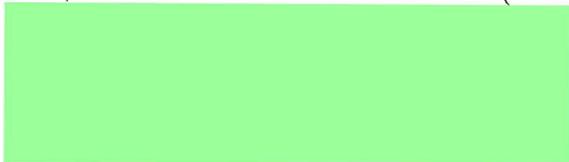




U.S. Citizenship
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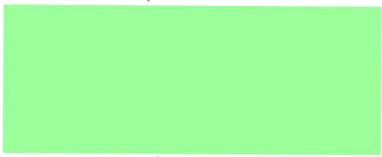


DATE: **JAN 29 2013** Office: VERMONT SERVICE CENTER FILE:

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 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 New York corporation established on January 5, 2005, engages in the business of investment consulting and international trade. It is a subsidiary of [REDACTED] Company, located in Beijing, China. The petitioner seeks to extend the beneficiary's employment as its General Manager for an additional period of two years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity in the United States.

The petitioner subsequently filed an appeal. 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 or executive 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.
- (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.

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 or executive capacity.

Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on March 1, 2011. In a letter dated February 25, 2011 submitted with the petition, the petitioner described the beneficiary's duties in the United States as the following:

The Beneficiary, [REDACTED] has assumed the duties and responsibilities of the executive/managerial positions of General Manager of [the petitioner] since he obtained his L-1A status in June 2006. As General Manager of [the petitioner], [the beneficiary] has planned and prepared business of the Company at its start-up, and continues his efforts in supervising and managing the Company's business up to today.

Through [the beneficiary's] efforts, the Company has provided consulting services to various clients in the area of investment banking relating to China, and other business consulting services and trading services involving US-China cross-border transactions. Under the supervision and management of [the petitioner], the Company has a steady income in the years of 2009 and 2010.

We are willing to extend [the beneficiary's] employment as General Manager for the next two (2) years. As the General Manager, he will continue to oversee the overall operation and strategy of the Company and make all significant financial decisions subject to the parent company's mandate. He will also oversee the business development of the Company, including acquisition of consulting projects and negotiation of consulting service agreements. [The beneficiary] will also provide general supervision and direction to the operation and administrative personnel that will be hired during the course of the Company's operations.

With the petition, the petitioner submitted its organizational chart depicting the beneficiary at the top, followed directly below by [REDACTED], Vice President, who in turn supervises three entities: (1) [REDACTED] Accountant; (2) [REDACTED] Sales and Consulting; and (3) [REDACTED]. [REDACTED] is depicted as directly supervising [REDACTED]. The organizational chart further listed the responsibilities for each employee/entity as follows:

1. The beneficiary, General Manager: overall management of the company, formulating business plans, supervise managerial staff, and high level development and negotiation;
2. [REDACTED] Vice President: marketing, business development;
3. [REDACTED] Accountant: accounting, tax reporting;
4. [REDACTED] Sales and Consulting: marketing, business development, IT service;
5. [REDACTED] financial management, book keeping, daily operation;
6. [REDACTED] marketing, business development, consulting, etc.

The petitioner submitted its Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2009 (ending in March) showing that it had two employees who received wages, tips, or other compensation. The petitioner also submitted its Forms 941 for the second quarter of 2009, fourth quarter of 2009, first quarter of 2010, second quarter of 2010, and fourth quarter of 2010, all showing that it had one employee. The petitioner's corresponding Form NYS-45-MN, Unemployment Insurance Return, for the first quarter of 2009

listed its two employees as [REDACTED] and the beneficiary. The petitioner's Forms NYS-45-MN for all other quarters of 2009 and 2010 confirmed that the beneficiary was the petitioner's only employee.

The petitioner submitted its 2009 W-2 forms reflecting that it paid \$150,000 in wages to the beneficiary, and \$4000 to [REDACTED].

The petitioner submitted copies of various contracts it has entered into, including one between it and EPOD Solar, Inc. dated February 9, 2010, signed by "[REDACTED] Chief International Business Director" on behalf of the petitioner.

The petitioner submitted its 2010 income statement showing operating costs including \$341,000 in "consulting fees" and \$150,000 in "salaries and wages."

The petitioner submitted its 2010 Form 1120, U.S. Corporation Income Tax Return, showing \$150,000 in compensation of officers, \$4000 in salaries and wages, and \$163,400 in consulting fees.

The director issued a request for evidence ("RFE") requesting, *inter alia*, the following: (1) a comprehensive description of the beneficiary's duties, indicating how the beneficiary's duties have been managerial or executive in nature; (2) a list of the petitioner's United States employees which identifies each employee by name and position title, as well as a complete position description for all employees, a breakdown of the number of hours devoted to each duty, and educational credentials of all employees; and (3) all Forms W-2, W-3, 1099, and 1096 issued by the U.S. entity in 2010.

In response to the RFE, the petitioner submitted a letter dated May 13, 2011 describing the beneficiary's job duties as follows:

1. Formulating short-, mid-, and long-term business plans;
2. Budgeting, and monitoring corporate cash flow and liquidity;
3. Providing general supervision and direction to the operation and administrative personnel, including long-term service contractors;
4. Evaluating options and making business decisions, such as selecting professionals (accountants, attorneys, bankers, etc.) and building and maintaining those relationships;
5. Initiating high-level communication with major players including underwriters, investment advisors and private equity funds in the investment banking field in the U.S. and maintaining relationships with those players; and
6. Determining all aspects of personnel issues, including hiring and discharge decisions, compensation, benefits, and leave issues.

In the same letter, the petitioner provided another version of the U.S. entity's organizational chart depicting the beneficiary at the top directly supervising [REDACTED], Vice President, who supervises five individuals: (1) [REDACTED], Daily Operation Staff; (2) [REDACTED], Public Relations Advisor; (3) [REDACTED], Business Advisor; (4) [REDACTED], Legal Advisor; and (5) [REDACTED], Accountant. The petitioner clarified: "The people under [the beneficiary's] supervision are providing services to the Company on a contractor basis and are not directly employed by the Company. But [the beneficiary] manages and oversees their roles within the Company." The petitioner further clarified that [REDACTED] used to be on the

company's payroll, but is now being paid as a contractor. The petitioner described the job duties of [REDACTED] as: "in charge of market research and business development, also in charge of international trading. In addition, Mr. [REDACTED] supervises other service consultants in the absence of [the beneficiary]." The petitioner provided no other job descriptions.

The petitioner submitted the degree certificates of the beneficiary and [REDACTED].

The petitioner submitted its 2010 Form W-2 issued to the beneficiary for \$150,000, and its 2010 W-3 showing a total of \$150,000 paid in wages, tips and other compensation.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be primarily employed in a managerial or executive capacity. In denying the petition, the director observed that the beneficiary is the petitioner's only employee. The director concluded that the petitioner failed to establish that the beneficiary is managing any subordinate employees or managing a department, subdivision, function, or component of the organization. The director also concluded that the beneficiary will be engaged in the non-managerial, day-to-day operations of the establishment.

On appeal, the petitioner asserts that "in determining whether an alien supervises others, independent contractors as well as company employees can be considered." The petitioner asserts that the beneficiary supervises "a group of professionals working for the company as contractors," including the vice president, the public relations advisor, business advisor, legal advisor, and accountant. The petitioner asserts that the beneficiary is involved in strategic planning, negotiation, and project development of the company that requires a high level of authority. The petitioner provides copies of several emails between the beneficiary and various business partners to illustrate the beneficiary's authority.

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 in the United States in a primarily managerial or executive capacity.

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(l)(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 organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, 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 that there is an actual need for a manager or executive who will primarily perform qualifying duties.

In the instant matter, the petitioner failed to provide a detailed description of the beneficiary's job duties. Most of the beneficiary's job duties were stated in vague and overly broad terms, such as "overall management of the company," "formulating business plans," "[p]roviding general supervision and direction

to the operation and administrative personnel, including long-term service contractors," and "[e]valuating options and making business decisions." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In the RFE, the director specifically instructed the petitioner to provide a comprehensive description of the beneficiary's duties, including a breakdown of the number of hours devoted to each duty. However, the petitioner failed to provide the requested information in response to the RFE. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). 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).

Overall, the petitioner has failed to provide a consistent, credible description of the petitioner's organizational structure and staffing. The petitioner initially submitted an organizational chart depicting the following employees: the beneficiary, [REDACTED], [REDACTED]. In contrast, in response to the RFE, the petitioner submitted a second organizational chart reflecting the following employees: the beneficiary, [REDACTED] (Daily Operation Staff), [REDACTED] (Public Relations Advisor), [REDACTED] (Business Advisor), [REDACTED] (Legal Advisor), and [REDACTED] (Accountant). The petitioner failed to explain why it submitted two different organizational charts, and which of the two charts, if either, is an accurate depiction of the petitioner's actual organizational structure.

Although the petitioner claims it utilizes the services of several professional contractors, the petitioner failed to establish that it actually utilizes contractors, or if it does, that the contractors utilized are the ones depicted in the organizational charts. The petitioner submitted no evidence establishing that it paid any wages or compensation to contractors in 2010. The petitioner's 2010 Forms 941 and NYS-45-MN consistently show that the beneficiary is the petitioner's sole employee. When directed to submit copies of all its Forms W-2, W-3, 1099, and 1096 for 2010, the petitioner submitted only the Form W-2 for the beneficiary and the W-3 confirming the beneficiary's salary. The petitioner submitted no Forms 1099 and 1096 to establish it paid wages or compensation to independent contractors in 2010.

While the petitioner's expense report and federal income tax return indicate that the petitioner paid between \$163,400 to \$341,000 in "consulting fees" in 2010, these documents do not identify the recipient(s) of the consulting fees, nor the service(s) rendered in exchange for these fees. The petitioner provided no evidence to establish that the "consulting fees" were made to the individuals and for the purposes depicted in the organizational charts.

Even assuming *arguendo* that the petitioner established that it utilized independent contractors, the petitioner has failed to credibly explain what job duties are performed by its contractors. The petitioner provided only vague and broad descriptions of the services provided by the contractors, such as "marketing," "business development," and "consulting." As discussed above, when requested by the director to provide a complete

position description for all its employees in the United States, including a breakdown of the number of hours devoted to each job duty, the petitioner responded by only providing a brief description of the beneficiary and [REDACTED] job duties. The petitioner failed to provide any detailed description of the duties performed by its other claimed contractors. 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).

Notably, according to the initial organizational chart, three individuals/entities are separately responsible for marketing and business development: [REDACTED]. Also, as discussed above, the contractors and services depicted in the initial organizational chart differ greatly from those depicted in the second organizational chart. In short, the record is completely devoid of any consistent explanation or credible evidence of which contractors the petitioner utilizes, and what services these claimed contractors provide.

Finally, a careful review of the record reveals additional discrepancies regarding the petitioner's staffing. The instant petition was filed by "[REDACTED]". In the Financial Advisory Engagement Agreement between the petitioner and [REDACTED], the signatory for the petitioner, bears the title "Chief International Business Director." In contrast, the petitioner's organizational charts neither identify [REDACTED] as an employee or contractor, nor depict a position of Company Secretary or Chief International Business Director.

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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

Based on the foregoing reasons, the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive 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.

ORDER: The appeal is dismissed.