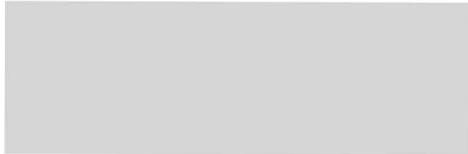


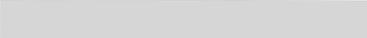


U.S. Citizenship
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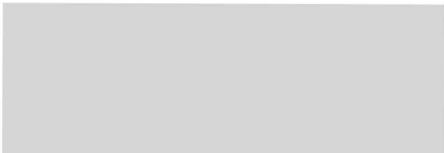


DATE: **JUN 30 2015** PETITION RECEIPT #: 

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, 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 this Petition for a Nonimmigrant Worker (Form I-129) 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 petitioner states that it intends to operate an information technology and software infrastructure solutions business. It claims to be a subsidiary of [REDACTED] the beneficiary's foreign employer located in India. The petitioner seeks to employ the beneficiary in the position of chief executive officer for an initial one-year period.

The director denied the petition, concluding that the petitioner failed to establish that it had secured sufficient physical premises to house its U.S. operation or that the beneficiary has been employed abroad in a managerial or executive capacity.

On appeal, the petitioner disputes the director's findings and submits evidence to support its assertions. 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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states 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 (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

II. Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on August 26, 2014. The petitioner provided two statements – one dated July 18, 2014, and one dated July 21, 2014 – from the U.S. and foreign entities, respectively, discussing both entities' business operations and the beneficiary's respective positions therein. The petitioner provided other evidence in the form of corporate and business documents.

On September 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 determined that the virtual office space the petitioner currently leases is not deemed to be "sufficient physical premises." The director also determined that the petitioner did not specify whether the beneficiary was employed abroad in a managerial or in an executive capacity and did not provide sufficient evidence establishing that the beneficiary was employed abroad in one capacity or the other.

The petitioner's response included a statement, dated October 5, 2014, listing the issues that were previously addressed in the RFE and describing the supporting evidence that was being submitted with the response to address the noted deficiencies. With regard to the beneficiary's employment abroad, the petitioner provided pay statements and numerous emails and documents issued by the board of directors in which the beneficiary's discretionary authority in his capacity as an executive director of the board were either mentioned or demonstrated. With regard to the petitioner's U.S. business premises, the petitioner provided the foreign entity's board resolution, dated August 28, 2014, and a copy of its lease agreement pertaining to the petitioner's rental of virtual office space.

After reviewing the petitioner's response to the RFE, the director denied the petition, concluding that the petitioner had not established that the beneficiary has been employed abroad in a managerial or executive capacity or that it has secured sufficient physical premises to house the new office.

On November 28, 2014, the petitioner filed an appeal seeking to overturn the director's decision. 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 director's decision. While we consider all evidence that has been submitted into the record, this decision will reference only those submissions that are relevant to the grounds for denial.

III. The Issues on Appeal

As indicated above, this decision will address two primary issues, which were the focus of the director's decision. Namely, we will determine whether the petitioner submitted adequate evidence to establish that it secured sufficient physical premises to house its business operation and that the beneficiary was employed abroad in a qualifying managerial or executive capacity for the required time period.

A. Qualifying Employment Abroad

The first issue to be addressed in this matter is whether the petitioner provided sufficient evidence to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity.

Our analysis of the beneficiary's employment abroad initially focuses on the beneficiary's job description, i.e., the job duties the beneficiary performed during the relevant time period of his employment abroad. 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 petitioner's organizational structure, the existence of support personnel and the job duties they performed, as well as any other relevant factors that may contribute to a comprehensive understanding of the beneficiary's daily tasks and his role in his position within the foreign organization.

In the present matter, the petitioner's July 18, 2014 supporting statement claimed that the beneficiary has been employed abroad in an executive capacity and referred to the beneficiary's job duties as "executive/managerial" without specifying whether the beneficiary is employed in a managerial capacity, in an executive capacity, or whether his current position with the foreign entity fits both statutory definitions. Rather, the petitioner provided a vague job description, indicating that the beneficiary "defines strategy/planning for [the] new business generation" and is "fully involved in the development of [the foreign] company's technology strategy." The petitioner further stated that the beneficiary defines the foreign entity's investment strategy, sets performance goals, oversees budgets, manages financial forecasting, and conducts employee evaluations on a yearly and bi-annual basis. However, the job description was too general to establish that the beneficiary's actual day-to-day duties are primarily managerial or executive in nature. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the

regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The petitioner also submitted a copy of the beneficiary's resume, which listed duties similar to the general responsibilities provided on the organizational chart. The resume also provides some examples of responsibilities the beneficiary has carried out including "implemented ERP based business Solution . . . using latest Hardware, Software and application tools; "Successfully created Data Solution using Seagate tools for better Data Availability online"; "implemented Corporate Email System and Access"; successfully Promoted Company business Interest. . ."; and "Successfully negotiated with clients in United States of America for Business Tie-ups for working with [the foreign entity]."

In addition, the petitioner provided a copy of the foreign entity's organizational chart, which depicted the beneficiary's position as directly subordinate to the managing director, whose position was at the top of the hierarchy. The chart lists the following bullet points below the beneficiary's name and position title:

- Marketing
- IT procurement, management
- Office facilities [and] Automation
- Government law [and] taxes
- e Tendering
- Ministry of corporate affairs
- Vendor development
- Bank account management

The petitioner did not specify the beneficiary's actual role with respect to any of these elements or functions or explain how the above job duties fall within the outlined criteria of managerial or executive capacity. The foreign entity's organizational chart further indicated that the beneficiary's direct subordinates include a quality control manager, a general manager, an accounts manager, and an accountant.

Although the petitioner was given the opportunity to provide additional information pertaining to the beneficiary's specific duties performed during his qualifying period of employment abroad, the petitioner's October 6, 2014 statement in response to the RFE referenced various corporate and business documents that were signed by the beneficiary in his directorial capacity, thus placing primary focus on the beneficiary's discretionary authority and his corresponding elevated placement within the foreign entity's organizational hierarchy. While these elements are certainly relevant to the overall consideration of the qualifying nature of the beneficiary's position, they are not adequate substitutes for a detailed job description that delineates the beneficiary's actual daily tasks and expounds on the beneficiary's managerial or executive role with respect to other employees within the foreign organization. Again, specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Here, despite the director's attempt to elicit a more detailed job description by expressly asking the petitioner to provide a statement listing the beneficiary's job duties and their respective time allocations, the petitioner

did not provide this critical information and instead made broad references to the beneficiary's position as that of an executive without providing statements or evidence to support such claims. As indicated above, discretionary authority and wide latitude in decision-making are factors that we consider in light of a detailed job description. Where the petitioner provides a job description that is devoid of meaningful information about the specific tasks the beneficiary carries out on a daily basis, we are unable to affirmatively conclude that the beneficiary allocated his time primarily to tasks of a qualifying nature during his employment abroad. 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)).

Further, the only specific examples of the beneficiary's duties provided in the record, specifically those provided in his resume, suggest that he was directly involved in performing hands-on technical work for the foreign company. As noted, the beneficiary indicates in his resume that he implemented an ERP solution using the latest software, hardware and tools, created a data solution, and implemented a corporate email system. The record reflects that the beneficiary's duties included both managerial and administrative or operational tasks, but the petitioner did not quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as those included in his resume, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

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, while documents have been submitted to establish the depth of the beneficiary's discretionary authority, the foreign entity's organizational chart does not establish that the entity had a management structure that is capable of supporting the beneficiary in an executive capacity, despite the managerial titles assigned to two of the beneficiary's subordinates. The record also lacks information about the job requirements pertaining to the beneficiary's subordinates, nor does the chart specifically name the employees who occupied the subordinate positions.

The record similarly lacks sufficient evidence to establish that the beneficiary was employed abroad in a managerial capacity, which also requires an analysis of the foreign entity's support staff in order to determine whether the beneficiary's subordinates could be deemed supervisory, professional or managerial employees. See section 101(a)(44)(A)(ii) of the Act.

Alternatively, if the petitioner claims that the beneficiary has been employed as a function manager, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be 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 petitioner did not articulate that the beneficiary managed a function of the foreign entity, and, as discussed, the record does not establish that his duties have been primarily managerial in nature.

Accordingly, in light of the above analysis, which contemplates the beneficiary's job description as well as the beneficiary's role within the context of the foreign entity's organizational hierarchy during the requisite time period, we find that the petitioner failed to provide sufficient evidence to establish that the beneficiary's employment with the foreign entity was in a qualifying managerial or executive capacity and on the basis of this conclusion this petition cannot be approved.

B. Physical Premises

The second issue to be addressed is whether the petitioner established that it has secured sufficient physical premises to house its proposed business. See 8 C.F.R. § 214.2(l)(3)(v)(A).

At the time of filing, the petitioner submitted a [REDACTED] "Businessworld" agreement which indicates that for \$199.00 per month, the petitioner had access to five days of office usage per month in the [REDACTED], Texas area. This agreement was signed in August 2012 and had a term of twelve months.

In response to the RFE, the petitioner provided a copy of a [REDACTED] "Online Virtual Office Agreement" with a [REDACTED] business center located at [REDACTED] Texas, which is the address the petitioner used on the Form I-129. This agreement was for a "standard virtual office" for a monthly fee of \$199.00, with a start date of June 1, 2014 and an end date of November 30, 2014. The full terms of the agreement were not provided. The petitioner provided a photograph of an office door marked "[REDACTED]" with the petitioner's name and logo on what appears to be a sheet of paper affixed to the door, as well as photographs of an occupied office and a room with a conference table. However, neither of the submitted leases specifically indicates that the petitioner occupies office [REDACTED] within the [REDACTED] HQ suite at this address.

On appeal, the petitioner asserts that the virtual office space it secured would be sufficient to house the petitioner's business operation. However, a review of the terms and conditions portion of the petitioner's "Businessworld" agreement indicates that the director reached the proper conclusion in finding such office space to be insufficient for purposes of the instant nonimmigrant visa petition. As seen in the first clause of the terms and conditions, the petitioner's use of the [REDACTED] office space would be limited based on the selection the petitioner makes in its membership agreement. In the instant case, the petitioner opted for only five days per month to use the [REDACTED] office space. It is unclear where the beneficiary and the petitioner's

prospective staff would actually carry out the daily operational tasks and IT work that would generate the petitioner's income during the remaining time period.

Moreover, the second clause of the same terms and conditions portion of the agreement expressly states, "A businessworld membership is not intended to be a replacement for a full time or regular office." Here, the petitioner has provided no evidence to establish that it has secured office space beyond the [REDACTED] virtual office option, thus leaving unanswered the question of where the petitioner's employees would work outside the five days per month during which the petitioner would rent the office space offered through [REDACTED]

Although the petitioner provided evidence that it signed a second lease agreement in May 2014, the petitioner did not provide the terms of this agreement, which requires the same monthly fee as the "Businessworld" agreement. The evidence submitted in response to the RFE was insufficient to establish that the petitioner has a full-time dedicated office space.

In light of the above, we concur with the director's finding that the petitioner did not secure sufficient physical premises to house the petitioner's business operation and for this additional reason the instant petition cannot be approved.

C. Additional Issue

Since the identified basis for denial is dispositive of the petitioner's appeal, we need not address another ground of ineligibility we observe in the record of proceeding. Nevertheless, we will briefly note and summarize it here with the intention that, if the petitioner seeks again to employ the beneficiary or another individual as an L-1A employee in the proffered position, it will submit sufficient independent objective evidence to address and overcome this additional ground in any future filing.

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.

Here, while the petitioner submitted a business plan, the evidence as a whole does not establish how the petitioner would support the beneficiary in a qualifying managerial or executive capacity as CEO after its initial year in operation. The petitioner's business plan indicates at page 2 that the company "will be signing a 10-Year franchise agreement with [REDACTED] to be a managed service provider," and contains numerous other references to this franchise relationship. However, the petitioner has not submitted any supporting documentation, such as a copy of the agreement or information regarding [REDACTED]. As the petitioner indicates that its financial outlook for the first year are predicated, in part on information collected from [REDACTED] franchises and disclosures, this evidence is critical to understanding the proposed scope and nature of the petitioner's operations.

Further, the petitioner's personnel plan, as identified at page six of the business plan, indicates that the company intends to hire two full-time employees and one part-time employee, and may or may not hire additional staff after six months. The petitioner indicates that these employees would include a director, an employee responsible for human resources and banking, and a technology specialist. The petitioner did not indicate which employee would be part time or define the subordinate employees' proposed duties. Upon review, the petitioner did not establish how a single technical employee would relieve the beneficiary from providing the IT services of the company. Therefore, the evidence of record does not establish that the beneficiary would be employed in a managerial or executive capacity within one year of approval of the petition. For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

IV. Conclusion

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In nonimmigrant visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. 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.