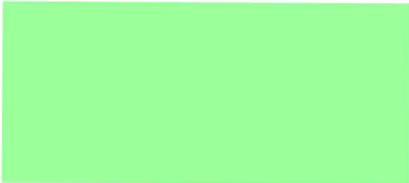


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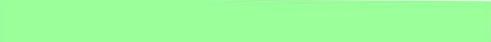
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE: **MAY 16 2013** OFFICE: VERMONT SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker under 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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. 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 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 New York corporation, is an import/export business. The petitioner claims to be an affiliate of [REDACTED] located in Japan. The beneficiary was previously granted one year in L-1A status in order to open a new office in the United States and the petitioner now seeks to extend her status the beneficiary as its President for an additional period of two years.

The director denied the petition on May 1, 2012, concluding that the petitioner failed to establish the beneficiary will be working primarily in a qualifying executive or managerial capacity. The director also found that the petitioner failed to provide IRS Form 941s, Employer's Quarterly Federal Tax Returns, for all four quarters prior to the date of filing. The petitioner also failed to provide the Form W-2s, Wage and Tax Statements, leaving the director unable to determine if the beneficiary supervised the work of other managerial or professional employees. Furthermore, the petitioner did not provide, as requested, any job descriptions, titles, or other information regarding any subordinate staff. The director concluded that the beneficiary, based on the evidence of record, is the petitioner's sole employee and is thus not relieved from performing primarily non-managerial and non-executive duties required to operate an import-export business.

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.

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.

Upon review, the AAO concurs with the director's decision and will affirm the denial of the petition. For the first time on appeal, the petitioner submits previously requested evidence for review. The submitted evidence will not be considered in this proceeding.

On November 21, 2011, the director put the petitioner on notice of the required evidence and gave a reasonable opportunity to provide it for the record before the visa petition was adjudicated. See 8 C.F.R. § 103.2(b)(8). Specifically, the director requested *inter alia* (1) a list of United States employees by title including position description with breakdown of number of hours, and educational credentials; (2) a copy of IRS Form 941, Employer's Quarterly Tax Return, for the last quarter of 2010 and the first three quarters of 2011; (3) a comprehensive description of the beneficiary's job duties; and (4) additional color photographs of the interior and exterior showing work areas, employees, and permanent signage. In response, the petitioner failed to provide the requested evidence. Instead the petitioner only submitted photos showing a single workspace with non-permanent signage in what appears to be a residence, along with workers and a

workspace that appears to belong to the foreign entity. The petitioner provided a single state quarterly tax return for the period from December 1, 2010 to February 28, 2011. With regard to subordinate employees, counsel for the petitioner stated that the beneficiary "doesn't have any employees at the present time." Finally, the petitioner re-submitted the position description provided at the time of filing, which had already been reviewed by the director and found to be deficient to establish the beneficiary's eligibility as a manager or executive.

The director denied the petition after noting that the petitioner failed to submit the requested evidence. The director also noted that the petitioner failed to submit a detailed description of the beneficiary's job duties and determined that without subordinate employees, it is unclear who will be performing the non-managerial duties of the organization.

The regulation at 8 C.F.R. § 214.2(l)(3)(viii) states that the director may request additional evidence in appropriate cases. Although specifically requested by the director, the petitioner did not provide the requested evidence. The petitioner's failure to submit this information cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). The director appropriately denied the petition, in part, for failure to submit requested evidence.

On appeal, the petitioner submits copies of the state quarterly returns, workers compensation records, and a job description for a subordinate employee.

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

The AAO notes that the petitioner has filed two supplemental briefs in addition to the original brief submitted with the appeal. In the first appeal brief, counsel or the petitioner states that the beneficiary controls the work of an assistant and submits a letter describing the intern duties. Furthermore, counsel states that the beneficiary's employees from the overseas organization are assisting her with her non-managerial duties.

In an additional brief, filed on December 3, 2012, counsel for the petitioner provides information regarding a past employee, current intern, and potential future hires. Counsel again asserts that the beneficiary's employees in Japan are assisting her with the day to day duties of the petitioner in the United States. Finally, counsel for the petitioner presents new evidence regarding a new office space owned by the beneficiary.

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. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (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).

Furthermore, the petitioner's responded to the RFE by stating that the beneficiary did not have any employees at the time of the response. As stated above, the petitioner is now changing positions on appeal, claiming that there is at least one subordinate employee, and, that there were prior employees of the organization. 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).

Upon review of the record, the AAO concurs with the director's determination that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

The petitioner expressly conceded that the beneficiary was its only employee at the time the petition. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. Given the petitioner's statement that the beneficiary was the only person employed by its import-export business at the end of the first year in operations, the director reasonably concluded that the petitioner was not eligible for an extension of the new office petition.

Further, an expanded description of the beneficiary's job duties provided in the initial brief on appeal confirms that the beneficiary was primarily engaged in non-qualifying duties at the end of the first year of operations. For example, counsel states that the beneficiary's duties include: "researching the best transportation means, routes and any special requirements in the handling and care of goods"; "ensures that goods are packaged appropriately"; "obtain, prepare and check all customs documents"; "makes and collects payments on behalf of the customer"; negotiates with shippers, agents, vendors and clients; "keeps track of invoices and prepares reports to expedite the billing process"; prepares reports, product proposals and price quotations"; "processing and executing authorizations, substitutions, orders, replacements, and credit memos"; interacting with customers to provide information about delivery, handles customer inquiries and resolves them; involvement in "the buying and selling of different types of products," and "advertises her company and services in the newspapers." This position description bears little resemblance to the description of general managerial duties attributed to the beneficiary at the time of filing or in response to the RFE but rather describes an

employee who is required to perform almost all day-to-day tasks necessary to operate the petitioner's import-export business.

Even if the AAO were to accept the newly submitted claims that the beneficiary is assisted by an intern and the staff of the foreign entity, the detailed description of the beneficiary's day-to-day duties reflects that she directly performs many non-qualifying operational duties that preclude a finding that she is employed in a primarily managerial or executive capacity. For the same reason, the AAO cannot accept newly submitted claims that the beneficiary is a "function manager." While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial. The petitioner has not met this burden.

While the petitioner indicates that the beneficiary will hire additional staff and further expand the U.S. operations, it must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

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, the petitioner has not met that burden. The director's decision is affirmed and the petition will remain denied.

The petitioner is not precluded from filing a new visa petition on the beneficiary's behalf that is supported by competent evidence that the beneficiary is now entitled to the status sought under the immigration laws.

ORDER: The appeal is dismissed.