



U.S. Citizenship
and Immigration
Services

D7



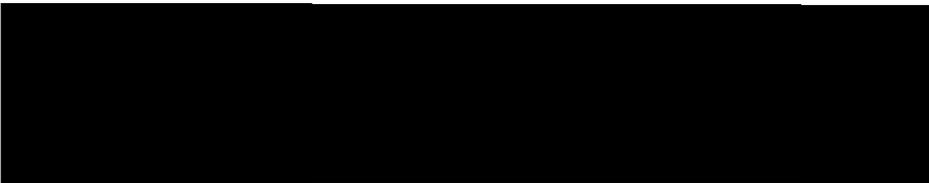
DATE: **OCT 26 2012** Office: VERMONT SERVICE CENTER

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:



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 classify 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 May 12, 2011, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial capacity. On June 14, 2011, the petitioner filed an appeal on Form I-290B, Notice of Appeal or Motion. The Administrative Appeals Office (AAO) will dismiss the appeal.

The petitioner, a Texas corporation established on January 18, 2007, engages in graphic design, advertising, and marketing services. The petitioner claims to be a subsidiary of Elevation Studio, S.A. de C.V. (the foreign entity), located in Monterrey, Mexico. The petitioner claims it is "100% capitalized" by the foreign entity. The petitioner has requested that the instant petition be treated as a new office petition. The petitioner seeks to employ the beneficiary as its Executive Director for an initial period of one year.

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

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.

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. Analysis

The first issue in the instant matter is whether the petitioner qualifies as a "new office." In general, the one-year "new office" provision is an accommodation for newly established enterprises, provided for by 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.

In creating the "new office" accommodation, the legacy Immigration and Naturalization Service (INS) recognized that the proposed definitions of manager and executive created an "anomaly" with respect to the opening of new offices in the United States since "foreign companies will be unable to transfer key personnel to start-up operations if the transferees cannot qualify under the managerial or executive definition." 52 Fed. Reg. at 5740. The INS recognized that "small investors frequently find it necessary to become involved in operational activities" during a company's startup and that "business entities just starting up seldom have a large staff." *Id.* Despite the fact that an alien engaged in the start up of a new office may not be "primarily" employed in a managerial or executive capacity, as then required by regulation and later by statute, the INS amended the final regulations to allow for L classification of persons who are coming to the United States to open a new office as long as "it can be expected . . . that the new office will, within one year, support a managerial or executive position." *Id.*

The petitioner requests that the instant petition, filed on February 22, 2011, be treated under the more lenient standard for a new office petition. Even though the petitioner was formed under the laws of the State of Texas in 2007, the petitioner asserts that it has not been engaged in the "regular, systematic and continuous provision of goods" in the United States. The petitioner therefore asserts that it is entitled to approval as a new office petition. On appeal, the petitioner states:

A careful review of the tax returns filed demonstrates that the petitioner has not been involved with the "regular, systematic and continuous provision of goods and/or services." The income reported in the tax returns for the years 2007, 2008 and 2009 is too low and inconsequential to establish that [the petitioner] had conducted business during those years The petitioner, [REDACTED], funneled all its work projects through the foreign parent company, [REDACTED]. That is the employees of the foreign parent company performed all services and products provided. [The petitioner] since its inception in 2007, did not perform any work on media and/or advertising projects. All work projects originated and were completed by personnel employed by [REDACTED] it should therefore be concluded that the entity actively involved in business activity was the foreign parent company, [REDACTED] and not the U.S. subsidiary, [the beneficiary]. The petitioner in addition submitted several invoices dating from 2007 to 2011; however, these invoices represent work performed by the foreign parent company. The services described in the invoices detail a sophisticated and technical job performance which could have only been performed by the foreign parent company as it was fully equipped to handle said projects. [The beneficiary] was not involved at any stage of the provision of services and/or product represented in the invoices except for the actual invoicing of the services itself

Upon review and for the reasons discussed herein, counsel's assertion that the petitioner qualifies as a "new office" is not persuasive. The definition of a "new office" in the regulations clearly emphasizes the United States activities of the entire organization and not just those of an individual United States petitioner. A "new office" is defined as an *organization* which has been doing business in the United States *through* a parent.

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). In the instant matter, the petitioner failed to submit a credible description of job duties for the beneficiary.

The petitioner described the beneficiary's proposed job duties in the United States in vague and overly broad terms. In a letter dated February 14, 2011, the petitioner described the beneficiary's job duties as including the following: "conduct and control all operations and strategic management activities in the United States"; "plan, formulate and implement administrative and operational policies and procedures for the corporation"; "oversee all legal matters related to the company"; "give direction and leadership toward the achievement of the organization's philosophy, mission, strategy, and its annual goals and objectives"; "establish, implement and review corporate objectives in terms of strategic associations and creation of internal procedures"; "set up and adapt existing company systems and controls"; and "ensure the company's growth and profitable operation." In the petitioner's response to the RFE, the petitioner described the beneficiary's duties as including: "plan strategies and plan for the welfare of the organization"; "organizational leadership"; and "promote active and broad participation."

This type of vague and broad language provides little, if any, insight on the beneficiary's actual daily activities in the United States. 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). 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. *Id.*

In addition to being overly broad and vague, the beneficiary's job description is not credible. In the job description provided in response to the RFE, the beneficiary is required to "coordinate with the board of directors, vice president, [and] senior vice president." While this job duty may appear credible on paper, it does not appear actually relevant to the petitioner or the foreign entity. The petitioner's Certificate of Formation and Organizational Consent of Directors reflect that the petitioner has only one director, the beneficiary, who holds the title of President and Secretary. The petitioner's Certificate of Formation, Organizational Consent of Directors, initial organizational chart, and amended organizational chart do not list a vice president or senior vice president position. Similarly, the foreign entity's Commercial Corporation Contract and organizational chart do not list a vice president or senior vice president position. Thus, it is not clear what the listed job duty of "coordinate with the board of directors, vice president, [and] senior vice president" refers to. Furthermore, another one of the beneficiary's job duties is to "look after the overall management of the human resources department." However, neither the petitioner's organizational chart nor the foreign entity's organizational chart lists a human resources department.

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.

After examining the totality of the record, the AAO concludes that the petitioner failed to establish that the beneficiary will perform primarily managerial or executive duties. The petitioner's organizational chart makes it clear that the beneficiary is the petitioner's sole employee at the time of filing. The petitioner's organizational chart reflects that the four positions subordinate to the beneficiary - an administrative assistant, a sales manager, a bookkeeper, and a graphic designer - are all currently vacant.¹ The petitioner's business plan clearly states that the petitioner is "planning to start hiring people early 2011." In the petitioner's response to the RFE, the petitioner reaffirmed that all four subordinate positions are currently vacant and that it plans to fill them in mid-2011.

According to the petitioner's business plan, the products and services the petitioner will provide include advertising planning, market research, video production, radio and TV spots, audio design, and business consulting related to marketing. However, the petitioner failed to explain who would perform these services or provide these products, if not the beneficiary. Since the beneficiary is the petitioner's sole employee, the AAO must conclude that the beneficiary will be the one who is primarily performing these tasks for the petitioner. Therefore, he is not considered to be "primarily" employed in a managerial or executive capacity.

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 Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Notably, the position descriptions for the administrative assistant, sales manager, bookkeeper, and graphic designer all do not list any marketing-related duties, other than a single reference for the graphic designer to "assist the marketing team." Similarly, the position descriptions for the administrative assistant, sales manager, bookkeeper, and graphic designer do not list any video production or radio/TV spots production

¹ In the petitioner's response to the RFE, the petitioner submitted an amended organizational chart showing the following seven vacant positions: a general manager, an assistant, a bookkeeper, a sales manager, two graphic designers, and a sales associate. Through the amended organizational chart, the petitioner increased its anticipated hiring by three additional employees, namely, a general manager, a sales associate, and a second graphic designer. The petitioner failed to provide an explanation for this change in anticipated staffing.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot make significant changes to its organizational structure. 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.

Therefore, the analysis of this criterion will be based on the initial organizational chart.

duties. In contrast, in its business plan, the petitioner stated that the beneficiary “will handle marketing for the company and will be working with a marketing specialist to develop a cost-effective advertising campaign for the company.” Moreover, the beneficiary’s resume reflects that he has work experience in marketing, script writing for TV, radio, and video spots, as well as television production. All these factors support the conclusion that the petitioner failed to establish that the beneficiary will be engaged in primarily managerial or executive duties. Rather, it is reasonable to conclude that the beneficiary would primarily be providing the non-qualifying services of the petitioner. For this reason, the appeal will be dismissed.

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.