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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

[REDACTED]

DATE: **AUG 13 2013** OFFICE: CALIFORNIA 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

✓ Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California 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 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 California corporation established in September 2000, states that it engages in the import/export of heavy pulp and paper industry machinery. The petitioner claims to be a subsidiary of [REDACTED], located in [REDACTED]. The petitioner seeks to employ the beneficiary as the president of its new office in the United States.

The director denied the petition on two alternative grounds, concluding that the petitioner failed to establish: (1) that the beneficiary was employed in a qualifying managerial or executive capacity at the foreign entity; and (2) that the beneficiary would be employed in a qualifying managerial or executive capacity within one year of approval of the new office petition.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner asserts that the beneficiary will be employed as an executive at the U.S. petitioning company. 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

A. EMPLOYMENT ABROAD IN A MANAGERIAL OR EXECUTIVE CAPACITY

The first issue addressed by the director is whether the petitioner has established that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner stated that the beneficiary's duties abroad for the 3 years preceding the filing of the petition, included the following: "[r]esponsible for planning, developing and establishing the major policies of the company. Participate in negotiation of financial aspects of all major contract, marketing analyst [*sic*]."

In support of the petition, the petitioner submitted a document from the foreign entity (signed by the beneficiary) titled, "Verification of Employment," certifying that the beneficiary was employed by the foreign entity for over eight years, with the current position of "director."

The petitioner did not submit any additional details about the beneficiary's duties abroad or the personnel structure of the foreign entity. The director issued a request for additional evidence ("RFE") instructing the petitioner to submit, *inter alia*, a copy of the foreign company's organizational chart describing its managerial hierarchy and staffing levels, including the names and job titles of all of the beneficiary's subordinates.

The petitioner submitted an organizational chart for the foreign entity depicting the beneficiary as president. According to the chart, the beneficiary supervises an auditor, , a secretary and accountant, , a sales and service manager, , and a marketing manager,.

The petitioner also submitted a document briefly describing the beneficiary's and his subordinates' duties, at the foreign entity, as follows:

President

Establishment of corporation, reviewing business plans, technical and commercial advisory and sales promotion for big & special project based on his experience in marketing of capital goods over 20 years as a leading and successful manager of a well-known Swiss Marketing Organization in Korea.

Auditor

Substantive analysis of asset and liability[.] Examining the accounting records, compare to charges with the voucher, and state the result.

Secretary & Accountant

Handling correspondence and do routing work such as typing, filling [sic] and reservations & arrangements for visitors and managing the schedule of [the beneficiary].

Sales & Service Manager

Handling all project and doing technical service and maintenance for our equipment in paper industry in Asia base on his experience which was gained with training in Germany from one of our suppliers over the past 3 years.

Marketing Manager

Handling some of projects [sic] together with [sales & service manager] and supporting him. Market Survey and developing marketing to expand our business[.]

The director denied the petition concluding, in part, that the petitioner failed to establish that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity. In denying the petition, the director found that the beneficiary does not manage a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties. The director observed that the descriptions provided for the sales/service manager and the marketing manager do not indicate that they supervise any other employees, notwithstanding their job titles. The director further observed that the above indicates that the beneficiary acts as a first-line supervisor involved in many of the day-to-day duties in the operations of a sales office.

On appeal, counsel for the petitioner describes the beneficiary's position abroad as follows:

In its [sic] capacity as President of the company in Korea since 1993, [the beneficiary] had overseen the creation of a business which became successful enough to contemplate opening a branch office in the United States for further distribution of heavy machinery used in the pulp and paper industry. [The beneficiary] is qualified as a result of his formal education having received a degree from [redacted] in Business Administration and having taken further extension courses at the [redacted] in 1992.

. . . the only evidence submitted established that [the beneficiary] had been operating as the Chief Executive Officer/President of [the foreign entity] in Korea since 1993 was further established in the organizational chart submitted with the original petition. There was no rebuttal evidence nor was any requested to contradict the assertion that [the beneficiary] had

been performing as President of the parent corporation since its inception in 1993. Accordingly, he could only be considered as an Executive of the parent company.

The language regarding the Sales/Service Manager or Marketing Manager appears to be a misreading of the letter [The beneficiary] was describing his future expectations for the businesses' success and was discussing the positions which he intended to create. He was not referring to his own duties or responsibilities either in the past or in the future with either [the foreign entity] or [the petitioner].

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity.

The fact that the beneficiary manages or directs a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(15)(L) of the Act. By statute, eligibility for this classification requires that the duties of a position be "primarily" of an executive or managerial nature. Sections 101(A)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44).

Here, the petitioner has not provided any information about the beneficiary's position abroad to establish whether he is employed in a primarily managerial or executive capacity. The very brief and vague position description does not establish that he is primarily an executive or is primarily a manager with sufficient subordinate employees to relieve him from performing non-qualifying operational duties. For example, while the petitioner indicates that the foreign entity employs a "sales and service manager", the petitioner's brief description of this employee's duties did not include any sales functions, while the petitioner indicated that the beneficiary himself is responsible for "sales promotion." Absent a detailed description of the beneficiary's actual duties and a consistent account of how the beneficiary allocates his time to specific duties, the AAO cannot conclude that the beneficiary has been employed by the foreign entity in a qualifying managerial or executive capacity. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Accordingly, the appeal will be dismissed.

B. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

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

On the Form I-129, where asked to describe the beneficiary's proposed duties in the United States, the petitioner stated, "[p]lan, establish and developm [sic] marketing for the corporation and to obtain optimum efficiency and maximize profits. Conduct marketing research and financial management of U.S. based operation."

The petitioner did not submit any additional information about the beneficiary's proposed position in the United States, information regarding the proposed nature of the new office, the scope of the entity, its

anticipated organizational structure and financial goals, or information regarding the size of the investment in the United States. See 8 C.F.R. §§ 214.2(l)(3)(v)(C)(1) and (2).

The director issued an RFE, instructing the petitioner to submit, *inter alia*, a letter from the foreign company explaining the need for the new office in the United States, indicating the proposed number of employees and types of positions they will hold, and how the proposed business venture will support a managerial or executive capacity position within one year.

In response to the RFE, the petitioner submitted a letter from the foreign entity stating the following about the beneficiary's position in the United States:

We anticipate that when functioning the office of [the petitioner] will support a staff of at least three individuals and more depending upon the volume of activity in sales. In addition to myself as Chief Executive Officer/President, I intend to employ a marketing manager and staff bookkeeper and auditor as well as a secretary and receptionist to handle the normal flow of paperwork and telephone traffic. The marketing manager may in the future, depending upon his or her success, employ outside sales individuals as contract commissioned sales people.

* * *

Within one year we expect sales of the heavy industrial machinery as well as other products which we are looking into including energy saving devices used in neon signage to generate sufficient income to support and pay the salaries of myself as Chief Executive Officer as well a minimum staff of three to four people. In the event that sales do not reach that level I am prepared individually to subsidize the operation of the office based upon my own personal assets.

The director denied the petition concluding, in part, that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive position within one year of approval of the "new office" petition. In denying the petition, the director found that the submitted evidence is insufficient to demonstrate that the beneficiary will function in a managerial or executive capacity and there is no indication that the beneficiary's duties will be primarily managerial or executive in nature. The director observed that the description of the petitioner's staffing plan indicates that the beneficiary would be performing more as a first-line supervisor in a sales office. The director further observed that the evidence is not persuasive in establishing that the beneficiary will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties.

On appeal, counsel for the petitioner contends that the beneficiary qualifies as an executive of the U.S. company and describes his qualifications as follows:

The petition filed by the employer in behalf of [the beneficiary] sought classification of [the beneficiary] not as a Manager but as its Chief Executive Officer.

* * *

Furthermore, [the beneficiary] invested from his own personal funds nearly \$150,000 into the operation of the office in [REDACTED] California clearly evidencing his commitment to the success of this endeavor. To ensure the success of the venture, his involvement in the day to day operation and details of the business are anticipated during the initial year of operation until the business is functioning on its own and has some assurance of success.

Since [the beneficiary] initially will be the sole Executive in the company, he alone will of course, have the authority not simply to sign predetermined contracts but to negotiate individual aspects for this highly sophisticated machinery including any modifications to its operation as well as terms of payment and total cost. Only a person with his background, experience and education would be qualified to carry out these responsibilities and clearly would fit within the definition of the Executive as defined in the regulations.

Upon review, and for the reasons stated herein, the petitioner has not established that it would employ the beneficiary in a qualifying managerial or executive capacity within one year of commencing operations in the United States.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by U.S. Citizenship and Immigration Services (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.

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

On review, the petitioner's brief description of the beneficiary's duties fails to establish that the beneficiary will be engaged in either a primarily managerial or primarily executive position. The description provided on the Form I-129 is more indicative of a marketing position and not of an executive at the U.S. company. The petitioner did not provide any further description of the beneficiary's duties or a specific staffing plan indicating the duties to be performed by the beneficiary's subordinate to demonstrate that he will be relieved from performing primarily non-qualifying duties within one year of the commencement of operations. 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).

Overall, the position description alone is insufficient to establish that the beneficiary's duties will be primarily in a managerial or an executive capacity, particularly in the case of a new office petition where much is dependent on factors such as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity. The petitioner has the burden to establish that the U.S. company will realistically develop to the point where it will require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period.

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. The petitioner is required to describe the nature of the office, the anticipated scope of the entity, its proposed organizational structure and its financial goals. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements. In its response to the RFE, the petitioner provided a brief, three-sentence statement referring to its staffing plan for the U.S. company. However, the record does not contain a business plan, hiring plan, or other evidence that would indicate the timeframe for hiring the proposed staff. As such, it is impossible to determine, based on the lack of evidence submitted, that the beneficiary would be relieved from performing non-qualifying duties within one year of commencing operations. The regulations require the petitioner to present a credible picture of where the company will stand in one year, and to provide sufficient supporting evidence in support of its claim that the company will grow to a point where it can support a managerial or executive position. 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)).

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary will perform the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary will *primarily* perform these specified responsibilities and will not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns and manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

Based on the evidentiary deficiencies addressed above, the AAO will uphold the director's determination that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or

executive capacity within one year of the approval of the new office petition. Accordingly, the appeal will be dismissed.

III. CONCLUSION

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, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that petitioner has not met that burden.

ORDER: The appeal is dismissed.