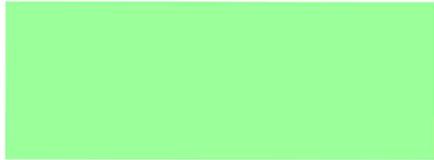




U.S. Citizenship
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Services

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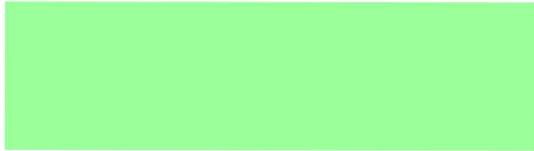


DATE: **OCT 08 2014** OFFICE: VERMONT SERVICE CENTER FILE:

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you

Ron Rosenberg
Chief, Administrative Appeals Office

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

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 Pennsylvania corporation, established in September 2012, states that it will engage in the garment import and export business. The petitioner claims to be a subsidiary of [REDACTED] and seeks to employ the beneficiary as the executive manager of its new office for three years.¹

The director denied the petition on two alternative grounds, finding that the petitioner failed to establish: (1) that it would employ the beneficiary in a qualifying managerial or executive capacity within one year of approval of the petition; or (2) that the foreign entity employed the beneficiary in a 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. On appeal, counsel for the petitioner asserts that the director failed to understand the nature of the petitioner's and foreign entity's business, the relationship between the businesses, and the beneficiary's role within both companies.

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, Petition for a Nonimmigrant Worker (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.

¹ A new office petition may only be approved for one year. 8 C.F.R. §214.2(l)(7)(i)(A)(3).

- (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. Employment in the United States in a Managerial or Executive Capacity

The first 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.

A. Factual History and Procedural Background

As indicated above, the petitioner's Form I-129 indicates that the beneficiary will be employed as the executive manager of the company, which intends to engage in the garment import and export business.

In support of the Form I-129, the petitioner provided a statement from counsel, dated January 28, 2013, indicating that the beneficiary would "supervise the hiring of all senior level personnel" and "be responsible for ongoing client servicing activities." Counsel further stated that the petitioner intends to hire a business development manager to assist with retail and exports, a personal secretary/administrative assistant to perform general administrative tasks as well as negotiate with clients and set up meetings, and an accountant to assist with preparation of monthly and annual statements, and perform internal audits.

The director determined that the petitioner failed to submit sufficient evidence to establish eligibility and therefore issued a request for evidence (RFE) on May 16, 2013. With respect to the new office and the beneficiary's employment therein, the director instructed the petitioner to provide evidence establishing

the organizational structure, financial goals, and size of the investment into the U.S. office; a business plan or executive summary for commencing the start-up of the new office, including a timetable for each proposed action during the one-year period from the date of filing the Form I-129; a copy of the U.S. entity's organizational chart showing the organizational hierarchy and staffing, a list of the proposed positions as well as each position's proposed job duties and educational requirements.

In response, counsel provided a statement, dated June 3, 2013, in which he provided the following description of the beneficiary's proposed employment:

The beneficiary will work for approximately work [sic] 50 hrs a week exercising all executive and non-executive duties, which will include but will not be limited to; [sic] hiring or firing of employees, business research & marketing, [d]eveloping marketing strategies and managing [the] parent company, interacting with clients, preparing financial goals & preparing performance reports targets etc. *The Beneficiary will supervise business research & marketing, creating marketing strategy and managing the business. He will work full time to maintain, [sic] ongoing business relationships, and management. [He] will have powers to hire or fire employees in the U[.]S[.] organization. The position is an "Executive Position". [sic] [The beneficiary] will primarily direct the management of the organization by exercising wide latitude in discretionary decision-making, establishing goals and policies of the organization and receives [sic] only general supervision or direction of the organization from the Indian parent company.*

(Emphasis in original).

Counsel also stated that the petitioner expects to hire approximately five employees to address its marketing, management, sales, and accounting needs. Counsel added that all of the beneficiary's subordinates will report directly to him.

The petitioner also provided a statement, dated May 30, 2013, on the foreign entity's letterhead, signed by [redacted] whose position with the foreign entity was not disclosed and his authority to sign was not established. Mr. [redacted] claimed that in order to assist the beneficiary in his work with the petitioning entity, the beneficiary will hire a "General Administration and Personal Manager" on a part-time basis, two marketing and development officers, a personal secretary, and an accountant/bookkeeper. Mr. [redacted] anticipated that "it will take three years from commencement to establishment of the U[.]S[.] Corporation" and therefore requested that the beneficiary be allowed to remain in the United States in L-1A status for a period of three years.

In addition, the petitioner submitted a statement, dated November 20, 2012, signed by [redacted] who claimed that the foreign entity – [redacted] – has sufficient funds to open a branch office "in any part of the world." The letter was accompanied by the petitioner's bank account information, which showed a balance of \$13,509 as of May 30, 2013, and a business plan in which the petitioner indicated that its overall mission was to provide its customers with good service and quality goods and to ensure fair treatment of employees. The petitioner clarified that its objectives are to establish an office with the

² As the author's name was not clearly handwritten, we cannot determine the correct spelling of his name.

necessary equipment and personnel, make contacts with buyers and sellers, identify prospective markets through research and review of customer lists, and collect information about market competition and establish marketing strategies to increase sales. The petitioner indicated that its in-house management team would consist of a president, a controller, and an assistant office manager with a plan to hire outside management support to assist with "creative and consulting inputs." The only timelines provided in the business plan were for the petitioner to establish "its reputation in the [g]arment industry by 2014" and to "have an active base of customers in North America" by the end of 2014.

After reviewing the petitioner's supporting evidence and RFE response, the director issued a decision, dated February 21, 2014, denying the petition based, in part, on the conclusion that the petitioner failed to provide sufficient evidence to establish that the petitioner would employ the beneficiary in a qualifying managerial or executive capacity within one year of approval of the petition. The director determined that the petitioner provided a vague description of the beneficiary's proposed employment and noted inconsistencies with regard to the number of employees the petitioner plans to hire as well as the position titles it intends to fill. The director also observed that the petitioner failed to provide job descriptions for any of its prospective employees and pointed out that the petitioner did not establish that the beneficiary's subordinates would be employed in a professional capacity.

B. Analysis

Upon review, and for the reasons discussed herein, the petitioner has not established that it would employ the beneficiary in a qualifying managerial or executive capacity within one year.

When a new business is 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 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 order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). 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.

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 one year. *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.*

Here, the petitioner has not established that it has acquired sufficient physical premises, nor the size of its financial investment in the United States. In addition, the petitioner provided inconsistent information regarding the company's proposed staffing and has not explained or provided evidence to establish how the beneficiary would be relieved from performing non-managerial duties within one year of approval of the petition.

When examining the executive or managerial capacity of the beneficiary, we look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner in this matter has failed to provide a sufficiently detailed list of the beneficiary's proposed duties. Therefore, we agree with the director's finding that the job description the petitioner provided was vague and we further find that the information provided conveyed little insight as to the beneficiary's actual proposed tasks. For example, the job description submitted in response to the RFE broadly stated that the beneficiary's job duties would include "developing marketing strategies," "interacting with clients," "supervis[ing] business research [and] marketing," and "creating marketing strategy and managing the business." Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

On appeal, counsel asserts that the "majority" of the beneficiary's time would be spent on "[s]trategic business activities," but he fails to clarify what those actual job duties would be.

Counsel also refers to unpublished AAO decisions in an attempt to compare the petitioner's circumstances with those in other cases where favorable outcomes resulted on appeal. However, counsel's reliance on previously issued non-precedent decisions will not overcome the petitioner's evidentiary burden in the matter at hand. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Furthermore, the position description alone is not sufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as the petitioner's business and hiring plans and any other evidence that would show that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity. The petitioner has the burden of establishing that within one year of the petition's approval, the U.S. company would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period. See generally, 8 C.F.R. § 214.2(l)(3)(v)(C).

Looking to the evidence presented in the instant matter, the petitioner has failed to address key issues pertaining to its hiring plan, such as failing to provide a hiring timeline and to resolve inconsistencies regarding the number of employees the petitioner plans to initially hire and the specific positions it plans to fill. As properly pointed out in the director's decision, while the petitioner originally claimed that it planned to hire three employees, the petitioner's RFE response indicated that the petitioner planned to hire a total of five employees. We also note that the petitioner's business plan contains inconsistencies as to which positions the petitioner plans to fill. Namely, on page three of the business plan, the petitioner

indicates that the petitioner plans to hire a president, a controller, and an assistant office manager. However, none of those three positions were included in counsel's original supporting statement, in his statement provided with the RFE response, or in the RFE response statement that was signed by [REDACTED]

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).

In addition, we concur with the director's determination that the petitioner's business plan is overly vague. Despite the director's request for specific information, the petitioner failed to provide relevant facts pertaining to the petitioner's prospective organizational hierarchy and staffing, job descriptions for the prospective hires, or the amount of the U.S. investment. While the petitioner provided a handwritten statement from an individual who claimed that the foreign entity had sufficient funds to finance the U.S. operation, the statement was not accompanied by any actual supporting evidence corroborating this broad assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Moreover, the petitioner failed to properly identify the individual who was making the assertion pertaining to the foreign entity's finances, thus precluding us from determining whether such individual had the capacity and requisite knowledge to make such assertions. We further note that a single bank document showing that the petitioner had in excess of \$13,000 approximately four months after the petition was filed is not sufficient evidence to establish that the petitioner would have the financial capability to fund the petitioner's operation, which would include the cost of hiring the beneficiary, a support staff, and warehouse space to house the petitioner's goods.

Lastly, while the record contains a photocopied office lease indicating that the petitioner will rent 800 square feet of office space for two years, the petitioner has failed to explain how it would operate its business without warehouse space to house the goods it plans to import and export. Counsel's assertion that it would be imprudent for the petitioner to rent warehouse space without the beneficiary's approved visa petition is insufficient to meet the regulatory requirement, which expressly states that the petitioner must provide evidence to show that it has secured *sufficient* physical premises to house the new office. (Emphasis added.) 8 C.F.R. § 214.2(l)(3)(v)(A). The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

In summary, the record shows that the petitioner failed to properly describe the beneficiary's proposed job duties or to provide evidence establishing which subordinate positions would be filled and when, what job duties those subordinates would carry out, or where they planned to obtain the funds to finance its U.S. operation. Moreover, the petitioner provided inconsistent information with regard to the staffing of its new office and failed to provide sufficient evidence showing that it meets the regulatory criteria pertaining to adequate space to house its U.S. operation. Given these considerable evidentiary deficiencies, we cannot conclude that the petitioner would have the capability to employ the beneficiary in a qualifying managerial or executive capacity within one year of the instant petition's approval; therefore, this petition cannot be approved.

III. Foreign Employment in a Managerial or Executive Capacity

The second issue to be addressed is whether the petitioner established that the beneficiary was employed abroad in a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(v)(B).

The director's adverse determination was based on the determination that the petitioner failed to establish what job duties the beneficiary performed abroad, what job duties the beneficiary's subordinates performed or the subordinate employees' qualifications.

On appeal, counsel asserts that the beneficiary, as sole proprietor of the foreign entity, "was responsible for conducting and operating the business" Counsel also contends that the director failed to review the organizational chart that was previously submitted in response to the RFE, where the beneficiary was depicted in a managerial position vis-à-vis other employees. In addition, counsel stated that the beneficiary set the sales goals, determined which countries to target for exporting and importing, studied global marketing trends, acted as the "Managing Partner" and reported only to other partners, and "managed marketing/merchandizing, design and procurement departments, supervised the work of managers, controlled the flow of the work . . . , [and] hired and fired employees of the departments."

Upon review, counsel's assertions are not persuasive. Contrary to counsel's claim, the director specifically acknowledged the petitioner's submission of the foreign entity's organizational chart and determined that the evidence submitted was not sufficient to establish that the beneficiary was employed in a qualifying managerial or executive capacity. While the director did not make the finding specifically in reference to the chart, the director clearly acknowledged having received the chart and thus it is reasonable to conclude that the director considered all of the petitioner's supporting evidence, including the submitted organizational chart, prior to issuing the adverse finding.

Further, counsel's additional description of the beneficiary's employment abroad makes references to "partners" of the foreign entity, which purportedly included the beneficiary as a managing partner. This statement, however, is not consistent with counsel's assertion that the beneficiary "was responsible for conducting and operating" the foreign business as its sole proprietor. 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). Furthermore, as previously indicated, 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). Given that the petitioner did not provide any foreign documents showing who owned the foreign entity and whether it was set up as a partnership or a sole proprietorship, counsel's assertion that the beneficiary managed the foreign entity along with other partners cannot be verified and the inconsistency between counsel's two statements cannot be resolved.

In addition, the foreign entity's organizational chart is not consistent with counsel's references to marketing/merchandising and design and procurement departments, none of which is depicted in the chart. Rather, the chart depicts an assistant manager/secretary responsible for sales and marketing, an accounts department, and a designer. While there may be some overlap between the positions listed in the chart and the departments that counsel references on appeal, the nexus is unclear and can only be

assumed to exist as there is no evidence or explanation specifically discussing the duties of the employees who work within the departments counsel mentions or the job duties such employees carried out. Further, while the sales associate, warehouse controller, and tailors and other staff are included in the foreign entity's chart, it is unclear who actually supervised the work of these individuals. The petitioner did not provide a detailed description of the beneficiary's job duties, clarify the foreign entity's organizational structure, or explain how the beneficiary operated within the given organization. As noted above, the record lacks evidence to establish whether the foreign entity was organized as a sole proprietorship or a partnership, thus further precluding an analysis of how the company was managed and by whom. Lastly, while the employee list that accompanied the petitioner's organizational chart in the RFE response identified [REDACTED] as a sales associate, the same individual was identified in the organizational chart as a designer. This inconsistency adds to the list of anomalies described above.

Accordingly, given the numerous deficiencies described above, we agree with the director's determination that the petitioner failed to establish that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity and on the basis of this second adverse finding the instant petition cannot be approved.

V. 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, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that petitioner has not met that burden.

ORDER: The appeal is dismissed.