



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAR 25 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 Virginia corporation established in 2012, engages in manufacturing and sales of goose down products. It claims to be an affiliate of [REDACTED], located in Novosibirsk, Russia. The petitioner seeks to employ the beneficiary as the chief operating officer 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 will be employed in a primarily managerial or executive capacity 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 primarily managerial capacity in the United States. 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.
- (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 Issues on Appeal

The primary 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 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(l)(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 June 15, 2012. In a letter accompanying the initial petition, the petitioner asserted that the beneficiary will be assuming a senior managerial level position in the United States, primarily charged with overseeing start up activities for the U.S. office. The petitioner described the beneficiary's proposed duties in the United States as follows:

1. Overseeing the development of overall U.S. operations, retaining ultimate discretionary authority for the administration and operation of the U.S. office;
2. Negotiating supplier, client, and partners contracts;
3. Developing internal policy and directing overall administrative and business affairs including hiring initial staff, managing outside contractors, business partners and clients, developing internal policy, negotiating contracts and directing staff;
4. Defining, implementing and monitoring an effective and productive Business Plan for the U.S. company;
5. Directing marketing efforts for raw and finished products, and analyzing and defining marketing strategies; and
6. Liaising with the headquarters in Europe to monitor and report progress of the U.S. enterprise.

The petitioner submitted its business plan, which described the petitioner's Personnel Plan as the following:

1. A CEO, [the beneficiary], to oversee and fill-in for all areas, direct and coordinate the organization's operational activities, negotiate and approve contracts, agreements with clients, suppliers, distributors or other organizational entities, and direct human resources activities;¹
2. A marketing and sales specialist to be hired in September 2012, who will be responsible for marketing efforts including trade shows, website, social media, advertising, and assisting in sales, customer services, and product management activities;²
3. A translator to be hired (on a contract basis) in 2012;³
4. A desk receptionist to be hired in 2012 to answer phones, receive payments, set appointments, maintain files, and data entry;⁴
5. An accountant/bookkeeper to be hired in 2012 for preparation of financial statements and reports;⁵ and
6. Sales representatives to be hired "progressively as the operations development [*sic*]," who will be responsible for contacting new and existing customers, answering customer questions, preparing sales contracts for orders, and submitting orders for processing.⁶

¹ On Form I-129, the petitioner listed the beneficiary's proposed position as Chief Operating Officer (COO).

² In contrast, the business plan included a separate Personnel Table (With Monthly Detail) which indicated that the marketing and sales specialist would be hired in August 2012.

³ The business plan included a separate Personnel Table (With Monthly Detail) which indicated that the translator had been hired as of May 2012. In contrast, on Form I-129 filed on June 15, 2012, the petitioner indicated that it had zero employees.

⁴ The business plan included a separate Personnel Table (With Monthly Detail) which indicated that the desk receptionist had been hired as of May 2012. In contrast, on Form I-129 filed on June 15, 2012, the petitioner indicated that it had zero employees.

⁵ The business plan included a separate Personnel Table (With Monthly Detail) which indicated that the accountant will be hired in September 2012.

⁶ The business plan included a separate Personnel Table (With Monthly Detail) which indicated that a sales representative had been hired as of May 2012. In contrast, on Form I-129 filed on June 15, 2012, the petitioner indicated that it had zero employees.

The business plan also indicated that the petitioner will hire a CEO associate and a lawyer at unspecified dates.⁷

The director issued a request for evidence ("RFE"), in which he instructed the petitioner to submit, *inter alia*, the following: (1) a detailed copy of the business plan for commencing the start-up of the company, giving a timetable for each proposed action for the first year starting with the date of filing; (2) a detailed description of the staff of the new U.S. office to include the number of employees, the job titles and duties, and the percentage of time dedicated to each duty to be performed by each employee; and (3) an organizational chart for the U.S. entity.

In response to the director's RFE, the petitioner provided the following timeline:

March – April 2012

1. Preliminary business visits to the U.S., by the prospective L-1A transferee;

May 2012

1. [The petitioner] is incorporated in Virginia and IRS Number obtained;
2. Office space lease signed in Herndon, VA for the administrative office of [the petitioner];
3. Fully functional, multi-page web site created in English [redacted];
4. Business Bank Account Opened;

June 2012

1. Negotiations with transport and logistics companies;
2. Business development activities with U.S. customer base including U.S. production companies for raw product and e-commerce activities development for the finished product;

July – August 2012

⁷ The business plan included a separate Personnel Table (With Monthly Detail) which indicated that a lawyer had been hired as of May 2012. In contrast, on Form I-129 filed on June 15, 2012, the petitioner indicated that it had zero employees.

Based on the numerous discrepancies contained in the Personnel Table (With Monthly Detail), the AAO affords the Personnel Table little probative value. 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.*

1. Planned arrival of the COO of the Company and interviews for hiring of personnel according to the business plan.
2. Continued development of business-to-business contacts via Fashion Products Association and American Down and Feather Council;
3. Preparation for the New York Home Fashions Market Week, the largest trade show of the kind in the USA.

September 2012

1. Participation in the New York Home Fashions Market Week, the largest trade show of the kind in the USA.
2. Hiring of Marketing & Sales Specialist finalized.
3. Continued business contacts with raw material buyers and promoters for e-commerce for finished products

October 2012

1. Hiring of Translator, Desk Receptionist, Accountant/Bookkeeper, and interviews for regional sales representatives.
2. Continuation of business activities-business development and processing of received orders.

November 2012-December 2012

3. Continuation of business activities-business development and order processing.

With respect to the director's request for a detailed copy of the business plan for commencing the start-up of the company and a detailed description of the staff of the new U.S. office to include the number of employees, the job titles and duties, and the percentage of time dedicated to each duty to be performed by each employee, the petitioner referred back to the previously submitted Business Plan. The petitioner asserted that the Business Plan provided sufficient details regarding the requested information.

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 within one year of operation. The director emphasized that the petitioner's descriptions of the beneficiary's proposed duties were too general and generally paraphrased the statutory definitions of managerial and executive capacity. The director further determined that the evidence was insufficient to establish that the beneficiary's proposed subordinate employees would be managers or professionals, concluding that the beneficiary will essentially be a first-line supervisor of non-professionals, directly involved in the petitioner's functioning.

On appeal, counsel asserts that the director failed to take into consideration the more lenient treatment for new offices, and erroneously applied the stricter regulations for established offices or extensions. Counsel asserts that the director disregarded the beneficiary's authority to hire personnel and wide discretion afforded to her in directing business operations, in favor of placing emphasis on the contention that her subordinate staff will not be professional in nature. Counsel asserts that the beneficiary's subordinates are professional in nature.

Finally, counsel disputes the director's conclusion that the beneficiary's job duties were vague and simply paraphrased the statute, asserting that the record contains sufficient detail regarding the beneficiary's duties.

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 of the approval of the petition.

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.*

In the instant matter, the petitioner has repeatedly described the beneficiary's proposed position in very broad terms, such as "[o]verseeing the development of overall U.S. operations, retaining ultimate discretionary authority for the administration and operation of the U.S. office"; "[d]eveloping internal policy and directing overall administrative and business affairs"; and "[d]efining, implementing and monitoring an effective and productive Business Plan for the U.S. company." As stated by the director, these duties merely paraphrase the statutory definition of executive capacity. See section 101(a)(44)(B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Accordingly, the director properly issued a RFE, requesting a detailed description of the beneficiary's job duties including the percentage of time dedicated to each duty to be performed. In response, the petitioner provided a timeline of the beneficiary's proposed duties in the United States. While this timeline provided slightly more details regarding the beneficiary's proposed duties in the United States, such as setting specific timeframes for the interviewing and hiring of the proposed Marketing & Sales Specialist, Translator, Desk Receptionist, Accountant/Bookkeeper, and regional sales representatives, the timeline was still too vague to provide a meaningful understanding of the beneficiary's daily activities for the entire first year of operations. In particular, the job duty for November 2012-December 2012 consisted of a single vague description: "Continuation of business activities-business development and order processing." Likewise, other than specifying hiring activities, the only job duty for October 2012 was "Continuation of business activities-business development and processing of received orders." These descriptions are simply too vague to explain what the beneficiary would be doing in the course of her daily activities for the entire first year. 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 her daily routine. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; the actual duties themselves will reveal the true nature of the employment. *Id.*

Curiously, the petitioner's timeline ended with November 2012-December 2012, despite counsel's acknowledgement that the first year of operations should be measured from the date of approval. The petitioner failed to explain what job duties the beneficiary would be performing after December 2012. Without such information, and relying solely on the petitioner's vague descriptions of the beneficiary's

proposed duties, the petitioner failed to provide a complete picture of the beneficiary's daily activities during the entire first year of operations.⁸ 8 C.F.R. § 214.2(l)(3)(ii) specifically requires the petitioner to provide a detailed description of the services to be performed; this requirement is not waived for new office petitions, despite counsel's assertion that the nature of the petitioner as a new office "restricts the ability to intricately detail every facet of [the beneficiary's] daily routine." The petitioner failed to comply with the regulations.

In addition, the petitioner failed to provide the requested breakdown of how the beneficiary's time would be allocated among her various responsibilities. This failure of documentation is important, because several of the beneficiary's job duties include potentially non-qualifying duties, such as negotiating contracts and agreements with suppliers, clients, distributors, and/or other organizational entities, processing received orders, and "continuation of business activities." As the petitioner failed to document what proportion of the beneficiary's duties would be spent on qualifying functions and what proportion would be spent on non-qualifying functions, the petitioner failed to establish whether the beneficiary will primarily be performing qualifying managerial or executive duties, or will spend the majority of her time conducting non-qualifying operational tasks.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. 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 *Matter of Church Scientology Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

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).

Thus, while several of the duties generally described by the petitioner could generally fall under the definitions of managerial or executive capacity, the lack of specificity raises questions as to the beneficiary's actual proposed responsibilities. Overall, the proffered position descriptions, including those contained in the

⁸ The term "first year of operations" is measured from the date that the petition is approved. 8 C.F.R. § 214.2(l)(3)(v)(C). On appeal, counsel asserts that the director misinterpreted the allowable one-year time frame, asserting that the director erroneously "implies that the petitioner has less than one year to develop operations," and at the same time, erroneously looks beyond the first year to consider the petitioner's hiring plans in the third year of operations. Counsel has not demonstrated that the director committed prejudicial error in conducting its review of the petition. The director's statements regarding the "first year of operations" were made in the context of rejecting the petitioner's anticipated hiring of supervisory staff in the *third* year of operations. As stated above, 8 C.F.R. § 214.2(l)(3)(v)(C) allows a petitioner one year from the date of approval to support an executive or managerial position. As the petitioner's hiring of supervisory staff is projected to occur outside of this one year time frame, the director properly did not consider the anticipated hiring of supervisory staff in assessing whether the beneficiary will be a supervisor of supervisory, professional, or managerial employees.

Business Plan, are insufficient to establish that the beneficiary's duties will be in a primarily managerial or executive capacity.⁹ For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner failed to establish that it had secured sufficient physical premises to house the new office, as required by 8 C.F.R. § 214.2(l)(3)(v)(A), as of the date the petition was filed.

With the initial petition, the petitioner submitted its "Online Office Agreement" with [REDACTED], reflecting that it has an agreement for office space for one person from June 1, 2012 through August 31, 2012. This "Online Office Agreement" does not in any way constitute a lease or other credible evidence that the petitioner has secured sufficient physical premises to house its new business. The "agreement" does not specify what type of office space the agreement is for, e.g. a physical office or a virtual office, what the actual square footage is, if any, of the premises, and provides no details regarding the terms and conditions of the agreement.¹⁰

Despite the director's request to provide documentary evidence that the petitioner has acquired a leased premise of sufficient size to conduct international trade, including an original lease agreement, a statement from the lessor identifying the square footage of the leased premises, and photographs of the interior and exterior of all premises secured for the U.S. entity, the petitioner failed to provide an original lease agreement or a statement identifying the square footage of the premises. 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). Although the petitioner submitted photocopied images of its new office space, the images were of such poor quality as to be completely indecipherable.

In addition, the "Online Office Agreement" is only for three months. The petitioner has not explained from where it plans to conduct its business after the expiration of the agreement.

Lastly, the "Online Office Agreement" specifies that the office space is for one person only. Thus, the petitioner failed to establish that it has secured sufficient physical premises to house the additional employees the petitioner purportedly plans to hire in 2012. Not only has the petitioner failed to establish that it has secured sufficient physical premises to house its new business, but in light of the petitioner's "Online Office Agreement" for one person, the petitioner's claims that it plans to hire several additional employees in 2012 is not entirely credible.

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-

⁹ Because the petitioner failed to make the threshold showing that the beneficiary's duties will be primarily managerial or executive in nature, the AAO need not address the issue of whether the beneficiary will be a supervisor of supervisory, professional, or managerial employees.

¹⁰ The website of [REDACTED] indicates that the company offers various types of offices, including part-time offices, day offices, and virtual offices. See [REDACTED] (accessed March 19, 2013).

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.*

For the foregoing reasons, the petitioner failed to establish it has secured sufficient physical premises to conduct its new business. For this additional reason, the appeal will be dismissed.

III. Conclusion

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving 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.