



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE **APR 01 2013**

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,

4 Ron Rosenberg
Acting 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 nonimmigrant petition seeking 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 New Jersey limited liability company, states that it operates a construction and real estate conglomerate. It claims to be a subsidiary of [REDACTED] located in Tehran, Iran. The petitioner seeks initial approval for the beneficiary for a period of one year so that he may serve as the President of its new office

The director denied the petition, concluding that the record does not establish: (1) that the beneficiary would be employed in a managerial capacity within one year of the approval of the petition; (2) that sufficient physical premises were secured to house the new office; or (3) that the foreign entity is doing business.

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 for the petitioner asserts that the director came to erroneous conclusions of law and fact in the denial. Counsel submits a brief in support of the appeal.

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 the 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) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to 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 involved 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.

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. The Issues on Appeal

A. Employment in a Managerial of Executive Capacity

The first issue addressed by the director is whether the petitioner established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity within one year of the approval of the new office petition.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on January 30, 2012. The petitioner stated that it is a real estate and construction conglomerate with no employees and no stated projected income. In a letter submitted in support of the petition, the petitioner described the beneficiary's proposed duties as President as follows:

He will manage all the affairs of the company in the US and oversee the consortium partners. He will also be responsible for disbursement of the capital investment, which is projected to amount to between two and three million dollars.

The petitioner further states that it has "provided employment though its consortium partner [redacted] he petitioner included a business plan with the initial submission stating that it purchased a property in New Jersey for renovation and then resale or rent as appropriate. The petitioner stated that it "contracted the participation" or two real estate agents and [redacted] for the rehabilitation

portion of the plan. Furthermore, the submitted business plan states that "the company anticipates the possibility of hiring full time rental agents at a point in the future." The petitioner also included a profit calculation sheet, a contract for the sale of the property, an invoice for construction services, and photos of the property.

The director issued a request for evidence ("RFE"), in which he instructed the petitioner to submit *inter alia*: (1) a comprehensive description of the beneficiary's proposed duties indicating how the duties have been and will be managerial or executive in nature; (2) the job titles and duties with percentage of time to be spent performing each for all proposed employees in the United States office; and (3) a description of the proposed management and personnel structure of the office.

In response, the petitioner stated that the beneficiary will have "complete control and authority" over the company and that he will "observe the company's day to day operations" and make general policy decision. The petitioner explained that the actual day to day oversight, however, will be handled by the construction contractors, supervisors, and marketing professional. The petitioner also provided a position description for the beneficiary as follows, referring to his title as "general manager":

Performs all executive functions. Oversees the funds invested by his overseas company. Develops and implements company priorities. In the initial phase he will oversee the services of independent contractors, seeing that their work conforms to standards of quality. Develops and pursues company goals in line with stated objectives. Makes final decision regarding the use of all invested funds and follows up to assure that appropriate return on those funds is realized by the company.

The petitioner clarified that those "providing actual services will not initially be employees of the company." The petitioner also stated that the beneficiary will "only be involved in developing and overseeing the company's direction" and will not be directly involved in "rehabilitation activities."

The director denied the petition, concluding that the record does not establish that the petitioner would employ the beneficiary in a qualifying managerial or executive position within one year of commencing operations in the United States. The director stated that the petitioner did not establish that the beneficiary would supervise and control the work of professional or managerial employees.

On appeal, counsel contends that the record supports a finding that the beneficiary will be functioning in a managerial capacity. The petitioner states that the business plan "dictates that when the company attains its full size that it will have its own employees."

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary has been and will be employed in an executive or managerial capacity.

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.*

Both in the initial job description and in response to the RFE, the petitioner described the beneficiary's duties in vague terms. Duties such as developing and implementing company priorities, overseeing funds, and performing all executive functions, do not give a clear picture of what the beneficiary will be doing on a day-to-day basis. While such responsibilities generally suggest that the beneficiary is responsible for oversight of the company, the brief job descriptions provided offer little insight into how he would actually allocate his time to specific tasks on a day-to-day basis. Reciting the beneficiary's vague job responsibilities or broadcast 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).

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 statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

The petitioner indicated that it will operate a real estate and construction conglomerate. Currently, the petitioner states that the company relies on the use of contracted realtors and an independent construction company to perform the rehabilitation and sales work related to the single family home it purchased. The petitioner states that it anticipates the possibility of hiring employees in the future. The petitioner, however, fails to provide any title, position description, time frame for hiring, or any other details that would support a

finding that the petitioner would have a staffing level, or professional level staff, able to support a managerial level position within one year of approval.

Furthermore, the petitioner's business plan was completely devoid of any plans to hire additional staff, any information about the size of the investment, or the company's ability to financially support the operations within one year of establishment. The business plan does not include projected income, expenses, or company growth beyond the purchase and sale of the one existing property owned by the entity. The business plan failed to address potential income or job duties to be performed by the beneficiary in connection with the two partnerships. Ultimately, the business plan and the record fail to demonstrate any sustainable revenue or projected growth sufficient to establish a reasonable expectation that the company would support a managerial or executive position within one year.

When a new business is 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 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 order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). 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. 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)).

Based on its failure to provide a detailed description of the beneficiary's proposed duties, the size of the U.S. investment, or a detailed business plan or other evidence describing the scope of the entity, its organizational structure, and its financial goals, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity within one year, or that the company would be able to support a managerial or executive positions. Accordingly, the appeal will be dismissed.

B. Physical Premises Requirement

The second issue addressed by the director is whether the record established that the petitioner had secured sufficient physical premises to house the new office, as required by 8 C.F.R. § 214.2(l)(3)(v)(A), as of the date the petition was filed.

In response to the RFE, the petitioner submitted the requested photos of the interior and exterior of the premises secured for the United States entity as well as a copy of the lease. The photo depicts a single desk. The lease describes the space as a 10' x 10' single office contained within a portion of a larger office space. The lease term runs from March 29, 2012 to June 30, 2012.

On appeal, the petitioner contends that "the expiration date on the current lease provides for an automatic renewal unless the lessee indicates otherwise" and therefore "does not suggest a temporary leasing arrangement."

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

The AAO acknowledges that the regulations do not specify the size or type of premises that must be secured by a petitioner seeking to establish a new office. However, the petitioner bears the burden of establishing that its physical premises should be considered "sufficient" as required by the regulations at 8 C.F.R. § 214.2(l)(3)(v)(A).

The petitioner states that it operates a real estate investment business and provided a lease for a 100 square foot office. The petitioner has not described the anticipated space requirements or staffing requirements for its business and it is thus not possible to determine whether the secured space, even if it were established that the lease would renew automatically, is sufficient to house the new operation. The presence of a single desk in a small office does not establish sufficient physical premises to show that the business will be able to support a managerial position within one year including the addition of new staff and space to meet with potential clientele or business partners. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Based on the insufficiency of the information furnished, it cannot be concluded that the petitioner secured sufficient space to house the new office. For this reason, the petition may not 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.