



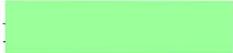
U.S. Citizenship
and Immigration
Services

(b)(6)

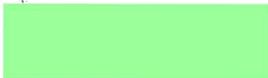


DATE: **JAN 28 2013**

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 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 Massachusetts corporation established on February 25, 2011. It is engaged in the business of selling tarps, geotextiles, and piping used in various industries. The petitioner claims to be a subsidiary of [REDACTED] based in China. The petitioner seeks to employ the beneficiary as President of its new office location.

On May 29, 2012, the director denied the petition, finding the petitioner failed to establish that it will employ the beneficiary in a primarily managerial or executive capacity within one year.

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, the petitioner contends it provided sufficient evidence that it will employ the beneficiary in a primarily managerial or executive capacity within one year, and suggests that the director did not thoroughly review the evidence of record.

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 Issue on Appeal

The sole ground for the denial is the petitioner's failure to show it would employ the beneficiary in a qualifying managerial or executive capacity within one year.

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 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).

On its Form I-129, Petition for a Nonimmigrant Worker, the petitioner described the beneficiary's proposed duties as: "To establish and develop business in U.S.; to secure lease and develop business relationships, to hire and fire personnel; to manage office and all operations; to secure new business." The petitioner's initial evidence included no further description of the beneficiary's proposed role as president of the new company.

The director advised the petitioner in a subsequent Request for Evidence (RFE) that the initial evidence was lacking an explanation of the specific duties the beneficiary would perform in the United States. The director requested, *inter alia*, "the duties with the percentage of time dedicated to each duty to be performed by each employee" of the U.S. office, a request that would reasonably include a job description for the beneficiary's proposed position. The petitioner failed to provide any additional information regarding the beneficiary's proposed duties in response. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The director denied the instant petition in part due to the petitioner's failure to show the beneficiary's duties would be primarily managerial or executive within one year. On appeal, the petitioner submits an affidavit from the beneficiary stating that her duties with the petitioner will be the following:

- Advises Board of Directors
- Advocates / promotes organization and stakeholder change related to organization mission
- Supports motivation of employees in organization products/programs and operations
- Ensures staff and Board have sufficient and up-to-date information
- Looks to the future for change [*sic*] opportunities
- Interfaces between Board and employees
- Interfaces between organization and community
- Formulates policies and planning recommendations to the Board
- Decides or guides courses of action in operations by staff
- Oversees operations of organization
- Implements plans
- Manages human resources of organization
- Manages financial and physical resources
- Assists in the selection and evaluation of board members
- Makes recommendations, supports Board during orientation and self-evaluation
- Supports Board's evaluation of Chief Executive
- Supports operations and administration of Board by advising Board members, interfacing between Board and staff, and supporting Board's evaluation of chief executive
- Oversees design, marketing, promotion, delivery and quality of programs, products and services
- Recommends yearly budget for Board approval and prudently manages organization's resources within those budget guidelines according to current laws and regulations
- Effectively manages human resources of the organization according to authorized personnel policies and procedures that fully conform to current laws and regulations
- Assures the organization and its mission, programs, products and services are consistently presented in strong, positive image to relevant stakeholders

Out of the twenty-one duties listed above, nine refer to a Board of Directors. However, the petitioner failed to produce evidence that it has a Board of Directors or intends to create one within the next year. Similarly, three of the duties involve "stakeholders." However, the petitioner did not produce sufficient evidence that it has stakeholders or plans to acquire any in the future. As such, more than half of the listed duties have little meaning when considered within the context of the totality of the evidence.

The remaining duties are extremely vague and redundant. The beneficiary states that she: "Looks to the future for change [sic] opportunities"; "Interfaces between organization and community"; "Oversees operations of organization"; "Manages financial and physical resources"; and "Manages human resources of organization." It is unclear what specific tasks the beneficiary will perform in relation to these broadly drawn responsibilities. Without further explanation, it is impossible to determine whether any of such duties are managerial or executive in nature. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The actual duties themselves reveal the true nature of the employment. *Id.* at 1108.

Several of the above duties refer to the supervision of staff and employees. 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 RFE issued by the director requested specific information about the expected number of employees, their job duties, and the management and personnel structure for the company. In response, the petitioner stated:

The hiring of personnel in the U.S. in the first year, [sic] will focus on hiring the fixed term staff. [The petitioner] will recruit local talent to develop the business. [The petitioner] will increase employment eventually to create the service department, meet transportation requirements, interface with marketing agencies, and develop a personnel department.

A letter that accompanied the petitioner's response to the RFE states:

The Company has a plan to transition day-to-day operations from [the beneficiary] to US citizens who will work in sales, manufacturing and transportation. The sales staff will be paid on a commission basis. Line workers will be paid at the going rate for similar work or minimum wage at the outset. At least two sales staff has [sic] been identified and their

resumes are attached. At least two container shipments have arrived from China to Boston for the conduct of business. [REDACTED] will oversee all aspects of the business development and hiring through its leased offices at [REDACTED] Boston, MA until the Company's manufacturing plant is secured

Notably missing are the requested details regarding the number of employees, a timetable for their hire, or the employees' job duties.¹ Again, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). While the petitioner indicates that it has identified potential candidates for sales positions, it has not adequately described the overall management and personnel structure of the new company.

A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988). The petitioner does not allege that the beneficiary will oversee professionals or supervisors. It makes reference to salespeople and line workers as potential future employees. Without some further explanation regarding the petitioner's anticipated organizational structure, it does not appear that the beneficiary would act other than as a first-line supervisor of non-professional employees.

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 written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 204.5(j)(5). In the instant case, the petitioner fails to articulate an essential function that the beneficiary will manage.

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

¹ Order forms and invoices for the petitioner are addressed to and show notations by [REDACTED]. However, the petitioner does not explain [REDACTED] role in the company or provide evidence that she is or will be a paid employee of the company.

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.*

The AAO does not question the beneficiary's authority to make important decisions for the petitioner. However, the petitioner must demonstrate that the beneficiary will be employed *primarily* in an executive capacity. As previously noted, due to the lack of evidence in the record regarding the beneficiary's proposed duties or the number and types of employees to be hired during the first year of operations, the petitioner has not met its burden of establishing that the beneficiary would be relieved of performing the company's day-to-day functions.

Overall, due to the lack of detail regarding the beneficiary's duties, as well as the lack of detail regarding the proposed organizational structure and other employee duties, the petitioner has failed to demonstrate that the beneficiary will spend the majority of her time performing managerial or executive tasks 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.

As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998). Although this precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The

plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id.

In response to the director's Request for Evidence (RFE), the petitioner submitted a business plan stating it is in the "plastic woven industry." In describing its business, the petitioner restated the purpose listed on its articles of organization:

[The petitioner] will engage in the import, export, wholesale and retail sales, manufacturer, distribution, and related business of products to include, without limitation, agrichemical heating film, greenhouse film, impermeable membrane, field plastic film, geocloth, waterproof awning and materials, shedding, stranded steel wire, galvanized products, lumber, home construction products, pipe, etc.

Although requested in the RFE, the petitioner did not provide a timeline or objectives for its first year of operations. Instead, its business plan states as follows:

In the first year, [the foreign entity] will send a manager to the branch ([the petitioner]) as the general manager of [the petitioner] to monitor the operating activities which include the hiring of personnel in the U.S., verification of the distribution partner, creation of a team-oriented work-place environment, etc.

This explanation lacks the detail necessary to constitute a timeline. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In addition, the petitioner fails to explain whether it will import products or manufacture them itself. If it intends to import the products, the business plan does not provide sufficient information about the supplier, the products' wholesale cost, or any other logistics. If it intends to manufacture the goods, the business plan does not give sufficient details regarding the raw materials, the production process, the production location, and the workforce needed to implement production processes. Without more detail, the petitioner fails to produce a credible business plan that demonstrates the business will grow within one year to the point that it can support the beneficiary in a primarily managerial or executive role.

The petitioner does state that it has developed a tarp superior to others in the industry. The petitioner submitted two shipment invoices for deliveries to the petitioner dated October 13, 2011, however neither of these describe the product shipped. A third shipping invoice lists the product as "polyethylene plastic woven tarp," however, it states the product was loaded in Shanghai on January 6, 2012 and unloaded in Boston on .

February 4, 2012. Although these invoices suggest the petitioner has been conducting some kind of business, they are not a substitute for a detailed business plan.

The regulations specify that the petitioner must demonstrate that either it or the overseas company has the financial resources necessary to commence operations. 8 C.F.R. § 214.2(l)(3)(v)(C)(2). In this case, the petitioner's business plan states that it has a funding request for a two-year \$200,000 loan. The petitioner does not state who the potential lenders are or whether its request has been approved. The petitioner states that \$150,000 of the loan will be used towards advertising, \$10,000 will be used for staffing, and \$10,000 will be used as operating funds for advertisement and promotion.

In its business plan, the petitioner has a Financial Plan section, which states:

The Funding Request in this Business Plan outlines the major start-up costs associated with this business. Regular monthly expenses are estimated at \$5,000 for paying the employee salaries and other related business expenses. The Business is expected to generate \$350,000 in the first year and gross profit is expected to be \$40,000.

The petitioner does not state when or from where it will acquire the money to initially purchase the products it intends to resell. In addition, although its initial two-year loan allocates only \$10,000 total toward salaries, the petitioner estimates in the above paragraph that staffing and other business expenses will cost \$5,000 per month or \$60,000 per year. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Nevertheless, the petitioner's business plan has no detailed breakdown of the company's hiring plans, the salaries to be paid to employees, other anticipated operating expenses or revenue projections, and as such fails to support a realistic expectation that the company will grow to the point where it would support a qualifying managerial or executive position.

The petitioner submitted bank statements showing that it has a business checking account. The statements show a balance of \$13,991.66 as of September 30, 2011. Under checking activity, the most notable transaction is a deposit of \$46,000 on August 29, 2011, which was then wired out internationally on the same day. There is no information regarding the source or recipient of the money. Without more information, this bank account does not provide sufficient evidence of adequate financial resources available to the petitioner.

The petitioner has failed to show that it would employ the beneficiary in a managerial or executive capacity within one year, or that its business will have developed to such a point that it can support such a position. The petitioner's appeal is therefore 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).

In addition to the basis for the denial raised by the director, the petitioner also failed to demonstrate that it has a qualifying relationship with the foreign entity. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

(b)(6)

The petitioner alleges that it is an affiliate of [REDACTED] based in China, and specifically claims the beneficiary owns and controls both companies.

The evidence submitted sufficiently establishes that the beneficiary owns and controls the foreign entity. However, the petitioner failed to provide sufficient evidence of its own ownership. The petitioner's articles of organization list the beneficiary as President and Director, but there is no indication that she has ownership and control. The petitioner provided no evidence that the beneficiary purchased an interest in the company or transferred capital for its start up. The petitioner's filing with the Commonwealth of Massachusetts states that the company has authorized 275,000 shares, and that no shares are outstanding. 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 petitioner has failed to corroborate its claim that the petitioner has an affiliate relationship with the foreign entity. For this additional reason, the petition cannot be approved.

III. Conclusion

Based on the foregoing, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity within one year or that the petitioner has a qualifying relationship with the beneficiary's foreign employer. 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.