



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **JAN 31 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 New Jersey limited liability company established on May 13, 2011, engages in the travel business. It claims to be a subsidiary of [REDACTED], located in Dubai, United Arab Emirates. The petitioner seeks to employ the beneficiary as the business development manager of its new office in the United States for a period of three years.¹

The director denied the petition, concluding that the petitioner failed to establish that the U.S. entity would support the beneficiary in a managerial position within one year of commencing operations 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 managerial capacity. Counsel submits a brief 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 Pursuant to 8 C.F.R. § 214.2(l)(7)(i)(A)(3), if the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year.

- (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.

II. The Issue on Appeal

The sole issue to be addressed is whether the petitioner established that the beneficiary would be employed in the United States in a primarily managerial capacity within one year.

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. 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. *See generally*, 8 C.F.R. § 214.2(I)(3)(v). 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.*

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on October 31, 2011. In documentation submitted with the initial petition, the petitioner described the beneficiary's primary job duties as to "bring[] together the customer focus team to work on each account, supervises their work, sets standards and general guidelines for each assignment which must be followed and executed by the team," as well as to "oversee[] the analysis and negotiations of contracts while liaising with local markets to support US and global air travel plans while proactively developing and managing relationships." The petitioner provided a list of the beneficiary's other job duties in the United States as follows:

1. Lead and manage business development and explore opportunities for the company;
2. Manage daily activities directly related to aggressive marketing the US operations;
3. Analyze and review existing contract agreements and make recommendations to optimize domestic negotiations;
4. Manage and coordinate activities regarding sales;
5. Lead and conduct extensive market research prior to starting up new business and continue gathering information throughout the life of the business;
6. Manage key personnel; while directing and coordinating financial activities for the company;

7. Lead complex, and high-profile negotiations for assigned categories of travel;
8. Manage ongoing competitive marketing analysis including strengths, weaknesses, opportunities and threats to assist in the development of a strategic plan for the future of the business;
9. Manage vendors and vendor relationships;
10. Regularly interacts with senior management or executive levels on matters concerning travel and meeting management categories; and
11. Attend workshops, trade shows, and seminars to keep up-to-date on changes in the industry.
12. Other assigned managerial duties.

The director issued a request for evidence ("RFE"), in which he instructed the petitioner to submit, *inter alia*: (1) a business plan giving a timetable for each proposed action for one year starting with the time of filing; and (2) a detailed description of the staff of the new U.S. office to include the number of employees, the job titles and duties with the percentage of time dedicated to each duty to be performed, and a description of the management and personnel structures of the U.S. office.

The petitioner submitted its business plan in response to the RFE. The business plan indicated that the petitioner plans to have three employees for its first year of operations: a business development manager (the beneficiary), an administrative assistant, and a business travel associate. The business plan provided the following list of job duties for the beneficiary:

Management & Operations (50%)

1. Analyze and develop different types of software, including marketing and customer relation management applications;
2. Set up company's intranets- networks that link computers within U.S. and overseas;
3. Lead and manage business development and explore opportunities for the company;
4. Manage daily activities directly relating to aggressive marketing the US operations;
5. Utilize project management skills for major meeting management project teams;
6. Manage personnel; direct and coordinate financial activities for the company;
7. Lead complex, and high-profile negotiations for assigned categories of travel;

Marketing (30%)

1. Investigate the economic conditions surrounding corporate business travel such as industry trends and competition;
2. Analyze and review existing contract agreements and make recommendations to optimize domestic negotiations; and
3. Lead and conduct extensive market research prior to starting up new business and continue gathering information throughout the life of the business;

Travel Agent Administrative Duties (20%)

1. Coordinate the database construction, maintenance, and expansion of the company's database;
2. Manage corporate airline air travel and contracts;
3. Assist other travel services for U.S. clients abroad. Assist with travel insurance; and

4. Visit hotels, resorts, restaurant to evaluate comfort, cleanliness and quality of food and service.

The business plan also provided the following list of job duties for the business travel associate and administrative assistant:

Business Travel Associate:

1. Works with management to determine a travel budget and develop travel policies for the entire company (30% of time spent);
2. Responsible for making reservations for executives and other business travelers, and choosing transportation and lodging options (60% of time spent);
3. Keeps employees up to date on travel regulations, such as passport and visa requirements, and provide information regarding rates of exchange or import duties (10% of time spent).

Administrative Assistant:

1. Maintains workflow by studying methods; implementing cost reductions; and developing office reporting procedure (20% of time spent);
2. Creates and revises office systems and procedures by analyzing operating practices, recordkeeping systems, forms control, office layout, and budgetary and personnel requirements (5% of time spent);
3. Develops administrative staff by providing training, information and educational opportunities (20% of time spent);
4. Coordinates preparation of reports, analyzing data, and identifies solutions;
5. Ensures operation of equipment by completing preventative maintenance requirements, calling for repairs; maintaining equipment inventories; evaluating new equipment and techniques (20% of time spent);
6. Provides information by answering questions and requests;
7. Maintains supplies inventory by checking stock; placing and expediting orders for supplies; verifying receipt of supplies (5% of time spent);
8. Completes operational requirements by scheduling and assigning administrative projects; expediting work results (30% of time spent).

The business plan described the focus of the petitioner's services as "escorted corporate travel packages." In particular, the business plan listed the following services as part of its specialized Meeting, Incentive, Conference and Exhibition (M.I.C.E.) services: hotel and travel services, including visa assistance; budget and timeline planning and management; venue and facility planning and recommendation; marketing, press relations, sponsorship sourcing and management; delegation management, speaker management, conference handouts, A/V technical support, exhibition management support, and all onsite logistics support.

The business plan described the petitioner's initial marketing and sales strategy as targeting and developing relations with satisfied corporate clients who have used the petitioner's services with the idea of encouraging favorable "word-of-mouth" business, and targeting key travel agents/professionals who have established corporate client bases. The business plan described its possible direct marketing methods, as well as its possible customer-based marketing methods, as potentially including "emphasizing repeat sales," "exploring add-on sales," and "add-on sales facilitated by links to our website."

Finally, the business plan described the technology that it would utilize as the following:

[The petitioner] will rely on the use of advanced technology and software widely used in the travel industry, such as, Amadeus and Galileo Systems in providing service to its clients. These systems allow [the petitioner] to provide up to the minute information on flight and reservation information. In addition, these systems simplify customer data storage and retrieval. [The petitioner] will make use of the latest computer technology and the Internet for market research, communications, data storage and sales. [The petitioner] will also create working agreements with other travel agencies in the U.S. that will enhance its technological abilities and its financial profitability.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial capacity within one year of the approval of the petition. The director observed that the only employee involved in sales for the U.S. petitioner is the beneficiary, and therefore concluded that the beneficiary would not be relieved from performing non-qualifying duties within the first year of operations in the United States.

On appeal, counsel for the petitioner reiterates the same job duties for the beneficiary as previously submitted, and points out the following: (a) the beneficiary holds a senior managerial and executive position in the foreign entity; (b) the foreign entity has an office manager in its corporate hierarchy; (c) the petitioner has expressed in its business plan that it will rely on the use of advanced technology and software to provide services to its clients, and will utilize the latest computer technology and the internet for "market research, communications, data storage, and sales"; and (d) the petitioner "has a dynamic website that be used for sales [sic]." Counsel then concludes the following:

The foregoing clearly establish that (a) the Beneficiary cannot maintain his day-to-day responsibilities after the establishment of the Petitioner during the first year; (b) most likely than not that Petitioner will hire an office manager, making Petitioner corporate hierarchy similar to [the foreign entity]; and that (c) there is no eminent need for the Beneficiary to transfer his sales duty to another employee during the first year as it is clearly proven from the submitted documents that sales and reservations are being handled through the petitioner's website and other technology softwares, that might be even remotely managed by other employee of [the foreign entity] from overseas [sic].

III. Analysis

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner failed to establish that the beneficiary will be employed by the United States entity in a primarily 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(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 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's description of the beneficiary's job duties indicates that the beneficiary will be primarily performing a variety of non-qualifying duties including sales, marketing, travel agent administrative duties, and even providing IT-related services. For example, the petitioner stated that the beneficiary will "[m]anage and coordinate activities regarding sales," "[m]anage daily activities directly relating to aggressive marketing the US operations," "[m]anage corporate airline air travel and contracts," "[a]ssist other travel services for U.S. clients abroad [and assist] with travel insurance," "[a]nalyze and develop different types of software," and "[s]et up company's intranets." Considering that the beneficiary will spend 30% of his time in marketing duties and 20% of his time in travel agent administrative duties, in addition to an unspecified portion of time in sales and IT duties, the record reflects that the beneficiary will be primarily performing non-qualifying duties.² Therefore, the beneficiary is precluded from being considered primarily employed in a managerial capacity.

An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988). The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). Where an individual is "principally" or "chiefly" performing the tasks necessary to produce a product or to provide a service, that individual cannot also "principally" or "chiefly" perform managerial or executive duties.

Although the petitioner used the word "manage" to describe the beneficiary's sales and marketing duties, it is evident that the beneficiary will be performing the sales and marketing duties himself, rather than managing these duties. As the director correctly noted, the record reflects that the beneficiary will be the petitioner's only employee with sales and marketing duties. The petitioner's position descriptions for its other proposed employees - the business travel associate and the administrative assistant - list no job duties related to sales or marketing.

² The petitioner asserted that the beneficiary would spend 50% of his time in "management & operations." This response is overly broad and insufficient. Not only did the petitioner fail to provide the percentage of time the beneficiary would spend on *each* duty as requested, the petitioner also failed to clarify what portion of the beneficiary's time would be dedicated to management, versus what portion of his time would be dedicated to operations. Nevertheless, the fact that the beneficiary will spend a portion of this 50% on non-qualifying operational duties, in addition to another 50% on non-qualifying marketing and travel administrative duties, renders him primarily engaged in non-qualifying duties.

On appeal, counsel asserts that the beneficiary "cannot maintain his day-to-day responsibilities after the establishment of the Petitioner during the first year" because the petitioner "most likely than not . . . will hire an office manager, making Petitioner corporate hierarchy similar to [the foreign entity]." However, counsel's assertions are unpersuasive and unsupported by the record. Prior to the appeal, the petitioner never asserted that it planned to hire an office manager within the first year of operations; to the contrary, the petitioner clearly and consistently expressed that it planned to hire only three employees, namely a business development manager (the beneficiary), an administrative assistant, and a business travel associate, in its first year of operations. On appeal, a petitioner cannot offer make material changes to the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Even assuming *arguendo* that the petitioner plans to hire an office manager in its first year, counsel's claims that this would make the petitioner's corporate hierarchy "similar" to the foreign entity and sufficient to relieve the beneficiary of his day-to-day responsibilities are unpersuasive. The petitioner failed to explain how the addition of one office manager would make the petitioner's operations "similar" to the foreign entity's operations. Based upon the documentation in the record, the foreign entity appears to be substantially larger and more structurally complex than the petitioner.³ Furthermore, the petitioner failed to explain how the addition of an office manager, whose job duties remain unknown, would relieve the beneficiary from performing the day-to-day services of the U.S. operations.

On appeal counsel asserts that there is "no eminent need for the Beneficiary to transfer his sales duty to another employee during the first year" because the petitioner has "clearly proven" that "sales and reservations are being handled through the petitioner's website and other technology softwares, that might be even remotely-managed by other employee of [the foreign entity] from overseas." Again, counsel's assertions are unpersuasive and unsupported by the record. Prior to the appeal, the petitioner never asserted that its sales functions would completely or largely be handled through the petitioner's website and through other technology. Rather, the petitioner's business plan only made two broad references to the petitioner's use of its website and other technology to *facilitate*, not perform, its sales functions. Specifically, the petitioner stated that it would "make use of the latest computer technology and the Internet for market research, communications, data storage and sales," and that its marketing strategy may include "add-on sales *facilitated* by links to our website" (emphasis added). These two statements fall significantly short of "clearly

³ The petitioner failed to provide a consistent, thorough description of the foreign entity's staffing and structure. The organizational chart for the foreign entity depicts the foreign entity's employees as the following: (1) [REDACTED] (owner-partner); (2) the beneficiary (owner-partner, general manager); (3) [REDACTED] (office-in-charge); (4) [REDACTED] (senior tour operator); (5) [REDACTED] (business development coordinator); (6) [REDACTED] (aviation supervisor); (7) [REDACTED] (accountant); (8) [REDACTED] (tour operator); and (9) [REDACTED] (aviation staff). In contrast, the petitioner claims that the beneficiary supervised the foreign entity's travel department, which "consisted of seven (7) team leaders and other travel personnel." In addition, the company brochure indicates that there are at least six different departments: incoming; outgoing & leisure travel; MICE; ticketing; traffic; and sales & marketing. Regardless, it is evident that the foreign entity is substantially larger and more structurally complex than the petitioner.

prov[ing]" that sales and reservations will be handled through the petitioner's website and other technology software.

Finally, counsel's speculation that the petitioner's sales and reservations "might be even remotely managed by other employee of [the foreign entity] from overseas" is not entitled to any evidentiary weight. A visa petition may not be approved based on speculation of future eligibility. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248; *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petition will be denied and the appeal dismissed for the above stated reasons. 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.