petitioner has not established that it has a qualifying relationship with the beneficiary's foreign employer. 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).

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.