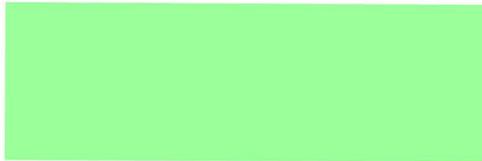


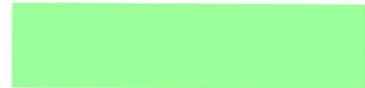


U.S. Citizenship
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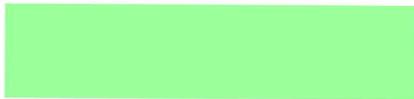
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DATE: **JUN 19 2013** OFFICE: VERMONT SERVICE CENTER

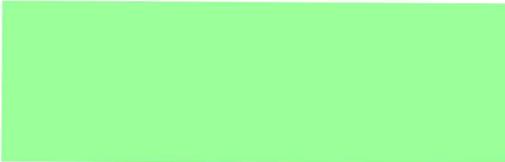


IN RE: Petitioner:
Beneficiary:



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 law was inappropriately applied by us in reaching our 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 request 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 that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Rob Rosenberg

Acting Chief, Administrative Appeals Office

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

The petitioner has petitioned 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 Florida corporation, states that it operates a catering and event planning business. It claims to be a subsidiary of [REDACTED], located in Italy. The petitioner seeks to employ the beneficiary as the director of operations in its new office for a period of one year.

The director denied the petition concluding that the petitioner failed to establish: (1) that it will employ the beneficiary in a managerial or executive capacity or that the new office will support such a position within one year of approval of the petition;; or (2) that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity.

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 evidence of record is sufficient to establish that it will employ the beneficiary in a qualifying managerial or executive capacity and that the company will support a qualifying position within one year.

Neither counsel nor the petitioner acknowledges or contests the director's separate finding that the petitioner failed to establish that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity. The AAO, therefore, considers this issue to be abandoned. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO). The AAO concurs with the director's findings that the petitioner submitted a general and nonspecific description of the beneficiary's current position as the foreign entity's operations manager, and failed to provide requested information which would have assisted the director in determining whether the beneficiary supervises subordinate managers, supervisors or professionals. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition will be denied and the appeal will be dismissed for this reason.

Accordingly, the sole remaining issue to be addressed is whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity in the United States within one year of the approval of the petition.

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.

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) also 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 involves 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 (1)(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.

II. The Issue on Appeal

The issue to be addressed is whether the petitioner established that it would employ the beneficiary in a qualifying managerial or executive capacity within one year of the approval of the petition.

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.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by 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(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.*

A. Facts and Procedural History

In a letter submitted in support of the petition, the petitioner stated that the beneficiary will serve in the executive position of Director of Operations for the petitioner's catering and event planning business. It described her proposed duties as follows:

[The beneficiary] will plan, develop, and establish overall policies and objectives of the company in accordance with the corporation charter. She will be responsible for ensuring the achievement of defined outcomes in administrative and operational plans in accordance with the company's mission, principles and business philosophy, within the strategic and operational guidelines established by the general coordination of all departments. Her major functions will be to implement the strategic goals and objectives of the company. She will report to the Board of Directors, and will give direction and leadership toward the achievement of the company's philosophy, mission, strategy, and its annual goals and objectives. She will support the Board by advising and informing Board members, interfacing between Board and staff, and supporting Board's evaluation of chief executive. She also will recommend the yearly budget for Board approval and prudently manage the company's resources within those budget guidelines according to current laws and regulations. As the executive over Human Resources, she will effectively implement the human resources policies of the organization according to authorized personnel policies and procedures that fully conform to current laws and regulations. Finally, she will be responsible for assuring the organization and its mission, products and services are consistently presented in strong, positive image to relevant stakeholders.

The petitioner stated that the beneficiary "will spend 100% of her time performing executive duties."

The petitioner submitted a copy of its 84-page business plan for its new office. The petitioner indicates that its activities will include catering as well as party and event planning, consultation, preparation and implementation of events. Section 2.3 of the business plan, at page 12, indicates that the company intends to employ a president, a vice president, an executive director (the beneficiary), as well as a business director, operations manager, event planning and preparation manager, financial manager, event consultation director and an office manager. Section 2.3.1 of the business plan, at p. 13, provides a "Personnel Count" and indicates that the petitioner anticipates employing a total of five employees in both 2011 and 2012. Although the petitioner provided the referenced list of nine positions to be filled, based on the "personnel count" the petitioner does not anticipate filling all of these positions during the first year of operations. The petitioner indicates at page 21 of the business plan that it intends to enter agreements with at least 20 third party vendors within six months of approval of the petition, and that these vendors will provide event and party planning services through the United States.

The petitioner's business plan includes a proposed organizational chart. The chart depicts a president at the top of the organization. His direct reports include a debits and receivables manager, a vice president, and an event planner/interior designer. The chart depicts a special projects chairperson who will report to the debits and receivables manager, an operations director (the beneficiary) who will report to the vice president, and a regulatory manager who will report to the event planner/interior designer. Finally, the chart indicates that the beneficiary will supervise an office manager and the regulatory manager will supervise a shipping and delivery coordinator.

The proceeding pages of the business plan included position descriptions for the positions of: president; vice president; operations director; event planner/interior designer (to be hired May 2011); special projects chairperson (to be hired on or before June 2012); accounts payable and receivable manager (to be hired on or before December 2012); regulatory administrator (to be hired January 2013); sales and marketing coordinator (to be hired on or before December 2012); and an office manager (to be hired by December 2012).

The petitioner stated that the president will spend 20% of his time setting and updating strategies and goals; 35% of his time delegating duties and team building; 15% of his time on capital allocation; and 30% of his time reviewing reports, mentoring managerial employees, and maintaining close contact with the Board of Directors. The petitioner indicated that the vice president will: direct and coordinate financial and budget activities (30%); confer with board members and staff members to coordinate activities and resolve problems (10%); direct and coordinate departments concerned with production, pricing, sales and distribution (20%); review reports prepared by staff (20%); and appoint department heads or managers and delegate responsibilities (20%).

The business plan included a brief description of the beneficiary's proposed duties and indicated that she will direct human resources activities; analyze operations to evaluate the company's performance; direct, plan and implement policies, objectives and activities; assist the board of directors with creating an annual organizational budget; prepare an annual audit and liaise with outside vendors; and oversee monthly and quarterly assessments of the company's financial performance.

The director issued a request for evidence (RFE) after reviewing the initial evidence. The director instructed the petitioner to submit, *inter alia*, evidence to show how the new company will grow to support a qualifying managerial or executive position within one year, and to demonstrate that the beneficiary would be relieved from performing the non-managerial, day-to-day operations involved in producing a product or providing a service. Specifically, the director requested a detailed description of the company's proposed staffing, including the number of employees to be hired and their proposed salaries or wages, their job duties and duties with the percentage of time allocated to each duty for each employee, and a description of the management and personnel structure of the new office.

The director acknowledged the organizational chart provided at the time of filing and observed that the petitioner had not identified any staff to actually perform catering duties. The director asked that the petitioner explain this apparent discrepancy.

In response to the director's request, the petitioner resubmitted the petitioner's business plan and referred the director to the organizational chart and personnel hiring plan contained therein. Counsel emphasized that the petitioner expects to grow from three employees in 2011 to 10 employees by 2015. With respect to the staffing levels, counsel asserts that the beneficiary's position "will satisfy the reasonable needs of the company" based on the company's expected stage of development within one year, and therefore USCIS should not place undue emphasis on the projected staff size.

Counsel stated that the beneficiary will supervise "several independent contractors and third party vendors and two strategic partners." Further, counsel stated that the beneficiary will be directing an essential function "by managing all aspects of the company's goals and objectives," and thus will be employed in a qualifying executive capacity.

Counsel's letter included a revised position description for the beneficiary's role as "executive director," as follows:

[The beneficiary's] time each week will be circulated as follows, 30% of her time will be spent research[ing] and analyzing current market conditions; 25% developing strategies for diverse market growth; 20% drafting all power point needed for her weekly [p]resentations; 15% keeping track of Info binder; 10% corresponding with the Board and CEO and keeping them abreast on any and all new market developments.

Counsel further stated that the beneficiary would supervise independent catering contractors who would actually perform the catering services for the business, and identified three potential contractors.

In the same letter, counsel included a completely different description of the proposed role of executive director which indicated that the beneficiary would develop and maintain operations business plans; provide input into the development of product strategy and new product research and development; establish production and quality control standards; provide guidance to the development of a manufacturing process plan; coordinate manufacturing activities with other functions; and review production and operating reports to resolve operational, manufacturing and maintenance problems.

The director denied the petition concluding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity within one year of the approval of the petition. In denying the petition, the director observed that according to the petitioner's organizational chart, the beneficiary would report to two higher-level executives and noted that, according to the personnel plan included in the petitioner's business plan, the petitioner does not anticipate hiring more than one additional employee prior to the end of the first year of operations. The director noted that the petitioner had not consistently or adequately explained or documented how it would use independent contractors to provide the services of the business. The director also noted inconsistencies in the petitioner's various descriptions of the proposed positions to be filled. Finally, the director found that the petitioner had not provided sufficient evidence to establish the size of the U.S. investment and the ability of the U.S. company to commence operations in the United States.

On appeal counsel asserts that "all of the information and documentation submitted thus far shows that the Beneficiary's position is in fact managerial in nature and the position she intends to fill is in fact an executive position, regardless of the number of subordinate employees to be supervised." Counsel contends that the director made "several misstatements about the Beneficiary's position," and made erroneous legal conclusions.

Counsel provides another revised position description for the beneficiary's proposed position, indicating that she will be "overseeing the sales and operations of the company" and implementing its operational goals. Counsel indicates that the beneficiary will develop budgets, hire fire and train employees, oversee operational procedures, set productivity levels and quality standards, work with the sales department to determine pricing, and ensure delivery of quality products. Counsel further indicates that the beneficiary will oversee inventory, work with purchasing agents, oversee accounts payable department, and company finance officers, and manage vendor relations, among other duties. Counsel contends that a close examination of these duties establishes that the beneficiary will manage an essential function, specifically, the "operational and financial management function."

B. Analysis

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 or executive 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. As noted above, 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(l)(3)(v).

Here, the petitioner has provided at least four different descriptions of the beneficiary's proposed position. The initial position description included in the petitioner's initial letter indicated that the beneficiary will allocate 100% of her time to executive duties during the first year of operations, that she will be responsible to "establish overall policies and objectives of the company," and that she will report directly to the board of directors. However, this position description merely paraphrased the statutory definition of executive capacity and was not credible in light of the petitioner's organizational chart which indicates that there are two tiers of managerial/executive employees above the beneficiary's position. Further, the position descriptions provided for the president and vice president attribute many of these same duties to them.

In response to the RFE, counsel submitted a letter with two completely dissimilar position descriptions for the beneficiary, neither of which bore any resemblance to the description provided at the time of filing. Counsel indicated that the beneficiary will spend 30% of her time researching and analyzing market conditions, 25% of her time developing marketing strategies, 20% of her time drafting Powerpoint presentations and 15% of her time "keeping track of Info binder." The petitioner did not attempt to reconcile this breakdown of primarily non-qualifying duties with its initial claim that the beneficiary would allocate 100% of her time to executive duties. At the same time, the petitioner stated that the beneficiary would perform duties associated with product strategies, product research and development, production and quality control standards, coordination of manufacturing activities, and development of manufacturing processes. This position description is clearly incongruent with the petitioner's plan to operate an event planning and catering company. On appeal, counsel introduces a fourth description of the beneficiary's duties which indicates that the beneficiary will be responsible for managing the petitioner's financial and operations functions.

Based on the sheer number of different position descriptions provided, the AAO cannot reach any conclusions regarding the actual nature of the beneficiary's proposed duties and cannot determine that the beneficiary will perform primarily qualifying duties within one year. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Further, on appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. 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).

It is also not evident that the beneficiary, who will report to a president and vice president, will have the necessary level of managerial or executive authority over the new operation, which, according to information in the business plan, anticipates hiring only one additional employee during the first year of operations. Even if the petitioner had adequately supported its assertions that independent contractors would provide the company's services, it still requires staff to perform other operational and administrative tasks and to supervise the service-providers. Therefore, absent a credible and reliable description of the beneficiary's actual duties and level of authority, the petitioner has not established that it will employ the beneficiary in a managerial or executive capacity. For this reason, the appeal will be dismissed.

Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. First, the AAO notes that counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp.*, where the Fifth Circuit Court of Appeals decided in favor of the legacy Immigration and Naturalization Service (INS), or *Mars Jewelers, Inc.*, where the district court found in favor of the plaintiff. With respect to *Mars Jewelers*, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district.

See Matter of K-S-, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Nevertheless, as noted above, the AAO is dismissing the appeal not because of the projected size of the petitioning company, but because the petitioner failed to provide a credible description of the beneficiary's proposed duties.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Due to the failure to provide the requested evidence, the petitioner has not met its burden.

ORDER: The appeal is dismissed.