

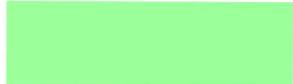


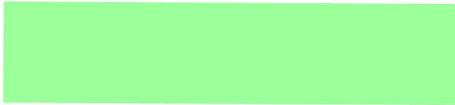
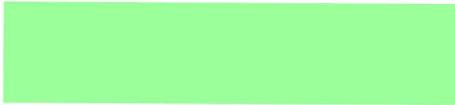
U.S. Citizenship
and Immigration
Services

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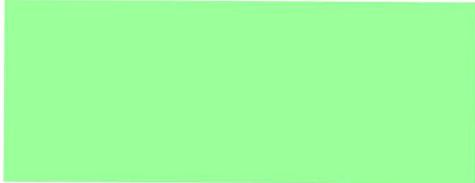
DATE: **JUN 25 2014** OFFICE: VERMONT SERVICE CENTER

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 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 is a Delaware limited liability company that purchases and exports medical equipment. The petitioner has now filed this nonimmigrant visa petition seeking to extend the beneficiary's employment in the position of chief financial officer in the nonimmigrant visa category of an L-1A 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 the United States 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

The record shows that the petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on April 30, 2013. Included among the petitioner's supporting evidence was a statement, dated April 22, 2013, signed by the beneficiary in his capacity as the petitioner's development manager. The beneficiary indicated that he would "operate and run" the petitioning entity for the purpose of purchasing medical equipment to be exported to the petitioner's foreign subsidiary. The beneficiary also stated that he would "be in full charge of all major decision-making," including all decisions regarding asset purchases and company finances, hiring, firing, and supervising all personnel, and negotiating major contracts. The petitioner also provided a document titled, "Organizational Chart," listing the beneficiary and the person in charge of purchasing and shipping as the two employees at the "executive/management" level and the two remaining employees – a secretary and a researcher – at the "lower level management" tier. The petitioner submitted pay stubs for the beneficiary's three subordinates showing that each employee was compensated a monthly wage of \$1,600.

On May 13, 2013, the director informed the petitioner that the record lacked sufficient evidence to warrant approval of the nonimmigrant visa petition filed on the beneficiary's behalf. The director acknowledged the petitioner's submission of foreign language documents and accordingly advised the petitioner that in order for such documents to be given evidentiary weight, they must be accompanied by English language translations that are certified by a translator who establishes that the translations are accurate and complete and that the translator is competent to translate from the foreign language into English. The director also instructed the petitioner to list the beneficiary's managerial or executive job duties and to provide a percentage breakdown indicating the portion of time that would be allocated to each individual job duty. In addition, the director asked for the submission of the petitioner's organizational chart or diagram depicting the company's organizational structure and staffing levels as well as a summary of each employee's job duties and educational levels.

The petitioner's response included a statement from counsel, dated June 10, 2013. Counsel catalogued the exhibits included in the response and stated that the petitioner currently has three employees all of whom are under the beneficiary's direct supervision. The petitioner provided a statement, which included the following description of the beneficiary's proposed employment:

[The beneficiary]'s position is in the executive level. He is the Chief [F]inancial [O]fficer . . . and that is the number one position in the [petitioning entity]. [He] is in full charge of all

policy and decision-making of the [petitioner]. Any major decisions of the U.S. Company[,] such as major contract execution or major policy change[,] is authorized by [the beneficiary].

[The beneficiary] will be [in] complete charge of the day[-]to[-]day management of the U.S. Company. His responsibility as Chief Financial Officer will be to manage the direction of the U.S. Company[,] which includes the hiring and firing of all personnel, supervision of all employees, [making] major asset purchase decision [sic], execution of major business decisions, decision [sic] as to acquisition of assets, [making] investment portfolio decision [sic], conducting and overseeing the financial affairs of the company and negotiating the purchase price of business equipment, machinery and financing terms with vendors or manufacturers, [sic] [The beneficiary] will be working forty hours a week. On some occasion [sic] on the weekend[,] depends [sic] on the meetings scheduled with the major companies pertaining [to] negotiation of major purchasing contracts.

[The] beneficiary is also responsible for evaluating the work performance of all employees. The method of evaluation depends on the responsibilities given to each employee and how well they perform. However, at this moment employees are being trained to perform their responsibilities at [sic] proper manner.

The petitioner added that, with the exception of yearly shareholders meetings, the beneficiary will not answer to a higher authority and will have control over the petitioning entity in meeting its goal of acquiring and exporting medical equipment to the foreign subsidiary and for the purpose of assisting "our [redacted] medical partners to update their medical technology" abroad.

The petitioner provided another organizational chart, which was titled "Executive and Management," and which listed the company's current employees, including the beneficiary as CFO, a warehouse manager who originally assumed the position title of secretary and listed as a lower level manager, an employee in charge of purchasing and shipping, and a researcher who would seek out inventory to be purchased and shipped to the petitioner's foreign subsidiary. In addition, the petitioner provided English translations of each employee's foreign educational credentials. Each translation contained a stamp stating "Translation is Correct" with a date and illegible signature.

After reviewing the petitioner's submissions, the director determined that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying executive capacity. Therefore, on July 5, 2013, the director issued a decision denying the petition. The director assessed the foreign document translations and determined them to be lacking in probative value given the petitioner's failure to provide evidence evaluating the educational levels the documents represent.

On August 6, 2013, U.S. Citizenship and Immigration Services (USCIS) received the petitioner's appeal of the director's decision.

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. Analysis

The primary issue to be addressed in this decision is whether the petitioner established that it will employ the beneficiary in a managerial or an 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 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, we review 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 the beneficiary's actual job duties and role in a business.

The petitioner must first show that the beneficiary performs the high-level responsibilities that are specified in the definitions of managerial or executive capacity. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend his or her time primarily performing 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. Alternatively, 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). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a position description that describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily job duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function.

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 determining whether the beneficiary manages professional employees, we must evaluate 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).

On the other hand, the statutory definition of the term "executive capacity" 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.* In addition, 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.

In the present matter, despite the petitioner's claim that the beneficiary would assume a position within an executive capacity, the supporting statements indicate that the petitioner relies on partial sections of the two statutory definitions, indicating on the one hand that the beneficiary assumes a supervisory role over the company's employees, which is a characteristic of a personnel manager, while on the other hand focusing on the beneficiary's placement at the top of the petitioner's organizational hierarchy and his policy-making role, which are characteristic of someone employed in an executive capacity. Although the petitioner is welcome to provide evidence to establish that the beneficiary's job duties fit all four criteria under each of the statutory definitions, the beneficiary may not claim to be employed as a hybrid "executive/manager." Despite our efforts to determine which statutory definition applies to the beneficiary's proposed position, the petitioner's deficient job description precludes us from being able to make such a determination. Instead of complying with the director's RFE instructions, which expressly stated that the petitioner was to list the beneficiary's job duties and indicate what percentage of the beneficiary's overall time would be allocated to each duty listed, the petitioner essentially restated the original job description, which consists of vague terminology that fails to convey a meaningful definition of the actual tasks the beneficiary would undertake on a daily basis. For

instance, the petitioner stated that the beneficiary would be in charge of all policy- and decision-making, which are both characteristic of an executive-level employee. However, the petitioner did not list a single task that would be representative of the beneficiary's policy- and decision-making role.

The petitioner also broadly stated that the beneficiary would be in charge of the petitioner's daily management, which would include hiring and firing as well as overseeing all personnel. Again, these are characteristics of a personnel manager. However, the petitioner did not expressly list any specific job duties that would explain how the beneficiary would manage his subordinates. Moreover, the petitioner failed to establish that the individuals who would be under the beneficiary's supervision are professional employees. As indicated above, the petitioner must establish that the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Even if we were to conclude that the evidence provided to establish each employee's educational credentials had sufficient probative value, the fact that an employee possesses a baccalaureate degree would not be sufficient. That being said, despite the director's analysis of the documentation submitted with regard to employee educational credentials, the record lacks evidence to show that the translations submitted can be deemed as certified, given that the translator of the documents cannot be identified and, with the exception of the stamp stating that the translation is correct, he or she has not certified that the translation is complete or that he or she is qualified to translate from the foreign language into English. *See* 8 C.F.R. § 103.2(b)(3). As a result of the evidentiary deficiencies discussed herein, the foreign language documents the petitioner provided lack probative value and thus will not be accorded any weight in this proceeding.

The petitioner also failed to establish that the beneficiary would be employed in a qualifying executive capacity. Despite the beneficiary's elevated position within the petitioner's organizational hierarchy and his authority to direct the organization, as required under the statutory definition of executive capacity, the record lacks evidence to establish that the beneficiary will primarily focus on the broad goals and policies of the organization. As indicated above, the petitioner failed to comply with the director's request for a supplemental job description containing a detailed account of the beneficiary's daily qualifying tasks and their respective time allocations. Instead, the petitioner provided a nearly identical job description as the one that was originally included in the petitioner's original supporting statement and thus failed to provide requested evidence. We note 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).

Given that the petitioner failed to provide a detailed description of the beneficiary's proposed employment, it is unclear what specific job duties the beneficiary would perform or that such duties would be primarily within a qualifying executive capacity. In fact, the petitioner readily stated that some unidentified portion of the beneficiary's time would be allocated to such non-qualifying tasks as contract negotiation and training employees to perform their respective job duties. The fact that the subordinate employees were not already trained when the petition was filed further indicates that the beneficiary would have to be directly engaged in not only training those employees, but also in assisting them in the performance of their respective operational tasks until the training is complete. As the petitioner indicated that the beneficiary is currently in the process of training his subordinates, it is unclear when the staff would be fully trained to actively relieve the beneficiary from having to perform the daily operational tasks that are necessary for the petitioner to function successfully in its business endeavors. The petitioner's statements do, however, indicate that the

petitioner did not have a trained staff readily available to relieve the beneficiary from having to perform daily operational tasks at the time the petition was filed.

While 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). Furthermore, merely establishing that the beneficiary performs tasks at a professional level is not sufficient unless those tasks rise to the level of managerial or executive capacity. Given the considerable evidentiary deficiencies that were fully discussed in the above analysis, it cannot be concluded that the petitioner attained a stage of development where it either required or had the organizational complexity to support an employee who would focus his time primarily on the performance of tasks within a qualifying managerial or executive capacity and on the basis of this conclusion the instant petition cannot be approved.

IV. Beyond the Director's Decision

Finally, while the director limited his decision to a discussion that focused on the beneficiary's proposed employment with the petitioning entity, we find that the record points to at least one additional deficiency that further precludes us from approving of this petition. Namely, the record indicates that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial capacity. See 8 C.F.R. § 214.2(l)(3)(iii).

The record shows that, with the exception of providing the beneficiary's position title of development manager and indicating that the beneficiary had twelve subordinates, the petitioner provided little information about the job duties the beneficiary performed or the tasks performed by the employees he allegedly supervised. Although the April 16, 2013 supporting statement from [REDACTED] indicates that the beneficiary had an oversight role over "the development, research and analysis of the medical center and its equipments [*sic*]," the petitioner did not include a discussion of the beneficiary's subordinates, what tasks they performed that required the beneficiary's oversight, or how they relieved the beneficiary from having to primarily perform non-qualifying tasks. The petitioner also failed to clarify what tasks were involved in "building [a] network between other branches" or what the beneficiary's specific role was in updating equipment. Without further explanation, simply stating that the beneficiary built networks and updated equipment indicates that the beneficiary performed various non-qualifying job duties with little information explaining what portion of his time was devoted to the non-qualifying tasks versus those tasks that would be deemed as managerial or executive. Merely claiming that the beneficiary assumed a supervisory role over twelve employees does not establish that the employment was within a qualifying capacity, particularly when no information has been provided to establish that the subordinates were supervisory, professional, or managerial employees. See section 101(a)(44)(A) of the Act.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See

Spencer Enterprises, Inc. v. United States, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO reviews appeals on a *de novo* basis). Accordingly, even though the above two issues were not addressed in the director's original decision, we find that the petitioner failed to meet the regulatory requirements discussed 8 C.F.R. §§ 214.2(l)(3)(iii) and on the basis of the above discussed adverse findings, the instant petition cannot be approved.

V. 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.