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



U.S. Citizenship
and Immigration
Services



DATE: **FEB 05 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:

SELF-REPRESENTED

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 seeks 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 is a Texas corporation established on June 23, 2009. It claims engages in the business of landscape design and lawn maintenance. The petitioner is an affiliate of [REDACTED] based in Pakistan. United States Citizenship and Immigration Services (USCIS) previously granted the beneficiary one year in the L-1A classification in order to open a new office for the petitioner. The petitioner now seeks to extend the beneficiary's status so that he may serve for an additional two years in the position of President.

The director denied the petition, finding the petitioner failed to establish that it will employ the beneficiary in a primarily managerial or executive capacity and that it has grown to the point that it can support a manager or executive.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded it to the AAO. On appeal, the petitioner submits a brief and asserts that the job duties it listed for the beneficiary demonstrate that he will be serving in a managerial or executive capacity, and that the director ignored the needs of the business as well as the realities of operating a business in issuing the denial.

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.

Further, the regulation at 8 C.F.R. 214.2(l)(14)(ii) states that a petitioner seeking an extension of a one year "new office" petition accompany their Form I-129 petition with the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The director denied the petition, in part, based on a finding that the petitioner would not employ the beneficiary in a qualifying managerial or executive capacity under the extended petition.

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.

One of the requirements for an extension of a new office petition is that the petitioner show it has been doing business for the previous year. 8 C.F.R. § 214.2(l)(14)(ii)(B). The term "doing business" is defined at 8 C.F.R. § 214.2(l)(1)(ii)(H):

Doing business means the regular, systematic and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

II. The Issue on Appeal

The director denied the instant petition, finding that the petitioner failed to show that it would employ the beneficiary in a qualifying managerial or executive capacity and that the petitioner had grown to the point that it could support such a position.

When examining the managerial or executive 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 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.* In addition, the definitions of executive and managerial capacity have two parts. To meet these definitions, the petitioner must first show that the beneficiary performs the high level responsibilities specified in the definitions. Second, the petitioner must prove the beneficiary will *primarily* perform these specified responsibilities and will not spend a majority of his time on day-to-

day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

On its Form I-129, Petition for a Nonimmigrant Worker, the petitioner stated that the beneficiary's duties and responsibilities include the following:

Responsible for the general management of the fledgling company. Hire, fire and train employees. Establish goals and direction of the young company. Oversee fulfillment. Develop and implement the marketing strategy. Enter into contracts for service.

The director issued a Request for Evidence ("RFE") and asked for additional evidence regarding the duties the beneficiary will perform under the extended petition. The director advised the petitioner that the duties described at the time of filing did not appear to be primarily managerial or executive in nature, and requested additional evidence of the beneficiary's job duties, as well as a breakdown of the number of hours spent on each duty each week.

In response, the petitioner provided a statement from the beneficiary's Business Co-Coordinator stating that the beneficiary acts in a managerial capacity and performs the following duties:

- Conducts a "Day Start" meeting with staff consisting of following activities (5 hours per week):
 - Briefing about ongoing landscaping jobs.
 - Reviewing the tasks and goals for the day for the company.
 - Discussing upcoming meetings with clients and potential clients.
 - Discussing issues with contractors.
- Ensure necessary plants, sod, materials, and all other supplies are ordered and available for use and installation (3 hours per week).
- Meet with Director/Co-Coordinator and Operations Manager to set daily priorities, review upcoming jobs, determine available resources to bid on future jobs, and discuss personnel and contractor issues and to instill motivation (5 hours per week).
- Meet with key corporate accounts to determine new business, contract compliance and customer satisfaction. Resolve issues that arise with the customer (10 hours per week).
- Source and negotiate contracts for necessary supplies and equipment to successfully and satisfactorily complete jobs. Plan the use of all supplies and equipment (3 hours per week).
- Oversee landscaping jobs to ensure compliance with specified design (5 hours per week).
- Review daily finance reports with the Accounts Manager to determine profitability and to review expenses (2 hours per week).

- Report to ownership group in Pakistan on progress of the US operation (2 hours per week).
- Review regulatory requirements (safety, taxation, etc.) to ensure compliance (1 hour per week).
- Conduct "Day End" meeting with staff to discuss progress on active jobs and to review potential future jobs discussed that day (3 hours per week).
- Review and update employee incentive/bonus sheet each day to ensure maximum output from employees and increase job satisfaction and motivation (1 hour per week).

Although the Co-Coordinator stated in his letter that the beneficiary serves in a managerial capacity, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The petitioner is not consistent in specifying whether the beneficiary will be engaged in primarily managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

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).

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a detailed position description that clearly explains the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In this case, the petitioner failed to articulate a specific function that the beneficiary will perform.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

Many of the beneficiary's duties are not managerial or executive in nature. Both the Day Start and Day End meetings appear to be instances in which the petitioner is acting as a first line manager, directly interacting with all employees and discussing or planning their work. These meetings account for a total of 8 hours per week of the beneficiary's time. The beneficiary spends 3 hours each week ensuring that the petitioner has the supplies necessary for providing its services, and an additional 3 hours ordering supplies and planning the use of supplies and equipment. These are administrative tasks and not the high-level activities characteristic of a manager or executive, as defined under the Act. The beneficiary purportedly spends 10 hours each week meeting with clients to determine new business, discuss contract compliance, and ensure customer satisfaction. He spends 5 hours per week making sure the landscape jobs comply with the clients' wishes. Although this client interaction is not the physical performance of landscaping, it is still an essential part of providing the petitioner's services and therefore not managerial or executive. These duties come to a total of 29 hours out of a 40 hour work week, thus accounting for more than 50% of the beneficiary's time. 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).

Section 101(a)(44)(C) of the Act requires the AAO to "take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function." The AAO has long interpreted the statute to prohibit discrimination against small or medium-size businesses. However, the AAO has also consistently required the petitioner to establish that the beneficiary's position consists of "primarily" managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks.

Reading section 101(a)(44) of the Act in its entirety, the "reasonable needs" of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be

"primarily" employed in a managerial or executive capacity as required by the statute. See *Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir. 2008).

Analysis of the petitioner's list of job duties for the beneficiary indicates he will spend less than 50% of his time on possibly managerial or executive duties. As stated above, even taking into account the needs of a small business, a beneficiary who does not spend the majority of his time on qualifying duties cannot be considered a manager or executive as those terms are defined under the Act. The petitioner's stated job duties therefore fail to support a claim that he would work in a primarily managerial or executive capacity.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

For these reasons, the petitioner has failed to show that the beneficiary will work primarily in a managerial or executive capacity. Accordingly, the appeal is dismissed.

III. Beyond the Decision of the Director

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO reviews appeals on a *de novo* basis).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

As previously noted, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) provides strict evidentiary requirements that the petitioner must satisfy prior to the approval of this extension petition. Upon review, the petitioner has not shown that it has been doing business for the year preceding its petition for a renewal of the visa. 8 C.F.R. § 214.2(l)(14)(ii)(B).

The petitioner received an L1A visa for the beneficiary on August 1, 2009. According to the petitioner, it purchased a landscaping business in December of 2009. It submitted the instant petition on August 2, 2010. The petitioner has not provided any objective evidence to show that it started doing business prior to purchasing the landscaping company in December of 2009. If the petitioner started doing business on this date, then it was not doing business for the required one year at the time it filed the petition.

For this alternative reason, the appeal is dismissed.

IV. Conclusion

The petition will be denied and the appeal dismissed due to the petitioner's failure to demonstrate that he will be employed in a primarily managerial or executive capacity. In the alternative, the appeal is dismissed because the petitioner did not establish that it has been doing business for the year prior to the filing of the petition. 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.