



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JUN 22 2015**

PETITION RECEIPT #: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

NO REPRESENTATIVE OF RECORD

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, Vermont 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 a nonimmigrant visa petition seeking to employ the beneficiary in the position of business manager for two years 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, concluding that the petitioner failed to establish that the beneficiary was employed abroad and would be employed in the United States in a managerial or executive capacity.

On appeal, the petitioner disputes the director's findings. The director declined to treat the appeal as a motion and forwarded the appeal to us for review.

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.

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 August 15, 2013.¹ In support of the petition, the petitioner provided various business, financial, and bank documents pertaining to the petitioner and the beneficiary's employer abroad.

¹ The record includes an addendum to the petition, dated July 22, 2013, in which the petitioner claimed to be a new office, despite the fact that it was established on August 1, 2011. However, the petitioner answered "no" to question 12 on page 22 of the Form I-129 Supplement L, thus indicating that the beneficiary is not coming to the United

On January 9, 2014, the director issued a request for evidence (RFE), informing the petitioner that the evidence initially submitted was not sufficient to warrant approval of the petition. The director informed the petitioner of the statutory and regulatory requirements that apply to the matter at hand and instructed the petitioner to provide, in part, evidence and information establishing that the beneficiary was employed abroad and that he would be employed in the United States in a qualifying managerial or executive capacity. The director specifically instructed the petitioner to provide organizational charts illustrating the staffing levels of both entities.

The petitioner responded to the director's request with a statement dated March 31, 2014. The petitioner asserted that an organizational chart "is not applicable" based on the fact that the beneficiary has been given "total control of all business decisions" concerning the U.S. entity. The petitioner did not provide any further information pertaining to the beneficiary's proposed or foreign employment, nor did the petitioner provide the requested organizational chart pertaining to the foreign entity.

After reviewing the submissions the petitioner provided in response to the RFE, the director concluded that the petitioner failed to establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity. Accordingly, the director issued a decision dated September 5, 2015 denying the petition.

On October 9, 2014, the petitioner filed an appeal seeking to overturn the director's decision and approve the petition. Based on our own comprehensive review of the record and for the reasons provided in the discussion below, we find that the petitioner failed to overcome the director's decision. While we consider all evidence on record, we will specifically reference only those submissions that are relevant to the beneficiary's proposed position with the U.S. entity.

III. The Issues on Appeal

As indicated above, the primary issues to be addressed in this decision pertain to the beneficiary's proposed employment with the petitioning entity and the beneficiary's employment abroad. Namely, we will review the petitioner's submissions to determine whether the petitioner provided sufficient evidence to establish that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity.

A. Qualifying Employment in the United States

First we will address the beneficiary's proposed employment with the petitioning entity. 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 description must clearly describe the beneficiary's job duties and indicate whether such duties are either in an executive or in a

States to open a new office. As such, the petitioner will not be given consideration as a new office pursuant to the regulation at 8 C.F.R. § 214.2(l)(2)(v), which applies when a beneficiary is coming to open or be employed in a new office.

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 in the context of the organizational structure of the prospective U.S. employer, the petitioner's organizational hierarchy and the existence of support personnel, and any other relevant factors that may contribute to a comprehensive understanding of the beneficiary's daily tasks and his prospective role within the petitioning organization.

In the present matter, while the petitioner claims that the beneficiary's prospective employment in the United States "is totally executive in nature," there is little probative evidence on record to support this assertion. 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.*

In the present matter, according to the job descriptions the petitioner provided in the Form I-129 Supplement L and subsequently in response to the RFE, the beneficiary's job duties would include acquiring and disposing of property, creating budgets for each construction project, setting an annual budget, managing loans, controlling the labor force, and drawing up contracts with clients, suppliers, and contractors. Although the petitioner ultimately provided an organizational chart on appeal, naming three craftsmen, an engineer, a plumber, an electrician, an HVAC worker, and two laborers as part of its organizational hierarchy, the record shows that the petitioner claimed to have only one employee – the beneficiary – at the time of filing. Despite the petitioner's submission of new information on appeal, the petitioner provided no evidence to support the staff named in its organizational chart, nor did the petitioner provide an explanation stating why it claimed only one employee at the time of filing as shown at Part 5, question 13 of the petition. 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). Further, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

In addition, while the record indicates that the beneficiary may have the requisite discretionary authority and placement within the petitioner's organizational hierarchy that fit the criteria of the definition of "executive capacity," the record lacks sufficient evidence to establish that the petitioner's organization, at

the time of filing, was adequately complex such that the beneficiary would be relieved from having to allocate the primary portion of his time to non-qualifying administrative and operational tasks. To the contrary, the record indicates that such tasks would be the beneficiary's chief focus. Despite the new information provided in the organizational chart that the petitioner now submits on appeal, the petitioner has failed to submit any evidence to corroborate the staffing composition depicted therein. 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)).

In light of the grave deficiencies described above, we find that the evidence of record does not establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

B. Qualifying Employment Abroad

Next, turning to the beneficiary's former employment with the foreign entity, we similarly focus on the beneficiary's job description at the initial portion of our analysis, followed by a review of the foreign entity's organizational hierarchy and the beneficiary's placement and role therein.

The record shows that despite the director's RFE, in which the petitioner was notified that the evidence pertaining to the beneficiary's former position abroad was insufficient to establish that the beneficiary was employed in a qualifying managerial or executive capacity, the petitioner failed to provide either a supplemental job description or the requested organizational chart depicting the foreign entity's management and staffing hierarchy. Thus, the only information on record that pertains to the beneficiary's former employment is the one-paragraph statement included in the Form I-129 Supplement L in which the petitioner stated that the beneficiary assumed the role of general manager and maintained "executive control over day[-]to[-]day management of the business interest" of the foreign entity. The petitioner broadly stated that the beneficiary was in charge of business acquisitions, managing the company's finances and loans, creating budgets, hiring and firing employees, and maintaining charge over the company's labor force. The petitioner did not include any information to specify what constituted the foreign entity's "labor force" or discuss whom the foreign entity employed to carry out its daily operational tasks so that the beneficiary's main focus was to carry out tasks within a managerial or executive capacity. We note that 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).

On appeal, the petitioner offers various draft reports containing the beneficiary's signature as a means of establishing that the beneficiary was employed in a managerial capacity. However, the beneficiary's signature only goes to show that the beneficiary had discretionary authority along with other partners whose signatures also appear on the same draft documents. The signature alone does not establish that the job duties the beneficiary performed during his employment abroad were primarily within a qualifying managerial or executive capacity. We further note that the petitioner has not remained consistent in claiming that the beneficiary was employed abroad in either a managerial or an executive capacity. While the petitioner initially claimed that the beneficiary was employed abroad in an executive

capacity, the petitioner altered the original claim on appeal, stating that the beneficiary assumed a "managerial role" in his former position abroad. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. Regardless, the petitioner has failed to provide sufficient evidence to support either that the beneficiary was employed in a managerial or in an executive capacity.

Accordingly, in light of the above analysis, which contemplates the beneficiary's job description as well as the foreign entity's organizational hierarchy, we find that the evidence of record does not establish that the beneficiary's former employment with the foreign entity was in a qualifying managerial or executive capacity. On the basis of this second adverse finding, this petition cannot be approved.

IV. Beyond the Director's Decision

Lastly, the record contains other evidentiary deficiencies that may lead to additional findings of statutory ineligibility on additional grounds that were not fully explored in the director's decision. However, we reserve any discussion of further ineligibility and only the findings that were expressly discussed above will served as grounds for our decision in this matter.

V. Conclusion

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.