



U.S. Citizenship
and Immigration
Services

(b)(6)



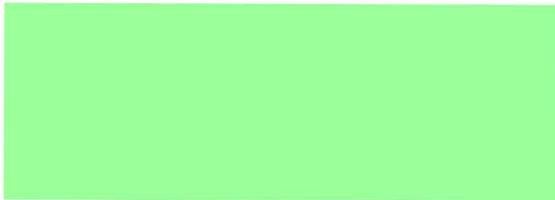
DATE: **JUL 02 2014** OFFICE: CALIFORNIA SERVICE CENTER

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:



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 Director, California 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, a Washington corporation engaged in international trade, claims to be an affiliate of [REDACTED] located in Tokyo, Japan, and seeks to employ the beneficiary as its president for one year. 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 director denied the petition concluding that the petitioner failed to establish that the beneficiary will 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. On appeal, counsel explains that the petitioner is still in its early stages of development and states that the beneficiary is essential for the petitioner's future progress.

I. The Law

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

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

II. Facts and Procedural History

The primary issue to be addressed in this discussion is whether the petitioner provided sufficient evidence to establish that the beneficiary would be employed in the United States in a managerial or an executive capacity.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on August 8, 2013. In support of the petition, the petitioner provided a statement, dated July 31, 2013, indicating that it currently has one employee – an operations manager – and plans to employ the beneficiary as its president. The petitioner offered the following description of the beneficiary's proposed position:

Supervision and directing company employees

In 2013 [the petitioner] will hire three key employees: a Financial Director, Marketing and Sales Manager[,] and an Administrative Assistant to the President.

The President will work closely and personally supervise the Financial Director. He will review the financial documentation prepared by the Financial Director to determine company profitability and growth in attaining business objectives, oversee accounting functions and formulate and administer the overall financial plans and policies. Finally, the President will ensure that all company financial activity complies with local and national regulations by using the professional services of a tax/corporate lawyer. The Financial Director will report directly to the President on this matter and other matters that can affect the financial health of [the petitioner]. The President will also supervise the Financial Director in identifying future employment needs in the Financial Department.

The President will directly supervise the Marketing and Sales Manager and the Operations Manager by overseeing business operations handled by both employees such as identifying potential customers in the U.S.; developing business relationships with existing customers . . . ; maintaining business relationships with suppliers in China and other countries; importing fish and shellfish products to the U.S.; organizing logistics, customs clearance and delivery of product to cold storages such . . . ; and identifying department needs for additional employees.

The Financial Director and Marketing and Sales Manager will report directly to the President.

Creating and coordinating a strategic business plan

The President creates and further coordinates a strategic business plan to source quality fish and shellfish products . . . to the U.S. market. . . . Based on the reports of the Marketing and Sales Manager, the President will create an overall company strategy and establish business and financial goals to successfully compete in the U.S. market.

Establishing the policies of the company

The President will be charged with establishing company policies to ensure compliance with the U.S. legislation and regulatory bodies. He will communicate with a corporate lawyer who would provide detailed legal advice with respect to these and other matters. The President will also develop the company's ethic's policy. This policy will clearly define unethical behavior, establish a company policy and give instructions to employees on how to report unethical behavior. The Financial Manager and Marketing and Sales Manager will report back to the President on compliance with the ethics policy.

Selecting and interviewing candidates for all executive and managerial positions

The president will personally select and interview the candidates for all executive and managerial positions. For the year 2013-2014 [the petitioner] plans to hire three key employees: a Financial Director, Marketing and Sales Manager and Administrative Assistant.

Overseeing the company's business operations

The Marketing and Sales Manager and Operations Manager will report to the President on a regular basis on the company's business operations, such as doing extensive product inspection to verify high quality, organizing product transportation and processing of raw materials into consumer food products.

Making decisions

While answerable to the management team of the parent company . . . , the President of [the petitioner] will hold authority to make executive decisions about the U.S. affiliate regarding creating company business and financial goals and policies; establishing overall business strategy; hiring employees; income, costs and other financial matters.

As President of [the petitioner], [the beneficiary] will make all final decisions about the U.S. office, but will report to and work closely with [redacted] the President of the parent company . . . to establish the general direction for the company. [The beneficiary] has substantial business experience in the field and proven decision-making skills. He will receive only general supervision from the parent company.

The petitioner also provided a business plan from 2011 anticipating that it would hire two full- and three part-time employees "at inception" and that it would hire two additional full-time employees "in the first two years of operation." As indicated above, the instant petition was filed in August 2013. In addition, the petitioner provided an organizational chart, which depicts a staff comprised of five positions – a president, an administrative assistant, a financial director, a market and sales manager, and an operations manager.

On August 21, 2013, the director issued a request for additional evidence ("RFE") in which he instructed the petitioner to submit, *inter alia*, the following: (1) a percentage breakdown of the amount of time the beneficiary would devote to each of his assigned executive job duties; (2) the petitioner's current organizational chart or diagram depicting the petitioner's staffing, including the names, job titles, job descriptions, and educational levels of the employees within the beneficiary's immediate supervision; and (3) the petitioner's state quarterly wage reports for the first and second quarters of 2013, showing the names, salaries, and number of weeks each employee worked during the respective quarters. Lastly, the director reflected on the evidence of record, determining that the evidence shows that the petitioner has been operating since 2011 and, therefore, cannot be deemed to be a new office. Nevertheless, the director informed the petitioner of the criteria it must meet in order to establish that it qualifies for treatment as a new office and allowed the petitioner the opportunity to provide evidence to meet such criteria.

In response to the RFE, counsel for the petitioner provided a statement, dated November 11, 2013, in which he stated that the petitioner has been operating since 2011 with a staff of one full-time employee – an operations manager. Counsel further stated that despite the petitioner's ability "to generate minimal sales

volumes in 2012 and 2013" and become profitable in 2013, "business development has not yet occurred beyond a minimum" due to the operation manager's inability to both direct the business and "simultaneously manag[e] import operations, product processing, quality control, [and] marketing and sales." Counsel indicated that the beneficiary would play a crucial role in determining the petitioner's main business focus and developing the petitioner's distribution of frozen fish and seafood. In addition, counsel provided the following percentage breakdown of the beneficiary's job duties:

1. Supervising and directing company employees (30%);
2. Creating and coordinating company business strategy to achieve business goals (50%);
3. Obtaining additional financing (5%);
4. Executing long-term business contracts with major U.S. processors, wholesalers, and retailers (10%); and
5. Establishing company policies (5%).

Counsel stated further, that the beneficiary would "make vital business decisions regarding business strategy, company personnel, and financial matters to expand operations and continue to increase profits significantly."

On November 27, 2013, the director issued a decision denying the petition. The director concluded that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or an executive capacity, pointing to the petitioner's lack of organizational growth since it commenced doing business in 2011 as one key indicator that the beneficiary would not primarily perform tasks of a managerial or executive nature in his proposed position as the petitioner's president. Given the number of years the petitioner had been doing business, the director determined that the petitioner did not qualify under the definition of "new office" and determined that, based on the petitioner's limited staffing, the beneficiary would primarily assist in the performance of the petitioner's operational tasks that would not fit the criteria of managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(ii)(F) for definition of the term *new office*.

On appeal, counsel disputes the director's finding, contending that the director misapplied the law, "mischaracterized the beneficiary's duties . . . , and failed to consider the reasonable needs . . . in light of the overall purposed and stage of development of the organization," referring to the petitioner as a new company that is still "in its infancy" as far as its stage of development.

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 Sole Issue on Appeal

As previously noted, the sole issue to be addressed 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 and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner'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 definition of managerial capacity and the statutory definition of 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 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.

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 that was originally submitted, we cannot overlook the petitioner's references to the integral roles of a financial director and sales and marketing manager, both of which were vacant positions at the time the petition, thus indicating that the beneficiary's job description was intended to describe job duties that the beneficiary would eventually perform once the petitioner was actually able to fill the vacant positions. Moreover, in light of the petitioner's claim that the beneficiary would be the one to hire employees to fill the vacant positions, it is clear that the organizational hierarchy discussed in the beneficiary's job description was not in place at the time of filing and thus the beneficiary would not be able to primarily perform the described job duties until sometime in the future. However, 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.

Further, in reviewing the additional job description provided by counsel in response to the RFE, counsel did not provide a list of the beneficiary's specific tasks, but rather provided vague statements that failed to convey a meaningful understanding of the specific managerial or executive tasks the beneficiary would carry out on a daily basis. It is reasonable to assume that any individual, when placed at the top of a company's organizational hierarchy, would be responsible for directing company employees and setting the company's business strategies. This information does not, however, help us to understand the beneficiary's specific job duties; nor does the information lead to the conclusion that the beneficiary would primarily perform tasks of a qualifying managerial capacity, particularly when the given organizational hierarchy into which the beneficiary would enter is comprised of a single employee. It stands to reason that the beneficiary would be called upon to carry out a variety of job duties, both qualifying and non-qualifying, in order to ensure that the petitioner is able to maintain its daily business operation. And 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 the matter at hand, the petitioner has failed to explain precisely how its limited staffing structure, which was comprised of a single employee at the time of filing, would be sufficient to relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying tasks. Despite counsel's numerous efforts to establish that the petitioner is a new office, the circumstances of its operational status for approximately two years prior to the filing of the petition indicate that the petitioner simply does not meet the technical criteria of a new office petitioner, which must have been doing for less than one year at the time of filing. *See* 8 C.F.R. § 214.2(l)(ii)(F).

Furthermore, despite the various business projections made in the petitioner's 2011 business plan, the petitioner did not meet its own objectives in hiring a staff of four full-time and two part-time employees two years after commencing its business operations. As indicated above, the petitioner continued to operate with one employee for approximately two years, despite its own projections. Regardless of the reasons for the petitioner's lack of business progress and inability to expand its organizational complexity, only the facts and

circumstances that exist at the time of filing can be considered to determine whether the petitioner was eligible for the immigration benefit sought herein. In addition, while counsel is correct in pointing out that USCIS must take into account the petitioner's reasonable needs when considering staffing size, those needs do not serve to override the petitioner's legal burden of having to establish that the beneficiary would primarily perform duties of a qualifying managerial or executive nature. The director's discussion of the petitioner's staffing is appropriate and suggests that the director had valid concerns regarding the petitioner's ability to relieve the beneficiary from having to primarily perform non-qualifying tasks. The information provided on appeal only contributes to the director's reasonable concerns.

The petitioner has also failed to establish that the beneficiary's proposed position meets the statutory definition of the term "executive capacity," which focuses on a person's elevated position within an 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.*

While the definition of "executive capacity" does not require the petitioner to establish that the beneficiary supervises a subordinate staff comprised of managers, supervisors and professionals, it is the petitioner's burden to establish that someone other than the beneficiary carries out the day-to-day, non-executive functions of the organization. Here, the beneficiary has not been shown to be employed in a primarily executive capacity. Despite the petitioner's claims, 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. In fact, although the petitioner claims that the beneficiary is an executive at the U.S. company, the only executive duties listed for the beneficiary merely paraphrase the statutory definition of executive capacity. See section 101(a)(44)(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. at 1108, *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

As discussed above, the petitioner has failed to establish that it was adequately staffed at the time of filing such that it was capable of relieving the beneficiary from having to allocate his time primarily to the performance of non-qualifying operational tasks. The petitioner has not established that a two-person business operation has a reasonable need for a president.

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.