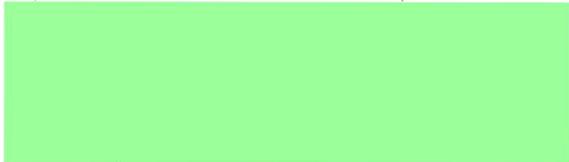




U.S. Citizenship  
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Services

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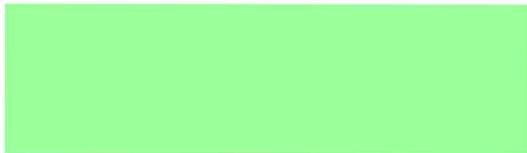


DATE: **APR 23 2013** Office: VERMONT SERVICE CENTER FILE:

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

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 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 petitioner, a Pennsylvania limited liability company established in April 2011, states that it intends to engage in financial consulting, financial services outsourcing, and human resources outsourcing. It claims to be an affiliate of [REDACTED], located in Ahmedabad, India. The petitioner seeks to employ the beneficiary as the LLC Managing Member of its new office in the United States.

The director denied the petition, concluding that the petitioner failed to establish: (1) that the beneficiary would be employed in a primarily managerial or executive capacity within one year of commencing operations in the United States; and (2) that the petitioner has secured sufficient physical premises to house the new office.

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 beneficiary will be employed in a primarily managerial or executive capacity. 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 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

The primary issue to be addressed 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.<sup>1</sup>

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker. On Form I-129, the petitioner described the beneficiary's proposed duties in the United States as follows:

As the founder and the LLC managing member of this new business, [the beneficiary's] primary duty is going to be finalizing a new office space to start this business and procure client contracts for financial consulting services that this company will provide. He will have to recruit new employees to build a team for the firms [sic] consulting practice. He will have to train the new employees (preferably from finance background) on the firms consulting services. He will be responsible for bringing in the required finances to take care of the expenses of this new firms [sic] business activities in the United States. The beneficiary will be executing new contracts with clients and generate revenues from these clients and use all those funds to expand [the petitioner] in the United States.

The petitioner submitted its business plan, which described the petitioner's mission as providing "world class financial, accounting, tax, technology, audit and human resources [services]." Specifically, the business plan listed the petitioner's financial and accounting services as including "bookkeeping, accounts payable,

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<sup>1</sup> On appeal, counsel asserts that the director "incorrectly classified" the petition as a "new office" petition. Counsel provides no explanation or supporting evidence to support this assertion. Based on the petitioner's response to the RFE indicating that it did not begin business until 2012 and the petitioner's tax return for 2011 showing \$0 in gross profit, the AAO concurs with the director's determination that this is a new office petition.

accounts receivable, tax preparation, accounts reconciliation and customized accounting services.” The business plan listed the petitioner’s human resources services as including recruitment, performance and progression, learning, compensation, HR administration, processing payroll, benefits, workforce and data administration, case management and customer service. The business plan stated: “Most of the tasks shall be done initially by the LLC managing member i.e. [the beneficiary] and once we establish some client contracts and employ some employees, several tasks will be delegated.” The business plan also stated that the “day-to-day business shall be managed and looked after by [the beneficiary].”

The business plan described the petitioner’s recruitment plan as initially recruiting two employees in the sales department, whose focus shall be “selling our consulting services to potential clients via phone and field marketing,” within the first quarter of the first business year. The business plan further stated that the sales team will grow to five team members by the third quarter of the first year, and then the petitioner “might start recruiting one or two (depending upon the customer work flow) operational executives to support the delivery of services being sold by the sales representatives.” The business plan indicated that by the first year, the petitioner plans to have ten employees, five of which shall be in the sales team and five of which shall be in the operations team. In addition, the business plan listed the petitioner’s “proposed location” as [redacted] Scranton, PA [redacted]

The director issued a request for evidence (“RFE”), in which he instructed the petitioner to submit; *inter alia*: evidence that the petitioner will grow to be of a sufficient size to support a managerial position; evidence that the beneficiary will be relieved from performing the non-managerial, day-to-day operations of the U.S. business; evidence of the current and planned staffing of the U.S. organization; and evidence that the petitioner has secured sufficient physical premises to house the new office.

In response to the director’s RFE, the petitioner submitted a “Business Consultant Contract” it entered into on July 24, 2012 with [redacted] (“Company”), located at [redacted] Hartselle, Alabama, for the petitioner to provide consultation services relating to “the management and organization of the company, their financial policies, the terms and conditions of employment and generally any matter arising out of the business affairs of the Company.” The petitioner asserted that this contract, worth \$120,000, constitutes evidence that the U.S. entity will grow to be of a sufficient size to support a managerial or executive position, as this contract “enables the U.S. entity to start operations working for the client and provide consulting and marketing services including acquiring new customers for our client” and “enables the U.S. entity to start recruitment and secure sales resources right away and that would relieve the beneficiary from performing the non-managerial, day-to-day operations involved in producing these services for our client.

The petitioner also submitted a document entitled “Recruitment Plan 2012” indicating that from April 2012 to September 2012, the petitioner projects to employ solely the beneficiary. Starting in October 2012, the petitioner plans to add one operations executive. In November 2012, the petitioner plans to add one sales executive and another operations executive. The petitioner plans to add another sales executive in December 2012.

The “Recruitment Plan 2012” listed the following duties for the beneficiary as CEO/Owner: make cold calls to potential customers; follow-up with leads and visit/meet with them to get contract; perform sales and execute contracts; cut checks for operating expenses; create an operating budget; implement and update the CRM platform to have professional management of customer accounts; ensure the company is in compliance

with city and state requirements; run advertising campaigns in magazines and on Internet to start lead flows; create and manage an effective sales team to ensure continuous flow of projects; and create and manage an effective operations team to ensure timely delivery of delightful services.

The "Recruitment Plan 2012" listed the following duties for the operations executive: plan and direct the day-to-day operations of the company; assist in creating new company policies and procedures for employees to follow, including setting policies in the workplace to ensure effective implementation; negotiating contracts and preparing for final review; managing the company's operating budget; act as the company's representative at committee meetings; responsible for hiring and supervising employees; and provide administrative support for the CEO such as telephone coverage, project management, mail handling, supplies control, processing of letters/correspondence, database management, and assist with other assigned projects. The plan indicated that the operations executive will report directly to the CEO until an operations manager is assigned.

The "Recruitment Plan 2012" listed the following duties for the sales executive: making and developing relationships with existing customers via meetings, telephone calls and emails; visiting potential customers for new business; making accurate, rapid costs calculations and providing customers with quotations; negotiating the terms of an agreement and closing sales; gathering market and customer information and providing feedback on future trends; representing the company at trade exhibitions, events and demonstrations; negotiating variations in price, delivery and specifications with the operations executive; advising on forthcoming consulting services developments and discussing special promotions; assist in identifying new markets and business opportunities; recording sales follow-ups and contract discussion information and sending copies to operations executive and CEO on daily basis; reviewing own sales performance, aiming to meet or exceed targets. The plan indicated that the sales executive will report directly to the CEO until a sales manager is assigned. The "Recruitment Plan 2012" did not list any other proposed positions.

The petitioner submitted an organizational chart for the U.S. entity depicting the founder/CEO at the top, who would directly oversee an operations executive (male), a sales executive (female), another operations executive (female), and another sales executive (male).

The petitioner submitted an unlabeled photograph of the exterior of an unmarked building, and a floor plan for [REDACTED] as "available." The petitioner submitted no lease or other documentary evidence to establish that it has secured office space at [REDACTED]

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity within one year of the approval of the petition. The director concluded that the petitioner failed to establish that the beneficiary would be relieved from performing the non-managerial, day-to-day operations involved in producing a product or providing a service. The director also denied the petition on the basis that the petitioner failed to submit evidence establishing that it had secured sufficient physical premises for its new office, such as a lease or purchase agreement.

On appeal, counsel asserts that the beneficiary will be employed in a primarily managerial or executive level, and will have authority over day-to-day operations beyond that of a first line supervisor. Counsel asserts that the fact that the beneficiary will also be performing "some functions that might be viewed as non-managerial,

such as making calls to potential customers and writing checks is simply a function of the size of the business . . . [but] do not detract from his primary responsibilities, which are unquestionably managerial in nature.”

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 by the United States entity in a managerial or executive capacity within one year.

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).

In the instant matter, the petitioner's description of the beneficiary's duties in the United States reflects that the beneficiary will be primarily providing the essential services of the petitioner. In the “Recruitment Plan 2012,” the petitioner listed the beneficiary's proposed duties as including “perform[ing] sales and execut[ing] contracts.” The petitioner's business plan indicated that: “Most of the tasks shall be done initially by the LLC managing member i.e. [the beneficiary].” The business plan also stated that the “day-to-day business shall be managed and looked after by [the beneficiary].” Although the business plan indicated that the petitioner plans to delegate “several tasks” once it establishes some client contracts and employs some employees, the petitioner did not provide any details specifically explaining which tasks it plans to delegate, to whom it plans to delegate these tasks to, and when it plans to delegate the tasks.

The evidence in the record indicates that the beneficiary will be the only or primary employee performing the financial consulting and human resources services that constitute the tasks necessary to provide the services of the U.S. entity. Although the petitioner asserted that it plans to hire additional staff to relieve the beneficiary from primarily performing non-qualifying services within the first year of operations, the petitioner's descriptions of its anticipated employees and their job duties fail to establish that the additional employees will perform any of the consulting services in order to relieve the beneficiary from performing these non-qualifying services.

The petitioner claims that by the end of the first year of operations, it plans to hire at least two sales executives and two operations executives. However, the petitioner's job descriptions for the sales executives and operations executives fail to indicate that they will perform any consulting services for the U.S. entity. None of the job duties listed for the sales executives and operational executives include any type of duties related to providing financial consulting services or human resources services, such as bookkeeping, accounts payable, accounts receivable, tax preparation, accounts reconciliation and customized accounting services,

recruitment, compensation, processing payroll, case management, and customer service for customers. Instead, the petitioner described the focus of the sales executives as “selling our consulting services to potential clients via phone and field marketing.” The petitioner’s description of the operational executives’ job duties included negotiating contracts, managing the company’s operational budget, and providing administrative support to the beneficiary, but listed no duties related to providing financial or human resources consulting services.<sup>2</sup> In short, the petitioner failed to establish that the beneficiary would be relieved from primarily performing non-qualifying services within the first year of operations, even with the anticipated hiring of two sales executives and two operational executives. For this reason, the appeal will be dismissed.

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).

The second issue to be addressed is whether the petitioner has secured sufficient physical premises to house its new office. Upon review of the petition and the evidence, the petitioner failed to establish that it has secured sufficient physical premises to house its new office.

The petitioner’s initial documentation described only its “proposed” location at the [REDACTED]. Accordingly, the director reasonably requested the petitioner to submit evidence that it has secured sufficient physical premises to house its new office.

In response to the RFE, the petitioner submitted a floor plan indicating that [REDACTED] in the [REDACTED] was “available.” The petitioner also submitted an unlabeled photograph of the exterior of an unmarked building. The director determined that this evidence was insufficient to establish that the petitioner actually secured the proposed office space at [REDACTED] and accordingly, denied the petition for this reason.

On appeal, the petitioner does not contest or even address the director’s finding that the petitioner failed to submit evidence establishing that it has actually secured physical premises for its new office, such as a lease or a purchase agreement. Therefore, the AAO considers this issue to be abandoned. *Sepulveda v. U.S. Atty Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885 at \*1, \*9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff’s claims to be abandoned as he failed to raise them on appeal to the AAO).

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.

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<sup>2</sup> Although the petitioner listed one of the operational executives’ job duties as “plan and direct the day-to-day operations of the company,” the petitioner neither elaborated on this particular duty nor explained who would *execute* the day-to-day operations of the company, as opposed to planning and directing them.

(b)(6)

**ORDER:** The appeal is dismissed.