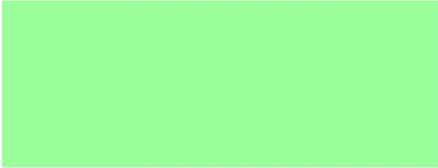




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **AUG 27 2014** 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
Chief, Administrative Appeals Office

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

The petitioner, a Florida limited liability company, states that it is a subsidiary of [REDACTED] located in Russia. The petitioner further states that it provides consulting services to metallurgy industries. The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's employment and status as a 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 beneficiary was previously granted one year in L-1A status in order to open a new office in the United States and the petitioner now seeks to extend the beneficiary's status for three additional years.

The director denied the petition, concluding that the petitioner had failed to establish that the beneficiary would be employed in a managerial or an 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.

I. The Law

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

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

In support of the instant Form I-129, the petitioner provided a letter, stating that it currently employs one senior sales manager and three junior-level sales managers in addition to the beneficiary. The petitioner offered the following description of the beneficiary's proposed position:

- Planning, developing, and establishing long-range goals and objectives of business organizations in accordance with board directives and corporation charters.
- Conferring with advisors to plan business objectives, to develop organizational policies to coordinate functions and operations, and to establish responsibilities and procedures for attaining objectives, and also in then implementing goals through subordinate administrative personnel and sub-contractors.
- All aspects of the [c]ompany's finance (budget and accounts receivable), administration, and marketing.
- Reviewing activity reports and financial statements to determine progress and status in attaining objectives and revising objectives and planning in accordance with current conditions.
- Directing and coordinating formulation of financial program to approve funding for new or continuing operations, to maximize returns on investments, and to increase productivity.
- Promoting the [c]ompany by representing it before organizations and participating at various seminars, conventions, and trade shows.
- Liaison activities with the accountants and lawyers who contract with the [c]ompany.
- Hiring staff and other personnel actions, including promotions, transfers, discharges, or disciplinary measures.
- Administrative control and conformance with legal requirements of the firm.

The beneficiary indicated that he would continue to have wide discretionary authority with regard to managing the company's services and would not carry out non-qualifying tasks.

The director issued a request for additional evidence ("RFE") in which she informed the petitioner that the record lacked sufficient evidence to establish eligibility for the benefit sought. Among the list of deficiencies, the director addressed the beneficiary's proposed position with the U.S. entity. Specifically, the director observed that the wage evidence previously provided indicated that a portion of the petitioner's staff included part-time employees, thus leading the director to question whether the petitioner had the staff necessary to support the beneficiary in a primarily managerial or executive position. The director asked the petitioner to provide an organizational chart depicting the petitioner's staffing levels and teams or departments into which the organization may be divided. The director also asked for a supplemental job description listing the beneficiary's proposed job duties.

In response to the RFE, the petitioner resubmitted the previously provided job description for the proposed position and provided job descriptions for each of the four remaining employees, indicating that only one employee – the senior sales manager – was employed on a part-time basis. The beneficiary claimed that all of the company's employees report directly to him and that he supervises and controls the work of all employees. The beneficiary further claimed that all of his proposed job duties are "executive/managerial in nature" and indicated that he does not perform any non-executive or non-managerial job duties. He also stated that any newly hired employees would report to him "through mid-level and subordinate managers."

The record shows that the petitioner did not provide an organizational chart depicted its staffing hierarchy and organizational subdivision. It is noted 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).

In a decision denying the petition, the director concluded that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director specifically pointed to the petitioner's vague description of the beneficiary's proposed job duties and its failure to establish that its senior sales manager is in fact a mid-level managerial employee as her position title suggests. The director also pointed out that while the beneficiary's job description indicated that the beneficiary would oversee the company's administration, marketing, and accounting, the record lacked evidence to show who was actually carrying out the petitioner's daily underlying administrative, marketing, and accounting tasks.

On appeal, counsel disputes the director's finding, asserting that the petitioner provided sufficient evidence to meet the preponderance of the evidence standard in establishing that the beneficiary would be employed in either a managerial or an executive capacity. Counsel now submits an appellate brief citing to prior AAO decisions in support of his assertions.¹

Upon review, and for the reasons stated below, we find that the petitioner has failed to establish that the beneficiary will be employed in a primarily managerial or an executive capacity.

III. The Issues on Appeal

As previously noted, the primary issue to be addressed in this decision is whether the petitioner established that the beneficiary would be employed in a managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, we 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.* 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). Beyond the required description of the job duties, U.S. Citizenship

¹ Only when the agency specifically designates a decision as precedent can it bind future decisions. 8 C.F.R. § 103.3(c).

and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioning entity's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that may contribute to a complete understanding of a beneficiary's actual duties and role in a business.

In order to allow the petitioner the opportunity to establish its statutory eligibility, we consider the beneficiary's proposed employment under the statutory definitions of managerial capacity and executive capacity. Both definitions 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 owns or 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").

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). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Although the beneficiary is not required to supervise personnel, if the petitioner claims that the beneficiary's duties are managerial because the beneficiary will be supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* Section 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, we look to see whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Here, the petitioner has not established that the beneficiary would be employed in a managerial capacity. In reviewing the petitioner's job description, we concur with the director in finding that the petitioner described

the beneficiary's proposed employment using vague terminology that paraphrases statutory criteria and fails to convey a meaningful understanding of the precise job duties the beneficiary would carry out on a daily basis within the scope of the petitioner's service-based business activities and the staffing that was in place at the time of filing. For instance, the beneficiary stated that he would focus, in part, on establishing the petitioner's goals and policies, which are among the statutory criteria for managerial capacity. However, it is unclear which of the beneficiary's specific daily tasks are representative of his policy-making role. The beneficiary was equally vague in broadly stating that he would direct and coordinate the formulation of a financial program. The description does not explain whom the beneficiary would direct or what components he would coordinate in meeting this general responsibility of creating a financial program. In addition, as properly pointed out in the director's decision, the petitioner did not explain what the beneficiary's specific role would be with regard to the petitioner's administration and marketing. Although the job descriptions of the petitioner's employees indicate that one of the junior sales managers would be responsible for marketing, the beneficiary's supervisory role with regard to this function, or the employee performing it, is unclear. While the beneficiary's intent was to establish that he holds a position of seniority, which entails discretionary authority over the petitioner's daily functions, the beneficiary failed to sufficiently clarify which of his daily tasks exemplify how he would assume administrative control in conformance with the company's legal requirements or what specific legal requirements would be the beneficiary's focus.

Furthermore, while the beneficiary indicated that all of the petitioner's employees would report directly to him, he failed to establish that any of his direct subordinates are managerial, professional, or supervisory employees, aside from what their respective position titles may suggest. Namely, while the position of senior sales manager is apparently intended to be distinguished from the three junior sales managers, there is insufficient evidence as to distinctions between the senior and junior positions within the scope of the petitioner's organization. Although the petitioner is not confined to a specific management structure, any claims made by the beneficiary must be supported through the submission of evidence. Despite the director's attempt to elicit relevant information by requesting that the petitioner provide a copy of its organizational chart, the RFE response did not contain the requested evidence and thus failed to establish that the petitioner's organizational hierarchy includes mid-level managers, who would serve as barriers between the beneficiary and any non-professional or non-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)). In addition, while the beneficiary referred to newly hired personnel, claiming that they would report to him through the mid-level managers, the record does not establish that the petitioner had any new hires at the time the petition was filed. Regardless of the petitioner's intention to hire additional employees in the future, which may alter the organization and create a more complex staffing hierarchy, a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Rather, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition.

Furthermore, despite the managerial position titles of the one senior and three junior sales managers, whom the petitioner employed at the time of filing, there is no evidence to establish that any of the beneficiary's subordinates had subordinates of their own. Thus, despite the managerial position titles of the beneficiary's subordinates, the record contains no evidence to establish that the petitioner, at the time of filing, was staffed with managerial or supervisory employees for the beneficiary to oversee. As the record contains no evidence

as to the subordinate employees' respective educational credentials, we also cannot conclude that the beneficiary's subordinates, at the time of filing, were professional employees. Although supervision of employees is not an express component of the statutory criteria for executive capacity, it is inherent to the definition that 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. That being said, the petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. Rather, the beneficiary includes personnel management aspects inherent to the managerial capacity and the policy-making component of the definition of executive capacity in his job description. The beneficiary does not, however, state whether the beneficiary will be employed in one capacity or another. On appeal, counsel for the petitioner further asserts that "[t]rying to portray an individual as belong exclusively to the managerial, executive, or specialized knowledge categories often does not reflect the true nature of her or his actual job duties." However, a beneficiary may not 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, the record must contain evidence establishing that the beneficiary meets each of the four criteria set forth in each of the two statutory definitions. As previously stated, providing a detailed job description complete with the beneficiary's daily tasks is critical to meeting the burden of proof, as the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

As previously discussed, the beneficiary's job description in the present matter offers only a vague understanding of the beneficiary's proposed position and does not delineate the actual daily tasks that would explain how the beneficiary will determine the petitioner's goals, oversee its finances and administration, and direct the formulation of a financial program. Without a detailed statement of the beneficiary's job duties, we cannot overlook the possibility that the job duties involved in these broadly stated functions would be outside the realm of what would be deemed as being within a qualifying managerial or executive capacity. While we acknowledge that no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" 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).

In addition, while counsel heavily focuses on unpublished case law in an effort to determine that the size of the petitioner's staff is not a determining factor in establishing whether the beneficiary is to be employed in a qualifying managerial or executive capacity, he fails to properly address the director's concerns with regard to the deficient job description and the unresolved questions pertaining to the beneficiary's subordinate staff and the potential that the beneficiary's management of such staff is further indication that the beneficiary would be engaged in non-qualifying tasks, such as overseeing the work of non-managerial, non-professional, or non-supervisory employees. Furthermore, counsel's focus on the beneficiary's discretionary authority regarding business decisions is not sufficient to establish that that beneficiary would allocate his time primarily to the performance of tasks within a qualifying managerial or executive capacity. As indicated above, the burden is

on the petitioner to provide a detailed job description, including the proposed list of the beneficiary's job duties, in order to establish that the primary portion of the beneficiary's time would be spent performing tasks of a qualifying nature. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Moreover, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions, such as those discussed in counsel's appellate brief, are not similarly binding.

Lastly, while the final portion of counsel's brief focuses on specialized knowledge capacity, such a discussion is irrelevant to the facts in the matter at hand, given that the petitioner filed the Form I-129 seeking to classify the beneficiary as an L-1A nonimmigrant, who would be employed in a managerial or executive capacity, rather than an L-1B nonimmigrant, who would be employed in a specialized knowledge capacity. 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. 1998).

As discussed above, the petitioner failed to disclose the beneficiary's specific job duties or to establish that its staffing was adequate to relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying operational tasks.

In light of the deficiencies described above, we find that the petitioner has not established that the beneficiary will be employed in a primarily managerial or an executive capacity in the United States. Accordingly, the appeal will be dismissed.

IV. Conclusion

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.