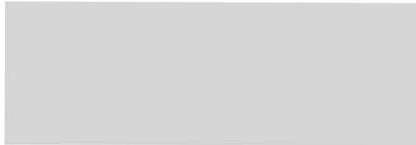




U.S. Citizenship
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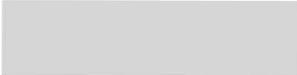


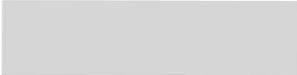
DATE:

JUL 09 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:



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) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

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

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. 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 a Nonimmigrant Worker, 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 California corporation established in [REDACTED], is an on-line clothing retailer. It claims to be a subsidiary of [REDACTED] located in [REDACTED]. The petitioner seeks to employ the beneficiary as its vice president for a one-year period.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary's position with the U.S. entity would be in a qualifying managerial or executive capacity.

On appeal, the petitioner asserts that director should have adjudicated this petition pursuant to the provisions applicable to new offices, as the company had been doing business for less than one year at the time the petition was filed. The petitioner contends that, due to this error, the director failed to consider the petitioner's expansion plans and anticipated staffing levels in determining whether the petitioner would support a managerial or executive position within one year.

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.

In addition, 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.

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.

Finally, 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. Section 101(a)(44)(C) of the Act.

II. Facts and Procedural History

The petitioner filed the Form I-129 on August 29, 2014. The petitioner provided supporting documents, including a supporting statement, dated August 25, 2014, and evidence in the form of financial and business documents pertaining to the petitioner and its foreign parent entity. The petitioner claimed to have no employees at the time of filing and provided projected financial figures to represent the company's gross and net income. On the Form I-129 Supplement L, where asked to indicate whether the beneficiary was coming to the United States to open a new office, the petitioner marked "No."

On September 10, 2014, the director issued a request for evidence (RFE), instructing the petitioner to provide evidence pertaining to various eligibility factors. Among the issues addressed was that of the beneficiary's proposed employment with the petitioning entity. Specifically, the director instructed the petitioner to provide a letter from the petitioning organization itemizing the beneficiary's typical job duties and indicate what percentage of time the beneficiary would allocate to each item on the list. The director also asked the petitioner to provide a chart or diagram illustrating its organizational structure and staffing levels, listing all employees by name and job title, and including their respective job descriptions and educational levels.

The petitioner's response included a statement, dated November 7, 2014, in which the petitioner provided the requested job description and time allocations. The petitioner also provided an organizational chart depicting a total of four named employees – the company's president, the beneficiary as the company's vice president, a web/technical employee, and a design employee – as well as numerous vacant departments and position titles that the petitioner anticipates filling at some future unspecified time. The petitioner also provided job descriptions for the beneficiary's two subordinates – a fashion designer and a web and graphics designer – and for the numerous vacant positions that have not yet been filled. The petitioner further indicated that the current employees, who were depicted as the beneficiary's subordinates, are currently employed as independent contractors. The petitioner provided evidence of payments to these two workers, one of which works on a part-time basis for a monthly fee of \$450.

On December 1, 2014, the director denied the petition based on a finding that the petitioner did not provide sufficient evidence to establish that it would employ the beneficiary in a qualifying managerial or executive capacity.

The petitioner filed an appeal on December 31, 2014 seeking to overturn the director's decision and have the petition approved. The petitioner asserts that the director should have adjudicated the petition pursuant to the provisions applicable to new offices, and that it need only establish that the company will support a qualifying managerial or executive position within one year of the approval of the petition.

Based on our own comprehensive review of the record and for the reasons provided in our discussion below, we find that the petitioner failed to overcome the chief basis for denial. While we consider all evidence that has been submitted into the record, we will specifically reference only those submissions that are relevant to the beneficiary's proposed position with the U.S. entity.

III. The Issue on Appeal

As indicated above, the primary issue to be addressed is whether the petitioner provided sufficient evidence to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

As a preliminary matter, we will address the petitioner's claim that the director should have adjudicated this petition pursuant to the regulatory provisions applicable to "new offices" at 8 C.F.R. § 214.2(l)(3)(v). Pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(F), "new office" means an organization which has been doing business in the United States through a parent, branch, affiliate or subsidiary for less than 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.

As noted, the petitioner was given the opportunity to identify itself as a "new office" on the Form I-129 and indicated that it is not, in fact, a new office. Further, the petitioner's supporting statements, both at the time of filing and in response to the RFE, made no reference to the new office provisions or the petitioner's eligibility as a new office. The new office provisions apply "if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office." Therefore, we cannot conclude that the director erred by not adjudicating the petition according to the new office provisions.

Nevertheless, as discussed below, the evidence of record does not meet the filing requirements for new offices at 8 C.F.R. § 214.2(l)(3)(v), and does not support a finding that the beneficiary would be employed in a qualifying managerial or executive capacity within one year.

We generally commence our analysis of the beneficiary's proposed employment by looking first to the petitioner's description of the beneficiary's job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The job description must clearly describe the job duties to be performed and indicate whether such duties are in either an executive or a managerial capacity. *Id.* Published case law has determined that the duties themselves will reveal the true nature of the beneficiary's employment. *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). We then consider the beneficiary's job description within the context of the organizational structure of the prospective U.S. employer, the existence of support personnel capable of relieving the beneficiary from having to allocate her time to primarily non-qualifying

operational tasks, and all other relevant factors that may contribute to a comprehensive understanding of the beneficiary's daily tasks and her prospective role within the petitioning organization.

In the present matter, the petitioner claims that the beneficiary would be employed in an executive capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct[] the management" and "establish[] the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

Turning first to the beneficiary's job description, which was provided in the petitioner's November 7, 2014 response statement, we note that a considerable portion of the beneficiary's time – perhaps as much as 65% – would be allocated to job duties of a non-managerial nature. Namely, the petitioner indicated that the beneficiary would act as "the point of contact" at various marketing events that she would attend in an effort to market the petitioner's online merchandise, conduct market research, develop marketing strategies, and negotiate with suppliers and manufacturers. The petitioner further pointed to the beneficiary's authority to engage in contract negotiations with suppliers and manufacturers as evidence of her wide latitude in discretionary decision-making. We find, however, that despite the level of discretionary authority the beneficiary would exercise over the petitioner's business matters, the actual act of contacting suppliers and manufacturers and engaging in contract negotiations is in itself indicative of a non-qualifying operational task, which would typically be performed by an executive's support staff rather than by the executive herself. While the petitioner's lack of a support staff indicates that the petitioner's specific needs require that the beneficiary engage in the non-qualifying job duties previously listed, those needs do not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

In addition, the petitioner indicates that it already employs a president, but has not provided a description of this employee's duties to allow us to determine to what extent the beneficiary's proposed duties, such as establishing goals and policies for the business as a whole, may overlap with those already performed by the president, to whom she will report.

Further, while we acknowledge that no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. 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. 593, 604 (Comm. 1988). Here, the record indicates that the non-qualifying operational duties named above would be the central focus of the beneficiary's position until such time that the petitioner progresses to a stage of development where it can sustain the management and staffing levels that are projected in its organizational chart.

Based on the evidence as presented in the record, despite the depiction of two subordinate employees in the organizational chart that was provided in the RFE response, the petitioner claimed no employees at the time of filing. In fact, the record indicates that even the two subordinates who were depicted in the chart and whose job duties the petitioner described were not employed on a full-time basis. However, a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). 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. 1998). In the present matter, the beneficiary's assigned job duties and the petitioner's organizational composition, which showed an overall lack of a support staff to relieve the beneficiary from having to allocate her time primarily to the petitioner's non-qualifying operational tasks, indicate that the petitioner lacked the need or the ability to employ the beneficiary in a primarily managerial or executive capacity at the time of filing.

On appeal, the petitioner focuses on its "intent to greatly expand its total number of employees within a short time of the [p]etition's approval," referring to itself as a "new office" and asserting that there is no legal requirement that the beneficiary must supervise a certain number of employees in order to merit the nonimmigrant classification sought herein.

While we agree that there is no statutory or regulatory provision requiring the beneficiary to oversee a minimum number of employees in order to establish that she would be employed in a managerial or executive capacity, the burden is on the petitioner to demonstrate that at the time of filing, the petitioning organization is able to relieve the beneficiary from having to allocate her time primarily to the performance of non-qualifying tasks. A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). USCIS may consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). As such, when the petitioner claims to have employed no one at the time of filing, as is the case in this matter, it is reasonable for us to question the petitioner's ability to employ the beneficiary in a qualifying managerial or executive capacity. If the petitioner had no one to relieve the beneficiary from carrying out its daily operational and administrative tasks, it is reasonable to assume that those tasks, which are essential for the petitioner's continued operation,

would fall solely on the beneficiary, at least until such time that the petitioner retains the services of employees and/or contractors to relieve the beneficiary of this burden.

Further, even if we were to consider the evidence presented in light of the new office provisions, such evidence does not support a finding that the beneficiary would be employed in a qualifying managerial or capacity within one year. In the case of a new office petition, 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. As noted, the petitioner has the burden to establish that 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 within one year. 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).

Here, the petitioner initially provided a proposed organizational chart indicating that the beneficiary would oversee a graphics department staffed by its existing independent contractors and a sales and marketing department with an unidentified number of positions that are "to be filled." In response to the RFE, the petitioner submitted a proposed organizational chart indicating that the beneficiary would oversee four departments and a total of sixteen subordinate positions. The petitioner offered no explanation for the drastic changes made to its proposed structure and has not submitted its business or hiring plans to corroborate the structure set forth in either of the organizational charts. 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)). Therefore, while the proposed structure depicted in the latter organizational chart may very well be one that would support a qualifying managerial or executive position, the petitioner did not establish when or if such structure would actually be in place. The record simply does not support a finding that the positions identified in the chart would be filled within one year and even if considered under the new office provisions, the petition is not approvable.

Based on the foregoing discussion, the petitioner has not established that it would employ the beneficiary in a qualifying managerial or executive capacity. Accordingly, the appeal will be dismissed.

IV. Conclusion

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.