



U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **JUN 19 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](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, 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 is a California corporation that seeks to employ the beneficiary in the position of Chief Executive Officer. Therefore, the petitioner filed this nonimmigrant petition seeking to open a new office in the United States and 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 director denied the petition finding that the petitioner did not establish that it would support a managerial or executive position within one year of the approval of the petition. The petitioner filed a timely appeal.

### I. The Law

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § § 214.2(l)(3)(v) also provides that 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, 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 (1)(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. Facts and Procedural History

The petitioner filed the Form I-129, *Petition for a Nonimmigrant Worker*, on July 11, 2014. The petitioner provided supporting documents pertaining to its foreign parent entity as well as documents discussing steps that have been and would be taken to establish its new office, including obtaining a lease to house the petitioner's business and hiring personnel to oversee the petitioner's finances, provide administrative services, and market and sell the petitioner's products.

On July 16, 2014, the director issued a request for evidence (RFE), instructing the petitioner to provide evidence to show, in part, that it will support the beneficiary in a managerial or executive position within one year of commencing operation.

The response addressed the director's request for documents pertaining to the foreign entity and included a copy of the petitioner's previously submitted business plan as well as a revised organizational chart showing the proposed structure of the company at the end of the initial year of operation.

On October 3, 2014, the director issued a decision denying the petition. The director reviewed the job description the petitioner provided in support of the petition and compared the two organizational charts in the record. The director concluded that the petitioner failed to establish that its organizational structure as depicted in either of the submitted organizational charts would support the beneficiary in a qualifying managerial or executive capacity at the end of the petitioner's initial year of operation.

On November 3, 2014, the petitioner filed an appeal seeking to overturn the director's decision. The petitioner provided an appeal brief and evidence in support of the Form I-290B. The director declined to treat the appeal as a motion and forwarded the appeal to this office for review.

Based on our own comprehensive review of the record and for the reasons provided in our discussion below, we find that the petitioner has failed to overcome the basis for denial. While we review all evidence that is part of the record, we will specifically reference only those documents 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 in this decision is whether the beneficiary's proposed position with the new office will support 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.

For several reasons the petitioner in this matter has failed to establish that the United States operation will succeed in moving away from an initial phase of development and toward full operations after one year of operation such that the petitioner would have an actual need and ability to support the beneficiary in a managerial or executive capacity where he would allocate his time primarily to performing qualifying job duties.

Specifically, the petitioner has not provided: a detailed description of the beneficiary's proposed job duties after the petitioner's first year in operation; evidence establishing that the beneficiary will be relieved of the need to perform the non-qualifying tasks inherent to the operation of the business by a subordinate staff within the petitioner's first year in operation; and evidence that a sufficient investment has been made in the United States operation. *See generally* 8 C.F.R. § 214.2(l)(3)(v)(C).

First, we turn to the beneficiary's job description and the petitioner's staffing composition as key indicators of whether the petitioner would support the beneficiary in a qualifying capacity after one year of operation. The petitioner's job description must clearly describe the duties that the beneficiary will perform and indicate whether such duties will be either in an executive or managerial capacity. The actual duties themselves reveal the true nature of the 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). Accordingly, we look to the beneficiary's job description, which was included in the foreign entity's statement, dated April 10, 2014. Reviewing each element of the beneficiary's proposed position, we find that the statement does not indicate whether the job description applies to the time period immediately following the beneficiary's arrival to the United States, i.e., the start-up phase of the operation, or whether the list represents job duties that the beneficiary would eventually perform during the next phase of development, i.e., after the petitioner has been operational for one year and is no longer considered a new office. *See* 8 C.F.R. § 214.2(l)(1)(ii)(F) (for definition of the term "new office"). Given that the petitioner has the burden of establishing that it would support the beneficiary in a managerial

or executive capacity after one year of operation, it is critical for the petitioner to specify the projected list of duties the beneficiary would be assigned at the end of the petitioner's initial year of operation.

Furthermore, even if the foreign entity's statement was intended to describe the beneficiary's position following the critical first year of the petitioner's operation, we find that the job description contained in the statement is overly vague and thus fails to convey a meaningful understanding what actual daily tasks the beneficiary would perform. 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. *Id.* In the instant matter, instead of providing a list of the specific tasks the beneficiary would be expected to perform, the foreign entity provided a job description that is primarily comprised of broad statements focusing on the beneficiary's discretionary authority in formulating management goals and operating procedures, planning for the petitioner's business expansion, setting prices, presiding over monthly meetings, and determining how the petitioner would be staffed. While all of these statements serve as valid indicators of the beneficiary's top placement within the petitioner's organizational hierarchy and senior level of authority, these factors alone are not sufficient to convey relevant information about the specific daily tasks he would perform in order to attain the broadly stated business objectives listed above. We cannot conclude that the beneficiary would primarily perform tasks of a qualifying nature based on his position as the head of the petitioning organization. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations expressly require a detailed description of the beneficiary's daily job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). Here, the petitioner failed to clarify what specific tasks the beneficiary would carry out on a daily basis at the end of the petitioner's initial year of operation.

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. 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 did not establish that the proposed organizational hierarchy would be sufficient to relieve the beneficiary from having to allocate his time primarily to non-qualifying operational tasks. The petitioner's revised organizational chart, which was provided in response to the director's RFE, indicates that at the end of its first year of operation the petitioner would employ an administrative assistant, a finance manager, and a sales department manager. The chart depicts the two latter positions as the beneficiary's direct subordinates, while depicting the administrative assistant as directly adjacent to the beneficiary's position. Although instructed to provide each employee's job description briefly stating what tasks they would perform, the petitioner failed to provide this critical information. As such, we are unable to gauge which operational tasks the support staff would carry out and how the employees' individual roles would impact the petitioner's organization and its ability to relieve the beneficiary from having to allocate his time primarily to non-

qualifying tasks. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Further, the petitioner initially submitted a chart which identified three employees, including the beneficiary, by name and stated that it would hire one sales representative during the first six months of operation and one sales representative in the latter half of the year. The original organizational chart did not include the administrative assistant, finance department manager or a supervisory sales department manager position; rather it indicated that the beneficiary and the CFO (the petitioner's minority shareholder) would directly and jointly manage a "department manager" of an undefined department, a sales manager, and two sales representatives. None of these positions was depicted as having subordinates. The petitioner did not explain the revisions made to the organizational chart. However, we note that the initial chart is more consistent with the projected staffing information provided in the petitioner's business plan.

In addition, the petitioner's summary of costs, which the petitioner described on page five of its business plan, shows that the petitioner did not account for certain necessary expenses, such as the cost of personnel salaries and payroll expenses, to corroborate its claim that it will carry out the hiring plan outlined in the business plan. Further, the petitioner did not specify whether any of the initial start-up expenses would account for the cost of inventory, which is critical for the petitioner to actually commence doing business and generate a stream of revenue. In fact, while the petitioner claimed that it will "enjoy a steady supply with reasonable costs," it provided no specific breakdown to establish the anticipated cost to manufacture and deliver the petitioner's product into the U.S. market.<sup>1</sup> The petitioner did not explain or provide evidence to establish a basis for its three-year projection of sales revenue; nor did the petitioner provide sufficient evidence to show that it actually conducted a feasibility study or market research upon which its revenue and growth projections could be based.

Moreover, other than stating that it plans to hire three employees within six months of the beneficiary's arrival to the United States, the petitioner did not specify a projected date of hire for additional positions, or state when it plans to actually purchase the inventory that would be used to generate revenue. While the regulations for a new office petition do not require the petitioner to provide evidence of any business transactions, the regulations do require that a petitioner seeking to extend the employment of a beneficiary who initially came to work in or open a new office must submit evidence to show that it has been doing business for the previous year. See 8 C.F.R. § 214.2(l)(14)(ii)(B). This requirement indicates that even a new office petitioner is expected to do business throughout its first year of operation. Given the petitioner's failure to fully account for all of the funds it claims it would need to cover its start-up expenses, not to mention its failure to account for the salaries of the beneficiary and the subordinates he would need to hire during the petitioner's first year of operation, the petitioner has failed to establish that it had the ability to commence doing business at the time the petition was filed. The petitioner 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).

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<sup>1</sup> See Business Plan, page 3.

On appeal, the petitioner repeats assertions that it previously made and points to documents that it previously submitted. However, as indicated above, we find that the petitioner failed to provide sufficient evidence to establish that it will grow to the point where it can support a qualifying managerial or executive position.

As noted above, the deficiencies in the petitioner's business plan coupled with the petitioner's failure to adequately describe the beneficiary's job duties and the job duties of the petitioner's proposed staff precludes us from reaching a favorable conclusion. We find that the record lacks sufficient evidence to establish that the United States enterprise will more likely than not grow to the point that it will reasonably require or be able to support the full-time services of an employee who would primarily perform qualifying managerial or executive duties. 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.