

DISCUSSION: The Director, Nebraska Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks to change the beneficiary's status from specialized knowledge worker (L-1B) to manager or executive (L-1A) and extend his period of stay as a nonimmigrant intracompany transferee pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L). The petitioner is a corporation organized in the State of North Carolina that is engaged in the distribution of electro-magnetic systems for industry. The petitioner claims that it is the affiliate of [REDACTED] located in Tamworth, Staffordshire, UK. The beneficiary was initially granted a one-year period of stay in the United States, which was subsequently extended for an additional two years. The petitioner now seeks to extend the beneficiary's stay for an additional four years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director misconstrued evidence submitted by the petitioner which described the beneficiary's responsibilities, and that his duties are in fact managerial and supervisory. In support of this assertion, counsel for the petitioner submits a brief and additional evidence.

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 issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

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.

With the initial petition, counsel for the petitioner, in a letter dated February 23, 2004, explained that the beneficiary was initially sent to the United States to render his services in the capacity of a Service Engineer. Counsel claims that due to increases in the petitioner's sales, the petitioner must expand its Service Department. As a result, counsel claims that the petitioner has appointed the beneficiary to serve as manager of its service department and that the beneficiary will simultaneously function in an engineering capacity.

The petitioner also submitted a letter dated February 17, 2004. In its letter, the petitioner briefly described the beneficiary's proposed managerial duties, stating "[i]n addition to acting in a service capacity, [the beneficiary] is now Service manager with full responsibility for the managing [of] the service operations of the company. He supervises the field activities of all company service representatives."

The director found this initial evidence to be insufficient. Consequently, a request for evidence was issued on April 7, 2004. In the request, the director asked the petitioner to submit a detailed description of the beneficiary's actual day-to-day tasks in his new managerial position, along with an estimate of the percentage of time that he would devote to each task. Additionally, the director requested an organizational chart for the petitioner which identified all eleven of its employees by name and position title. Finally, the director requested a brief description of each employee's duties.

In a response received on June 30, 2004, the petitioner submitted the requested evidence. With regard to the beneficiary's duties, the petitioner provided the following description.

1. Develop and manage the Service Department budget for the company.

The Service Department is now the largest department in the company and is expected to grow to six service representatives by the end of the calendar year. In addition, [the beneficiary] will develop an Applications function within the Department and will identify, hire and train Application Engineers over the next year. It is currently anticipated that the company will hire up to two Applications Engineers over the next year. [The beneficiary] will be responsible for a staff of six Service representatives and two Applications Engineers over the next 18 months. Development of the departmental plan and budget requires oversight on a monthly basis and normally involves approximately 10% of [the beneficiary's] time.

2. Hire, train and supervise the Service staff.

[The beneficiary] is responsible for managing the activities of the Service Representatives including technical training, and customer service, supervision of daily activities, including scheduling throughout the Service territory (USA, Canada and Mexico), approval of expenses and travel. The company now has four full-time Service Representatives and he is charged with assuring that the Company can meet the service requirements for the 1500 current customers as well as all new customers. Based on sales trends, [the beneficiary] will be required to hire and train at least two additional Service Representatives over the next six to nine months. In the past, the Company has transferred Service Representatives from

affiliated companies. However, the Company intends to hire US nationals. It is unlikely that these new hires will be familiar with the Company's proprietary technology so [the beneficiary] will have to develop training manuals and protocols to assure technical proficiency. In addition to Service Representatives, [the beneficiary] will also hire and train at least two Application Engineers over the next year.

[The beneficiary] has hired the existing Service staff for the Company. He interviewed and evaluated their knowledge of the [company's] proprietary technology, product and service requirements and training. He also evaluates prospective employees, determines qualifications and, in accordance with the company's budget and service requirements, hires and trains the staff. He determines what training and qualifications are required to fulfill the company's product commitments. The recruitment and training of prospective employees is an ongoing function requiring about 5% of his time on a weekly basis.

[The beneficiary] is responsible for overseeing and managing installations of company products throughout the United States, Canada and Mexico. This responsibility includes coordination with the Sales Department, the manufacturing facilities in Italy, shipping companies to ensure on-time arrival as well as supervision of installation crews. Supervision and oversight of the installation function is a critical responsibility that can determine the financial performance of the company. Subject to normal corporate responsibility delegations, [the beneficiary] makes essentially all decisions concerning allocation of Service Department employee time, approval of overtime and employee suitability for this function.

[The beneficiary] is responsible for ongoing training of the Service staff. He coordinates training with and through the parent company, assures that all Service personnel receive ongoing training both at the manufacturing facility level and the customer level. [The beneficiary] develops the training materials and conducts training sessions as necessary. [The beneficiary] also assures that the Sales force receives adequate technical training in the company's technology.

[The beneficiary] also prepares staff to train customers in the use and application of company products. [The beneficiary] devotes approximately 15% of his time "training the trainers" and customers.

Together, the various aspects of managing the Sales Department – from hiring, training, supervising and oversight takes approximately 75% of [the beneficiary's] time on a daily basis.

3. Applications Manager.

[The beneficiary] has also been assigned responsibility for developing an Applications function for the company. In this capacity, [the beneficiary] will be responsible for providing technical support to the Service and Sales Departments. He will relate directly to customers

in assuring proper product configuration based on customer specifications and requirements. He will be responsible for working with the parent company in enhancing existing technologies and developing new ones to meet the company's principal industrial markets: injection molding, milling machines and heavy duty materials handling machinery. He will be expected to hire, train and manage at least two Applications Engineers to assist the Sales Department. [The beneficiary] will devote approximately 15% of his time to this function.

4. Service Assistance.

Because of [the beneficiary's] experience with the company's technology, [the beneficiary] will from time to time provide direct assistance to customers when complications arise beyond the capability of the average company Service Representative. This will involve approximately 5% of the [beneficiary's] time.

Additionally, the petitioner provided the following summary of duties:

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| 1. | Departmental Supervision (involves scheduling, training, supervision, contact with customers) | 75% |
| 2. | Development of Applications Function | 10% |
| 3. | Liaison with Sales Department – training, application support | 10% |
| 4. | Specialized Service Calls | 5% |

The petitioner's organizational chart demonstrated that the beneficiary reported directly to the Operations Manager, who in turn reported to the president. Directly under the beneficiary's supervision were four Service Representatives, and the chart further indicated that an additional two Service Representative positions would be filled in the future. With regard to the Service Representatives, the petitioner stated that they "are responsible for installation, service and repair of company products. This includes on-site service and customer training. Each of the four representatives was delegated with a specific territory to service.

On August 10, 2004, the director denied the petition. The director determined that, based on the information provided, it appeared the beneficiary was engaged primarily in non-qualifying tasks and thus could not be considered as a managerial or executive employee. On appeal, counsel for the petitioner alleges that the director focused on only a small section of the beneficiary's stated duties and one part of the regulations, and ignored the remaining duties and other pertinent aspects of the statute. Counsel addresses each of the four aspects that define managerial capacity and attempts to demonstrate how the beneficiary's stated duties satisfy each of the individual definitions.

Upon review, counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. In this case, the petitioner specifically indicated that the beneficiary would be employed in a managerial capacity.

In this case, the petitioner initially gave a general overview of the beneficiary's duties in its February 17, 2004 letter. In that letter, generalizations were made with regard to the standard activities of the beneficiary. For instance, the petitioner advised that he would act as the service manager for the company as well as act in a service capacity. This generalized statement did little to clarify the exact nature of the beneficiary's job, his responsibilities, and his daily functions.

In response to the director's request for evidence, additional details regarding the beneficiary's position were provided. The petitioner claimed that the beneficiary oversees four service representative, all of whom are allegedly professionals, and that the majority of his time is devoted to the various aspects of managing the sales department, including "installation, service, onsite repair and customer training," "develop training manuals," and training service personnel. Although the petitioner claims to employ professional subordinate employees beneath the beneficiary, it fails to explain why the beneficiary is engaged in such a wide array of tasks, and why the subordinate employees do not relieve him from these obligations. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, despite providing a percentage breakdown of the time the beneficiary devotes to each generalized field of duties, the petitioner fails to document what proportion of the beneficiary's duties within these areas would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on each of these tasks. This failure of documentation is important because several of the beneficiary's daily tasks, such as those cited above, do not fall directly under traditional managerial or executive 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 petitioner attempts to classify non-qualifying duties under headings that fall under the regulatory definitions of managerial capacity. For example, counsel on appeal alleges that the beneficiary has the authority to hire and fire employees and alleges that to date he has hired all the service employees. While hiring and firing employees are recognized as managerial duties, the petitioner does not specifically state how much time, on a daily basis, the beneficiary spends devoted to this qualifying task. Based on the small number of employees and relatively low number of proposed positions, it seems logical to conclude that hiring and firing a staff of four sales representatives does not take up a majority of the beneficiary's time.

In addition, counsel for the petitioner relies on the fact that the beneficiary supervises professional employees as a further basis for establishing his eligibility. Although the beneficiary is not required to supervise

personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

The petitioner claims that the beneficiary is a manager by virtue of his supervision of four service representatives. With regard to the duties of these four employees, the petitioner simply stated that they are responsible for the installation, service and repair of company products. The petitioner did not provide the level of education required to perform the duties of its service representatives, and there is no evidence in the record to establish that the positions these persons fill require an advanced degree, such that they could be classified as professionals. Nor has the petitioner shown that any of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Merely submitting an organizational chart with the beneficiary at the top and subsequently claiming the beneficiary is a manager by virtue of his position in the organizational hierarchy does not satisfy the petitioner's burden of proof. There is no evidence in the record establishing that the service representatives are professional, supervisory, or managerial employees. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Although counsel on appeal claims that the beneficiary will soon hire professional employees, such as engineers and electronics specialists, this assertion is not persuasive. 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. 1978). The fact that the beneficiary anticipates hiring subordinate professionals in the future does not establish eligibility under the managerial category. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). This has not been established here.

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The record indicates that the beneficiary will primarily engage in non-qualifying duties from which he is not relieved by subordinate professional employees. 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. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3). For this reason, the petition may not be approved.

Beyond the findings in the previous decision, the remaining issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the petitioning entity and a foreign entity

pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner has submitted a consolidated balance sheet for the alleged parent company of the petitioner and foreign entity. However, no additional documentation is included in the record in support of the claimed affiliation between these two entities.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of the petitioner's claimed qualifying relationship, a consolidated balance sheet alone is not sufficient evidence to determine whether Finmagneti S.P.A., the alleged common stockholder, maintains ownership and control of both the petitioner and the foreign entity. The corporate stock certificate ledgers, stock certificate registries, corporate bylaws, and the minutes of relevant annual shareholder meetings of both companies must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 362. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. Therefore, the petitioner has not demonstrated that a qualifying relationship still exists with a foreign entity and has not persuasively demonstrated that the foreign entity will continue doing business during the alien's stay in the United States. For this additional reason, the petition may not 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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

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, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.