



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: JAN 28 2013

Office: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

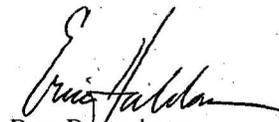
ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Ron Rosenberg

Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as 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 Texas corporation established in July 2011, states that it engages in the retail and export of auto parts. The petitioner claims to be a subsidiary of [REDACTED] located in South Africa. The petitioner seeks to employ the beneficiary as president of its new office in the United States.

The director denied the petition concluding 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.

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 director's determination is contrary to the evidence submitted. Counsel submits a brief and copies of previously submitted evidence 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 ISSUE ON APPEAL

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

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on December 23, 2011. In a letter dated December 19, 2011, the petitioner described the beneficiary's job duties as follows:

As the President of the company, [the beneficiary] will be responsible for the following job duties:

- Establish the general policies of [the petitioner] in the United States
- Direct the management of [the petitioner] in the United States, including strategic planning, market development, shipping and logistics
- Manage the managerial and technical staff of the company
- Responsible for policy development and implementation
- Establish the business goals of the organization and exercise wide latitude in discretionary decision-making
- Develop strategic alliance with the U.S. companies on various sales projects
- Work closely with overseas parent company to develop company policies, and provide strategic planning and implementation of key decisions
- Work with foreign buyers in Africa to market company's products
- Plan, direct, and implement all aspects of the marketing and sales strategies including sales, public relations, advertising, special events, customer service and relations

This is an executive position as defined under INA Sec. 101(a)(44), 8 CFR Sec. 214.2(l)(1)(ii)(B).

The petitioner submitted a document titled "detailed description of each position" listing the job duties for each of the beneficiary's proposed subordinates, including a manager, shipping clerk, sales person, and accounts/clerical staff. The petitioner also submitted a two-page business plan for its auto parts export business dated September 26, 2011, which describes its hiring plan as follows:

The company will employ 4 workers in the first year of its operation. An experienced manager in auto part export business will be hired for the general operation of the company's export business. A shipping clerk will be hired for handling the shipping and warehouse needs of the company. An accounting clerk will be hired for the company's accounts and clerical duties. A sales person will be hired for the company's general sales.

The petitioner's two-page business plan did not include any further information regarding the company's anticipated organizational structure or financial objectives for the first year of operations. *See* 8 C.F.R. § 214.2(l)(3)(v)(C)(1).

The director issued a request for additional evidence ("RFE") on January 6, 2012, instructing the petitioner to submit, *inter alia*, evidence to demonstrate that the beneficiary, within one year of operation, will be relieved from performing the non-managerial, day-to-day activities involved in producing a product or providing a service. The director advised that the job description provided at the time of filing was insufficient to establish that the beneficiary would be performing primarily qualifying duties and requested additional information regarding the beneficiary's proposed role and the proposed subordinate positions.

In response to the RFE, counsel for the petitioner submitted the same list of duties it provided at the time of filing the petition. Counsel additionally that such duties are "clearly managerial/executive in nature," and that the beneficiary will "spend virtually all his time in the executive/managerial duties." Additionally, counsel emphasized that the beneficiary "will be the highest executive officer in the US" with "total discretion over the running and operation of the business."

With response to the petitioner's proposed staffing, counsel stated: "The employer plans to hire 4 people initially, after the approval of the beneficiary's L-1. None of the position requires a 4-year college degree, although the Manager is required an Associate degree of equivalent."

The director denied the petition on February 7, 2012, concluding 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 beneficiary would not be involved in the supervision and control of the work of other supervisory, professional, or managerial employees who will relieve him from performing the services of the corporation within one year of the commencement of operations. The director further found that there is insufficient evidence to show that the U.S. entity, within one year of operations, can reasonably be expected to operate at a level that will support the beneficiary's proposed executive position or that he would be relieved from performing the day-to-day operations involved in providing goods or services.

On appeal, counsel for the petitioner submits a brief and indicates that the director "did not provide a single specific fact to show that the beneficiary would be engaged in non-managerial work." Counsel submits the same list of job duties previously provided and states the following:

USCIS position is in contrary [*sic*] to the evidence submitted. The documents submitted clearly shows that the beneficiary would be employed in a managerial position involving in the supervision and control the work of a Manager, who will be responsible for the day-to-day operations of the business. This was provided in the Business Plan, list of subordinate positions, the job duties, and other related documents submitted to USCIS.

Counsel maintains that the director's decision "did not provide a single specific fact to show that the beneficiary would be engaged in non-managerial work."

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.*

At the time of filing the petition and in response to the RFE, the petitioner and counsel indicate that the beneficiary's position is an executive position as defined by statute and regulation. However, on appeal, counsel for the petitioner asserts that the beneficiary's job duties are "managerial and executive in nature." 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.

On review, the petitioner's description of the beneficiary's duties fails to establish that the beneficiary will be engaged in either a primarily managerial or primarily executive position. While the AAO does not doubt that the beneficiary will exercise discretionary authority over the U.S. company as its president and partial owner, the petitioner has not provided sufficient information detailing the beneficiary's proposed duties at the U.S. company to demonstrate that these duties qualify him as an executive. Here, the petitioner characterized the

beneficiary's role as president and identified his duties as "establish the general policies of [the petitioner]"; "direct the management of [the petitioner]"; "manage the managerial and technical staff"; and "establish the business goals of the organization and exercise wide latitude in discretionary decision-making." These duties merely paraphrase the statutory definition of executive capacity. See section 101(a)(44)(B) of the Act. 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. at 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.). 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.

Although advised that the initial position description was insufficient and afforded a second opportunity to supplement the record, the petitioner failed to provide any detail or explanation of the beneficiary's proposed activities in the course of his daily routine in response to the request for evidence. Instead, the petitioner simply listed the same or similar duties previously submitted and again failed to provide a breakdown of the amount of time the beneficiary devotes to each task. 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).

This failure of documentation is important because the petitioner's description of the beneficiary's job duties includes potentially non-qualifying duties and does not establish what proportion of the beneficiary's duties are managerial or executive in nature, and what proportion are actually non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). For example, duties such as developing alliances with U.S. companies on sales projects, working with foreign buyers to market the company's products, and implementing the company sales, public relations, advertising and customer service activities, without further explanation, do not clearly fall within the statutory definitions of managerial or executive capacity. 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.

While several of the duties described by the petitioner would generally fall under the definitions of executive capacity, the lack of specificity raises questions as to the beneficiary's actual proposed responsibilities. 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).

At the time of filing, the petitioner submitted a two-page business plan that did not describe the foreign entity's vision or actual plans for the U.S. company. The business plan does not contain any information regarding anticipated revenues and capital required for carrying out its plans to operate as a "retailer and exporter of auto parts" in the United States. As such, it is impossible to determine, based on the minimal 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 exactly 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)).

While the petitioner consistently indicates that the company will hire a manager and three employees during the first year of operations, the business plan does not include any financial information and thus does not corroborate the petitioner's assertions that the company would support the claimed employees during its first year of operations. The evidence does not satisfy the petitioner's burden to provide evidence of the company's financial objectives or to establish the size of the United States investment and its financial ability to commence doing business in the United States. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). Further, the AAO notes that while the petitioner claims that it will hire a shipping employee, an accounting clerk, a sales employee and a manager, it has not indicated that it will hire an employee to source and purchase the automobile parts it intends to export, or to assist the beneficiary with his stated responsibility for implementing "public relations, advertising, special events, customer service and relations."

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 address 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, the burden of proving

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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.