



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **JAN 29 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:

[REDACTED]

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Florida limited liability company established in January 2011, engages in the business of exporting raw materials for the fragrance and cosmetics industries as well as providing consulting services in this specialized industry in the United States and abroad. It is a subsidiary of [REDACTED], located in Caracas, Venezuela. The petitioner seeks to employ the beneficiary as President and Managing Member of its new office in the United States for a period of one year.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity within one year of commencing operations in the United States.

The petitioner subsequently filed a timely appeal.¹ The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary will be employed in a primarily managerial capacity. Counsel submits a brief and additional 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.

¹ The appeal is considered timely. Even though the appeal was received on the 35th day, the 33rd day fell on a Saturday. See 8 C.F.R. § 1.2 (definition of "day").

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- (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 to be addressed is whether the petitioner established that the beneficiary will be employed in the United States in a primarily managerial capacity within one year.²

Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on February 21, 2012. In a letter dated February 15, 2012 submitted with the petition, the petitioner described the nature of the U.S. entity's business as exporting raw materials for the fragrance and cosmetics industries as well as providing consulting services in this specialized industry in the United States and abroad. The petitioner described the day-to-day activities of the U.S. company as including: coordinating sales distribution programs; arranging for shipping details and custom issues on all export matters; preparing and analyzing sales and operation reports; representing the company at trade association meetings to promote its products and services; and engaging the services of sales representatives who will be in charge of securing new customers for the company as well as promoting its products in the marketplace.

With the petition, the petitioner submitted its business plan which described the U.S. entity's business purpose as to serve as the "U.S. purchasing agent for the foreign affiliated company, [REDACTED], located in Caracas, Venezuela." The business plan explained that the foreign company "sells fragrances

² The petitioner only asserts that the beneficiary will be employed in a managerial capacity. The petitioner does not claim that it will employ the beneficiary in an executive capacity. Therefore, the AAO will only analyze the beneficiary's employment in a managerial capacity.

and cosmetic packaging supplies (bottles, etc.) within the beauty and home care products industry throughout South and Central America.”

The business plan described the U.S. entity’s initial management team as consisting of the beneficiary, who “will serve as General Manager and Director of the Company, overseeing all aspects of operations.” The business plan further described the beneficiary’s duties and the petitioner’s initial staffing structure as the following:

During the initial start-up stages, [the beneficiary] will serve as the firm’s manager, overseeing all aspects of U.S. operations, with the assistance of two employees already working for the company. All other duties will be subcontracted out to local businesses. Additional employees will be hired after the initial start-up period, in order to provide adequate service levels.

During the initial stages of the US purchasing agent/affiliate of the foreign company, focus will be placed on meeting current suppliers and establishing a local relationship. At a point where the exporting process is functioning smoothly, [the beneficiary] will branch out product review and purchasing efforts to new US suppliers, seeking reliable sources of supply at competitive pricing.

[The beneficiary] will initially perform a substantial portion of the actual work of the operation himself for two important reasons. First, this will allow him to learn, first-hand, the requirements of the process involved in the operation of a U.S. Company. Second, it will allow him to develop training materials, procedures, and performance requirements for subcontractors/personnel to be added after the initial months of operation.

[The beneficiary] will also be responsible for client development for the Company. In this role, he will:

- Manage sales activities.
- Analyze sales statistics in order to formulate policy.
- Review market analyses to determine customer needs, volume potential, price schedules, and discount rates.
- Develop sales campaigns to accommodate the goals of Company.
- Represent the Company at trade association meetings to promote products and services. [and]

- Travel to visit customers to promote product sales and to establish and/or maintain customer relations.

The director issued a request for evidence ("RFE") requesting, *inter alia*, the following: (1) a short answer to each of the following questions: how many subordinate supervisors and/or professional employees will be under the beneficiary's management; the job duties of the employees managed; how much of the time spent by the beneficiary will be allotted to executive/managerial duties and how much to other non-executive/managerial functions; and the degree of discretionary authority the beneficiary will have in day-to-day operations; (2) a list of all U.S. employees that identifies each employee by name and position title, as well as a complete position description for all the employees, including a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis, including one for the beneficiary; (3) evidence to show how the new company in the United States will grow to be of sufficient size to support a managerial or executive position, including evidence that the beneficiary, within one year of operation, will be relieved from performing the non-management, day-to-day operations involved in producing a product or providing a service; and (4) a detailed description of the staff of the new U.S. office to include the job titles and duties with the percentage of time dedicated to each duty to be performed by each employee and the description of the management and personnel structures of the U.S. office.

In response to the RFE, the petitioner submitted a letter dated March 8, 2012 listing the beneficiary's job duties in the United States as the following:

1. Directing the management of the organization through review and analysis of reports prepared and provided by division managers;
2. Developing and establishing short and long term goals and policies of said goals and policies through subordinate managers;
3. Exercising discretionary decision making on matters pertaining to: strategic long term planning, organizational objectives and goals, and development of company standards, processes, and procedures;
4. Reviewing reports from managers and making operational recommendations based on such;
5. Establishing personnel policies and institution of benefit programs such as: health insurance, workers compensation, and pension plans;
6. Locating, negotiating, and procuring contractual relationships with customers and suppliers, both domestic and international;
7. Developing marketing and advertising strategies for company products and developing, along with division manager, additional product lines, methods of distribution, and sales outlets;
8. Pursuing company's legal matters with legal counsel on all matters relating to corporate issues, commercial matters, collections, contract drafting and execution, litigation, among others;
9. Creating of systems and budgeting controls for company and assigning division budgets to division managers for compliance;
10. Securing banking and other financial services including loans, lines of credit, and extensions on credit limits;
11. Overseeing accounting, taxation, payroll and budgeting functions with internal and external accounting professionals;
12. Delegating day to day activities to subordinates for execution and oversight; and

13. Conducting marketing and profitability studies to promote and to direct corporate expansion.

In the same letter, the petitioner asserted that the beneficiary will supervise the activities of [REDACTED] General Manager, and [REDACTED], Administrative Assistant. The petitioner asserted: "Both of them will perform the day to day tasks required to operate the company, leaving [the beneficiary] to perform primarily managerial and executive functions as outlined above."

Finally, the petitioner provided position descriptions for its two current U.S. employees, [REDACTED] and [REDACTED]. Regarding the duties of [REDACTED] the petitioner indicated that he is the General Manager, responsible for the following duties:

1. Report directly to the company's President;
2. Direct and coordinate the support services of the company as they relate to day to day operations including: payroll and payroll taxes, accounting, banking, accounts payable, and accounts receivables;
3. Prepare operational reports and schedules for review by company President and implement recommendations for improvement of operations;
4. Oversee logistics, operations, and day to day accounting activities;
5. Implement and manage budgets for contracts, purchases, and supplies as established by company President; and
6. Hire, train, and terminate clerical personnel.

Regarding the duties of [REDACTED], the petitioner indicated that she is the Administrative Manager, responsible for the following duties:

1. Administrative monitoring of contracts;
2. Control and monitoring of billing and collections;
3. Payroll preparation;
4. Calculation and payment of taxes and employer contributions based on accountant's recommendation;
5. Control and renewal of operating and business licenses; and
6. Perform document storage and retrieval functions.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be primarily employed in a managerial or executive capacity within one year. In denying the petition, the director concluded that the beneficiary's specific duties call for him to be heavily and directly involved in sales activities and customer contact. The director also noted that the petitioner failed to specify its plans for future hiring. The director concluded that the petitioner failed to establish whether anyone would be available to relieve the beneficiary from performing non-qualifying duties. The director concluded that it appeared that the beneficiary will be engaged primarily in the non-managerial operational tasks required for the company, with occasional first-line supervisory duties over nonprofessional employees.

On appeal, counsel for the petitioner asserts that the beneficiary will be employed in a managerial capacity, and will "essentially perform the same duties as he has performed in Venezuela." Counsel asserts that the beneficiary will be managing rather than performing the work himself, as he has sufficient subordinate

employees to relieve him from performing the day-to-day duties of the company. In particular, counsel discusses the foreign entity's management structure led by [REDACTED], both of whom report directly to the beneficiary, and the foreign entity's structure of other subordinate employees who are in charge of relieving the beneficiary of any non-qualifying duties. Counsel disputes the director's conclusion that the beneficiary will be "heavily and directly involved in sales activities and customer contact," and discusses the foreign entity's structure of subordinate individuals who perform sales and customer service components. Counsel also asserts the beneficiary qualifies as a "functional manager" because he has discretionary authority over the foreign entity's monthly USD \$1 million budget. Finally, counsel asserts that Congressional intent for the L-1 visa is to allow small-sized businesses and entrepreneurs to operate in the United States.

Discussion

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed by the United States entity in a managerial capacity within one year.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(I)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's proposed organizational structure, the duties of the beneficiary's proposed subordinate employees, the petitioner's timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. The petitioner's evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(I)(3)(v).

In the instant matter, the petitioner has failed to provide a credible, consistent description of the beneficiary's job duties in the United States. Many of the beneficiary's proposed job duties in the United States do not appear credible or relevant to the U.S. entity's actual organizational structure. For example, the petitioner asserted that the beneficiary's job duties in the United States will include "[d]irecting the management of the organization through review and analysis of reports prepared and provided by division managers" and "[c]reating of systems and budgeting controls for company and assigning division budgets to division managers for compliance." However, the petitioner does not claim that the U.S. entity has any division managers or divisions. It appears that these job duties pertain to the beneficiary's job duties abroad, not to the beneficiary's proposed job duties in the United States.

The petitioner has not credibly demonstrated how the beneficiary "would essentially perform the same duties as he has performed in Venezuela." A comparison of the scope and size of the foreign entity's operations and organizational structure with the petitioner's current operations and structure reflects significant differences between the two entities. As described by the petitioner, the foreign entity is in an "advanced stage of

operations” and employs eight employees and numerous professional subcontractors. In contrast, the U.S. entity is in “a start-up stage of operations” and employs only two employees. The petitioner has not explained how it is possible or feasible for the beneficiary to “essentially perform the same duties” in light of the U.S. and foreign entity’s vastly different stages of operations and staffing levels.

Moreover, the petitioner has failed to establish that the beneficiary will not be primarily engaged in non-qualifying duties. According to the business plan, the beneficiary will be responsible for “client development for the Company,” which includes substantial sales activities. The petitioner states in the business plan that the beneficiary “will initially perform a substantial portion of the actual work of the operation himself.” In addition, the petitioner listed one of the beneficiary’s job duties as “[l]ocating, negotiating, and procuring contractual relationships with customers and suppliers.” All of these statements support the director’s conclusion that the beneficiary will be “heavily and directly involved in sales activities and customer contact.”

The sales and customer contact duties the beneficiary will perform constitute performing the tasks necessary to provide the daily services of the U.S. operations. The petitioner described the nature of its business as to export materials abroad and act as the purchasing agent for the foreign affiliated company. The petitioner described its day-to-day services as including “coordinating sales distribution programs,” and “engaging the services of sales representatives who will be in charge of securing new customers for the company as well as promoting its products in the marketplace. Necessarily, the petitioner’s daily operations require sales and customer contact duties. The petitioner has not established who, if not the beneficiary, will be performing these duties in the United States. The petitioner does not claim to employ any sales representatives in the United States. Neither the General Manager nor the Administrative Manager have any sales duties, according to the position descriptions the petitioner provided. In short, the record indicates that the beneficiary alone will be performing the sales and customer contact duties for the U.S. entity.

Although the petitioner asserts on appeal that the beneficiary’s sales and customer contact activities “are merely two components of the beneficiary’s complex job description,” the petitioner has failed to establish what percentage of time the beneficiary will spend on these particular tasks. In the RFE, the director specifically requested the petitioner to identify how much time the beneficiary will spend on executive/managerial duties and how much time on non-executive/managerial duties, and to provide a breakdown of the hours devoted to each of the beneficiary’s job duties. However, the petitioner failed to provide this information in response to the RFE. This failure of documentation is critical because the beneficiary’s sales and customer contact duties are non-qualifying duties. As the petitioner failed to document how what proportion of the beneficiary’s time will be spent on non-qualifying duties, the petitioner failed to establish that the beneficiary will be “primarily” employed in a managerial capacity. 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).

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 *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995) (citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm’r 1988)).

On appeal, counsel for the petitioner broadly asserts that the beneficiary will be relieved from performing non-qualifying duties. However, counsel does not explain how the beneficiary will be relieved from performing non-qualifying duties *in the United States*. In the appeal brief, counsel only discusses how the foreign entity has a sufficient organizational structure to relieve the beneficiary from performing non-qualifying duties in Venezuela. Counsel does not explain nor document which of the petitioner's two U.S. employees or which of the foreign entity's employees will relieve the beneficiary from performing non-qualifying duties in the United States.

While the petitioner is not precluded from asserting that the foreign entity has sufficient individuals who perform sales and customer service components, it is incumbent upon the petitioner to establish that the foreign entity's employees will perform the sales and customer service functions for the petitioner's U.S. sales activities. In the instant matter, the petitioner has not done so. Rather, the petitioner seeks to rely upon the foreign entity's organizational structure alone, without demonstrating how the foreign entity's organizational structure will support the petitioner's business activities within the United States.

The record also contains discrepancies regarding the beneficiary's proposed job title in the United States. According to Form I-129, the beneficiary will be employed as the Managing Partner. In the supporting documentation submitted with the initial petition, the petitioner claimed the beneficiary will be its President. In the business plan, the petitioner described the beneficiary as its "General Manager and Director."

Finally, the record is unclear what the U.S. entity's actual management structure will be. Specifically, the petitioner claimed in its business plan that the "initial management team will consist of [the beneficiary]," who will "oversee all aspects of operations" as its "General Manager and Director." In contrast, the petitioner claims to employ Cesar Morillo as its General Manager, and that his responsibilities include "oversee[ing] logistics, operations, and day to day accounting activities."

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).

The AAO does not doubt that the beneficiary will have the appropriate level of authority over the petitioner's business. However, the definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does 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). The petitioner has failed to establish this second element of eligibility.

Based on the foregoing reasons, the petitioner failed to establish that the beneficiary will be employed in a primarily managerial capacity. 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. Accordingly, the appeal will be dismissed.

Although the appeal will be dismissed, the AAO withdraws some of the director's comments that were inappropriate or without factual support. Specifically, the AAO withdraws the director's comments regarding the foreign entity's "small amount of storage/warehouse space (perhaps the size of a large rented storage locker)" as well as the foreign entity's lack of growth. On appeal, the petitioner provided sufficient evidence establishing that the director incorrectly converted the foreign entity's warehouse space from square meters to square feet, and overlooked previously submitted evidence establishing the foreign entity's growth over the years.

ORDER: The appeal is dismissed.