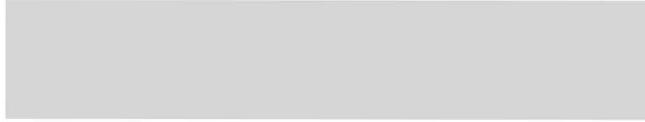




U.S. Citizenship  
and Immigration  
Services

(b)(6)



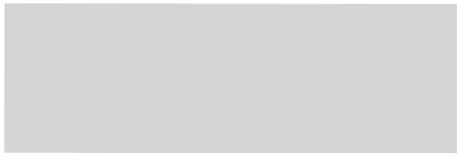
DATE: **AUG 21 2015**

PETITION RECEIPT #: 

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 is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page ([www.uscis.gov/i-290b](http://www.uscis.gov/i-290b)) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg  
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 appeal will be dismissed.

The petitioner filed this Form I-129, Petition for Nonimmigrant Worker (Form I-129), 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 Florida limited liability company established in [REDACTED] states that it operates a luxury resort and golf course. It claims to be a subsidiary of [REDACTED] located in Brazil. The petitioner seeks to employ the beneficiary as the sales and marketing director of its new office in the United States for a period of one year.

The director denied the petition, concluding that the evidence of record did not establish (1) that the beneficiary will be employed in a qualifying managerial or executive position within one year of approval of the petition; and (2) that the petitioner secured sufficient physical premises to house the new office.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to our office for review. On appeal, the petitioner asserts that it provided sufficient evidence to support the approval of the petition. The petitioner submitted a brief and additional evidence 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(1)(3) states that an individual petition filed on Form I-129, Petition for a Nonimmigrant Worker, 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 (1)(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.

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 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.

## II. The Issues on Appeal

### A. Employment in the United States in a Managerial or Executive Capacity

The first issue to be addressed is whether the petitioner established that the new office will support an executive or managerial position within one year of approval of the petition.

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. The "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of a beneficiary 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 submitted a letter dated May 23, 2014 in support of the initial petition. According to the petitioner, it was established in [REDACTED] to serve as a subsidiary of a Brazilian-based golf resort, [REDACTED]. Specifically, the petitioner noted that the United States entity was established for the purpose of marketing golf and vacation packages to United States travelers.

Regarding the beneficiary's proposed position, the petitioner stated that the beneficiary will serve as the company's marketing manager and provided a list of the beneficiary's duties. The petitioner also claimed that by the end of its first year of operations, the company would also employ a financial director, a sales and marketing manager, a vendor relations assistant, and an administrative assistant in addition to the beneficiary.

The petitioner also provided a bank account statement showing a balance of \$1,000 as of April 30, 2014. An income/expense statement for year end 2014 showed projected revenue and operating expenses. The petitioner also included projected business startup costs of \$49,000. The same document included a line for investor funding of \$100,000 to be provided by "Owner 1."

The petitioner provided a list of the job duties for the proposed subordinates including the sales and marketing manager, the sales representative, the vendor relations assistant, and the administrative assistant. The petitioner stated that the sales and marketing manager would report to the sales and marketing director and would oversee one sales representative and at least four additional independent sales representatives.

In a request for evidence (RFE) issued on June 26, 2014, the director requested evidence to demonstrate how the company will grow to be of sufficient size to support a managerial or executive position and that the beneficiary's proposed position will be in a managerial or executive capacity.

In response to the RFE, the petitioner provided a letter from [REDACTED] the President, Director and Owner of the foreign entity. Mr. [REDACTED] stated that the United States organization will market the parent company's golf resort to Florida and North America, and that by the end of the first year of official business operations, the petitioner was expected to reach revenues of \$420,000. Mr. [REDACTED] further claimed that in the future, the United States organization would "expand and diversify its operations by entering the residential and commercial real estate sector,"

noting that this expansion would ultimately result in the establishment of a real estate division which would generate additional revenue for the petitioning enterprise.

The petitioner also provided additional evidence in response to the RFE that addressed its first year of operations, the petitioner provided an expanded business plan covering the target market and sales, position descriptions for employees along with hiring and personnel plans, an organizational chart, and projected profit and loss statements for the first five years of operations. The projected personnel plan for year one shows six employees including a finance director, a sales and marketing manager, a sales representative, a vendor relations assistant, and an administrative assistant.

In addition, the petitioner submitted an updated bank statement showing a balance of \$20,069.90 as of June 30, 2014.

The director denied the petition on October 3, 2014, finding that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, the petitioner contends that the director erred in her conclusion that the beneficiary's duties are not primarily managerial and emphasizes that its organizational structure supports a managerial position.

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, we 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, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's proposed organizational structure, the duties of the beneficiary's proposed subordinate employees, the petitioner's timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. The petitioner's evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally* 8 C.F.R. § 214.2(l)(3)(v).

In the instant matter, the petitioner has repeatedly described the beneficiary's proposed position in very broad terms, noting that he will plan and implement sales and marketing strategies, pricing strategies, oversee market research, monitor competitor products, develop market channel activity,

meet with clients, and oversee subordinate employees. 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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

While several of the duties broadly described by the petitioner would generally fall under the definitions of managerial or executive capacity, the lack of specificity raises questions as to the beneficiary's actual responsibilities. Overall, the position description alone is insufficient 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 evidence that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity. 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.

On appeal, the petitioner claims that the beneficiary's duties are managerial in that they involve overseeing and directing activities. Specifically, the petitioner points to the beneficiary's managerial duties including the following: planning and overseeing advertising and promotion activities, overseeing and evaluating market research, and directing market channel development activity. Even though the petitioner claims that the beneficiary directs and manages these marketing activities, it does not claim to have anyone on its staff to actually perform the marketing duties associated with these tasks. Thus, either the beneficiary himself is performing the marketing tasks or he does not actually manage the marketing tasks as claimed by the petitioner. In either case, we are left to question the validity of the petitioner's claim and the remainder of the beneficiary's duties as described. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If the beneficiary is performing the marketing tasks, we note that 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. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Furthermore, a number of the beneficiary's duties, including those cited to by the petitioner on appeal, show that the beneficiary is performing the actual day-to-day work of the company. Specifically, the beneficiary will develop and implement marketing plans, plan and oversee advertising and promotion activities, develop a positioning and price strategy, evaluate market research and adjust marketing strategy, monitor competitor products, and meet with key clients. While the some of the duties as described indicate that the beneficiary will be "overseeing" the activity, we note that the petitioner does not claim to have anyone on staff to perform the marketing work. Again, an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity.

See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. at 604.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

The petitioner shows that the beneficiary will manage a subordinate supervisor, specifically a sales and marketing manager. The petitioner, however, has not shown how the company will grow to be a sufficient size to support two managers. The petitioner claims that the sales and marketing manager will supervise one sales representative and will use contract sales services to fill the remaining sales representative needs. The petitioner, however, has not provided any detailed information in the budget regarding projected expenses for these contracted services, and has not included these positions in the payroll projections. In addition, the petitioner does not include any position dedicated for the marketing work to be supervised by the sales and marketing director and sales and marketing manager. The petitioner has not shown how the organizational structure would support two sales and marketing managers supervising a single sales associate.

The evidence must substantiate that the duties of the beneficiary and his subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial or executive under the statutory definitions.

Our analysis of this issue is severely restricted by the petitioner's failure to submit a credible business plan. As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. See *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

*Id.*

The petitioner's business plan and supporting documentation does not provide a clear picture of the nature of the petitioner's services and the financial investment in the United States operations. First, the petitioner has not provided any documentation to show the relationship between the United States petitioner and the parent company. This omission is critical since the petitioner claims that the U.S. office was established to market and promote vacation packages to the parent company's golf resort located in Brazil. The petitioner's financials in the business plan project a total of \$420,000 of sales in year one with \$84,000 attributed to the cost of goods sold. The petitioner, however, does not include any contract or letter with the parent company to substantiate how the profit and gross cost of the vacation packages will be shared by the two entities. Without supporting evidence to show the cost of the vacation packages to be paid by the petitioner, the claims set forth in the business plan are not credible. Absent a credible business plan outlining with specificity the petitioner's marketing plan, organizational structure, and staffing requirements, we are precluded from finding that the petitioner's new office will be viable and will support a managerial or executive position by the end of the first year of operations.

Overall, the vague job description for the beneficiary's proposed position, coupled with the discrepancies noted with regard to the business plan and the petitioner's proposed organizational structure, prohibits a determination that the petitioner could realistically support a managerial or executive position within one year. Accordingly, the appeal will be dismissed.

#### B. Physical Premises to House the New Office

The second issue to be addressed is whether the petitioner has secured sufficient physical premises to house the new office, as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

On the Form I-129, the petitioner identified its mailing address [REDACTED]. The petitioner indicated this same address as the beneficiary's intended worksite.

The petitioner submitted a service agreement for office space. The agreement did not identify the service provider and the petitioner is listed as the client. The agreement started on March 10, 2014 and runs for a 12 month period. The agreement stated that total fixed monthly fees are \$749. The petitioner also submitted a lease agreement dated March 10, 2014. The lease does not identify the parties to the lease or the office location, type of premises, or lease duration. The lease is signed by [REDACTED], Contract Administrator, and the beneficiary on behalf of the petitioner as its Marketing Manager. The lease includes an addendum for general office policies.

The petitioner also included a letter from [REDACTED]. The letter is dated September 15, 2014. The letter states that the petitioner will have "Access" to 751 square feet of office space and facilities including a reception area, waiting room, conference area, and lounge area. The letter states that the office space is 165 square feet. The petitioner submitted photographs of the office space.

Upon review, the petitioner has not established that it had secured sufficient physical premises to house the intended new office as of the date the petition was filed.

As previously noted, when a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is ready to commence doing business immediately upon approval. 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 commence business, that it has the financial ability to commence doing business in the United States, and that it will support the beneficiary in a managerial or executive position within one year of approval. *See generally* 8 C.F.R. § 214.2(l)(3)(v).

We observe that the "physical premises" requirement that applies to new offices serves as a safeguard to ensure that a newly established business immediately commence doing business so that it will support a managerial or executive position within one year. *See* 52 FR 5738, 5740 (February 26, 1987). In order to be considered a qualifying organization, a petitioner must be doing business in a regular, systematic and continuous manner. *See* 8 C.F.R. §§ 214.2(l)(1)(ii)(G) and (H). Inherent to that requirement, the petitioner must possess sufficient physical premises to conduct business.

As a preliminary matter, the petitioner has not provided a document identifying the nature of the leased space and amount of office space available signed by both the lessor and the petitioner. The lease document includes only general terms, and does not identify any specific information pertaining to the petitioner's leased space. The service agreement initialed by the petitioner does not include any information identifying the lessor or the type of space leased. While the lessor submitted a letter describing the leased space, this information is not verified in any of the leased documents.

In addition, the petitioner's photographs of the lease space raise questions about the validity of the lease. There are two photographs of the exterior of the premises which appear to be two different buildings. The petitioner submitted a copy of the building residents' signage; however, the sign for [REDACTED] and lessees including the petitioner appear to be digitally altered. 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. *Matter of Ho*, 19 I&N Dec. at 591.

Furthermore, the petitioner's lease for one office location is not sufficient to support the proposed staff of a six employees by the end of the first year of operations. The letter submitted by the lessor indicates that the petitioner has only rented one unit of office space. The photos of the premises show an office with one desk and a conference table; therefore, the space appears to only accommodate one employee on a day-to-day basis.

On appeal, the petitioner stated that the lease agreement allows for additional space to be added. However, the lease does not contain any clause permitting the addition of additional space as needed. Furthermore, at \$749 a month for 12 months the lease will cost the petitioner \$8,988 for the first year of operations. The petitioner's profit and loss statement included in the business plan shows that the petitioner has budgeted \$8,988 for rent expenses for the first year. The petitioner, therefore, has not allotted funds within its business plan to cover rental expenses for additional office space even if it were able to do so.

In this case, the lack of sufficient business premises and the conflicting evidence of record falls short of establishing that the petitioner will be doing business in a manner that will support the beneficiary's claimed position.

### III. Conclusion

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate 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 burden has not been met.

**ORDER:** The appeal is dismissed.