



U.S. Citizenship
and Immigration
Services

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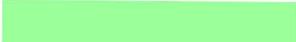


DATE: **AUG 13 2013**

Office: VERMONT SERVICE CENTER

FILE: 

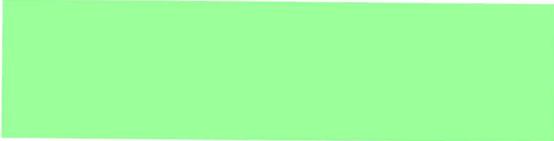
IN RE:

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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg

Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Delaware corporation, states that it engages in the wholesale of marine equipment and parts. The petitioner claims to be an affiliate of [REDACTED] located in [REDACTED]. The petitioner seeks to employ the beneficiary in the position of president for a period of three years.

The director denied the petition concluding that the petitioner failed to establish it will employ the beneficiary in a qualifying 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 evidence submitted establishes that the beneficiary will be employed in a managerial capacity. Counsel for the petitioner submits a brief statement and additional evidence on 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.

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. DISCUSSION

The sole issue addressed by the director is whether the petitioner established that it will employ the beneficiary in a primarily managerial or executive capacity.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner stated that the beneficiary would be employed as president of the U.S. company and indicated that the company had five employees and a gross annual income of \$1,264,058.00 as of the date of filing. In a letter submitted in support of the petition, the petitioner described the beneficiary's proposed position as follows:

As President of [the petitioner], [the beneficiary] is responsible for managing and directing our development activities. He develops our business plans, formulates policies and strategies for our US expansion and international development, supervises and controls our US operation including import and export, contract negotiation, financing and banking, and reviews activity reports and financial status to determine progress and revises objectives and plans in accordance with current conditions. In the area of human resources management, [the beneficiary] exercises authority in regard to hiring, firing, training, delegating of assignments according to capabilities and preferences, discipline, promotions, and remuneration.

The petitioner submitted an organizational chart for the U.S. company depicting the beneficiary as president and [redacted] as vice president, supervising a sales department, financial department, and legal consultant. The sales department lists [redacted] as manager, supervising a sales engineer, [redacted] and a sales assistant, [redacted]. The financial department lists [redacted] as bookkeeper, supervising a contracted company for CPA services; and the legal consultant is [redacted] of [redacted].

The director issued a request for additional evidence ("RFE") in which he instructed the petitioner to submit, *inter alia*, the following: (1) a comprehensive description of the beneficiary's proposed duties; (2) a list of all employees in the U.S., including name, title, position description, and a breakdown of the number of hours devoted to each duty on a weekly basis; (3) all IRS Forms W-2 and 1099 for the previous year; and (4) its most recent IRS Form 941, Employer's Quarterly Federal Tax Return.

The petitioner submitted a document titled "Description of the Beneficiary's Duties" indicating that the beneficiary would perform the following:

- Developing company business plans, formulating policies and strategies for [petitioner] expansion and international development, including the policies of investment, development and foreign trade in US and through our US company;
- Directing and coordinating [petitioner] business activities, supervising implementation of managerial system and plan targets;
- Controlling and supervising [petitioner] operation including contract negotiation, financing and banking;
- Reviewing reports and records of the operation and development, responsible for designing all import/export strategies;
- Reviewing activity reports and financial status to determine progress and revise objectives and plans in accordance with current conditions;
- Supervising and controlling the work of other supervisory and professional employees, and overseeing [petitioner's] day-to-day overall business operation; and
- Making discretionary decisions to hire, fire employees, delegate assignments according to capabilities and preferences, and exercising authority for discipline, promotion and remuneration.

. . . it is anticipated that 25 of [the beneficiary's] working hours (weekly) will be on development and formulation of business plan, policy, and strategy; and 15 of his hours will

be on supervising, directing and reviewing [petitioner's] business function and overall operation for the first few months of his arrival with L-1 status. He will then spend more time or mainly focus on developing, formulating and planning [petitioner's] business development and expansion.

The petitioner also provided a similar breakdown of job duties, including number of hours devoted to each duty per week, for the vice president, [REDACTED], the office manager and bookkeeper, [REDACTED], the sales engineer, [REDACTED], and the sales assistant, [REDACTED].

The petitioner submitted the requested IRS Forms W-2 demonstrating that [REDACTED] was paid \$34,250.00, [REDACTED] was paid \$34,669.23, [REDACTED] was paid \$12,359.36, and [REDACTED] was paid \$2,887.50, for the year preceding the filing of the petition. The petitioner provided a payroll summary of earnings register from its payroll service provider indicating wages paid to the sales assistant, and a letter explaining that this employee joined the company the same year the petition was filed. The payroll provider indicated that it could not provide the petitioner or USCIS with copies of IRS Forms 941 because the document includes employee payroll data for all of its clients.

The director denied the petition on September 27, 2001, concluding that the petitioner failed to establish that the beneficiary will be employed in a qualifying managerial or executive capacity. In denying the petition, the director found that the beneficiary's duties are general managerial functions and merely paraphrase portions of the regulatory definitions of managerial and executive capacity, rather than specifying exactly what duties the beneficiary will be performing within the context of the petitioner's business and current staffing structure. The director further found that the record does not demonstrate that the positions occupied by the beneficiary's subordinates are supervisory, managerial, or professional in nature, or that the beneficiary will function at a senior level within the organizational hierarchy other than in position title.

On appeal, the petitioner submits a letter dated October 16, 2001 listing the same duties for the beneficiary and further describing them as follows:

Clearly, the description contains languages [*sic*] that are directly supervisory in nature and falls under the direct definition of "managerial capacity" of [the Act]. The description specifies exactly the beneficiary's duties. . . . The documents we have provided demonstrate the beneficiary will be employed in a primarily managerial capacity.

* * *

The supporting documents demonstrate the beneficiary has been employed in a primarily managerial capacity and his actual daily activities are managerial or executive in nature. . . . one of the beneficiary's duties is to control and supervise [petitioner] operation including contract negotiation, financing and banking. The Lease Agreement for [the petitioner's] office space in New Jersey . . . was signed by [the beneficiary] on behalf of [petitioner]. Another duty of the beneficiary is to make discretionary decisions to hire, fire employees, delegate assignments according to capabilities and preferences. As the Form I-9 . . . shows that Mr. [REDACTED] Vice President of [petitioner] was hired by [the beneficiary]. These, as well as many other documents submitted . . . evidence [the beneficiary's] authority to sign

contracts on behalf of [petitioner] and discretion over [petitioner's] operations and management. The documents we provided evidence the beneficiary has been and will be employed in an executive or managerial capacity and his actual daily activities are managerial or executive in nature.

* * *

The supporting documents demonstrate the positions being occupied by other individuals are supervisory, managerial, or professional in nature. [The petitioner's] Organizational Chart and List of [Petitioner's] Employees and Their Position Description With a Breakdown of Duties in Terms of Approximate Hours per Week submitted previously . . . clearly demonstrate that [petitioner] employs Vice President who is also managing Sales Department, Sales Engineer and also retains legal and personnel consultants and accountant as well, and obviously, these positions are supervisory, managerial and/or professional in nature.

The petitioner also explains that its IRS Forms 941 for the first and second quarters of 2001 are not available, but submits payroll records for the first two quarters as evidence of its employees. The payroll records indicate that the petitioner employed [redacted] and [redacted] at the time the petition was filed.

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a position that is primarily executive or managerial in nature.

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 in either an executive or a managerial capacity. *Id.*

The AAO does not doubt that the beneficiary will have the appropriate level of authority over the petitioner's business as its owner and president. However, the definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. See 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

In the instant matter, the petitioner characterized the beneficiary's role as president, noting he will "develop business plans"; "formulate policies and strategies for US expansion and international development"; supervise and control US operation"; and "exercise authority in regard to hiring, firing, training, [and] delegating of assignments." Those duties merely paraphrase, in part, the statutory definitions of managerial and executive capacity. See section 101(a)(44)(A) and (B) of the Act. Conclusory assertions regarding the

beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The petitioner further detailed the beneficiary's duties indicating that he will "[d]irect and coordinat[e] [petitioner] business activities, supervising implementation of managerial system and plan targets"; "[c]ontrol and supervis[e] [petitioner] operation including contract negotiation, financing and banking"; "[r]eview reports and records of the operation and development"; "responsible for designing all import/export strategies"; "[r]eview activity reports and financial status"; "[s]upervis[e] and control the work of other supervisory and professional employees"; "oversee [petitioner's] day-to-day overall business operation"; and "[m]ak[e] discretionary decisions to hire, fire employees, delegate assignments . . . and exercise[e] authority for discipline, promotion and remuneration." The petitioner failed to identify any specific tasks the beneficiary would perform on a day-to-day basis and merely listed broad areas of responsibility. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner failed to provide any detail or explanation of the beneficiary's actual activities in the course of his daily routine or a breakdown of the amount of time the beneficiary devotes to each task. Therefore, based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary will primarily perform non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties will be managerial in nature, and what proportion will be non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). 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 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).

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2).

The petitioner indicates that the beneficiary's direct subordinate will be the vice president, whose stated duties include some supervisory functions (three hours per week). The description of the vice president's duties indicates that he allocates the majority of his time to the sales function. The petitioner has not established that it actually employs the claimed sales engineer, and its supporting evidence includes a number of invoices, which identify the vice president as "sales representative." Further, the petitioner has not indicated how much time the beneficiary himself will allocate to supervisory functions, although it appears that this amount would be 15 hours per week or less based on the petitioner's general breakdown of the beneficiary's responsibilities.

The record does not establish that the beneficiary would be primarily engaged in the supervision of a subordinate staff comprised of managers, professionals or supervisors.

The petitioner has not established, in the alternative, that the beneficiary will be employed primarily as a "function manager." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must 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. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating 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. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Here, the petitioner did not indicate that the beneficiary qualifies as a function manager. The petitioner did not articulate the beneficiary's duties as a function manager and did not provide a breakdown indicating the amount of time the beneficiary devotes to duties that would clearly demonstrate he manages an essential function of the U.S. company.

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 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.* Here, the beneficiary has not been shown to be employed in a primarily executive capacity. The petitioner failed to demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations.

The AAO further notes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, however, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not

conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Here, the petitioner indicates that the beneficiary has one direct subordinate who supervises three additional employees, but has failed to document its employment of one of these employees, the sales engineer. Further the record shows that the petitioner's vice president is directly involved in performing the sales function, notwithstanding his job title. Given the petitioner's failure to document the employment of all of its claimed staff and its failure to provide a description of the beneficiary's specific duties and the amount of time he will allocation to each task, it remains unclear how the beneficiary's subordinates will relieve him from performing other non-qualifying administrative and operational duties.

The petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity or as a function manager. Accordingly, the appeal will be dismissed.

III. 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.