

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

87



File: EAC 07 021 50829 Office: VERMONT SERVICE CENTER Date:

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)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner filed this nonimmigrant visa petition seeking approval of the employment of the beneficiary as vice president of the United States operation 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 United States operation is a corporation organized under the laws of the State of Georgia and is allegedly a business development company. The petitioner is the beneficiary's foreign employer and is allegedly a business entity formed under the laws of Portugal.

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

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel to the petitioner asserts that the director erred and that the beneficiary will primarily perform qualifying duties. In support of the appeal, counsel submits additional evidence and implies that Citizenship and Immigration Services (CIS) should treat the petitioner as a "new office."

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

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

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

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

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

The petitioner does not clarify in the initial petition whether the beneficiary will primarily perform managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act and, on appeal, the petitioner asserts in a letter dated December 28, 2006 that the beneficiary will be employed in an "executive managerial position." A petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. Given

the lack of clarity, the AAO will assume that the petitioner is asserting that the beneficiary will be employed as either an executive *or* a manager and will consider both classifications. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

In support of its petition, the petitioner submitted an organizational chart describing the personnel structure of the United States operation. The beneficiary, the proposed vice president, is shown reporting to a chief operating officer and supervising four account managers. It is unclear whether the United States operation currently has any employees.

The United States entity described the proposed duties of the beneficiary, the vice president, in an undated letter appended to the petition as follows:

Executes and implements the delivery of the company's services. Identifies the new areas and prospects for growth, defines the sales plan, expands the product mix, and creates the necessary business development and sales structure for the growth of the corporation. Recruits and manages the business development and sales team – account managers. Personally manages the company's key accounts. Reports to the [chief operating officer].

The account managers are, in turn, defined as performing the tasks necessary to provide a service.

On November 7, 2006, the director requested additional evidence. The director requested, *inter alia*, an organizational chart for the United States operation clearly specifying the beneficiary's proposed subordinates, detailed job descriptions for the beneficiary's proposed subordinates including a breakdown of the number of hours devoted to each duty on a weekly basis, copies of the subordinates' educational credentials, and a copy of the United States operation's 2005 tax return and Forms W-2.

In response, counsel submitted a letter dated November 22, 2006 in which counsel asserts that the beneficiary will be employed as "chief operating officer" of the United States operation. Neither counsel nor the petitioner acknowledges that this assertion is materially different from the claim made in the initial petition that the beneficiary will be the "vice president" of the United States operation. The petitioner also submitted a materially different organizational chart for the United States operation. The new chart shows the beneficiary serving as "chief operations officer" and as supervising the "vice president" who, in turn, supervises the account managers. As counsel asserts in the letter dated November 22, 2006 that the beneficiary "will need to recruit the account managers," it appears that these employees have not yet been hired. Overall, the record does not establish that the United States operation currently has any employees.

The petitioner also submitted job descriptions for the positions listed on the organizational chart. As these job descriptions are in the record, they will not be repeated here. Generally, the "chief operating officer" is described as "overseeing day-to-day operations" and as managing the business. The "vice president" is generally described as leading the "sales team" and managing sales activities.

On December 18, 2006, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

On appeal, counsel asserts that the director erred and that the beneficiary will primarily perform qualifying duties. In support of the appeal, counsel submits additional evidence and implies that the Citizenship and Immigration Services (CIS) should treat the United States operation as a "new office."

Upon review, counsel's assertions are not persuasive.

As a threshold issue, it must be noted that it was appropriate for the director to treat the United States operation as a fully-formed entity. Consequently, the director was not obligated to apply the more lenient "new office" criteria found at 8 C.F.R. § 214.2(l)(3)(v) to the instant petition. The petitioner clearly indicates in the L Classification Supplement to Form I-129 that the beneficiary is *not* coming to the United States to open a "new office." Furthermore, the record indicates generally that the United States operation has been in existence and operating since 2004. While the petitioner claims that it purchased its interest in the United States operation only a few months before the filing of the instant petition, this fact alone would not necessarily establish that the petitioning organization meets the definition of a "new office" in the regulations. See 8 C.F.R. § 214.2(l)(1)(ii)(F). Absent a specific assertion that the beneficiary is coming to the United States to open a new office coupled with evidence that the petitioning organization meets the regulatory definition of a "new office," the director appropriately treated the United States operation as a fully-formed entity. Regardless, counsel's attempt to first raise this issue on appeal was inappropriate. A petitioner may not make material changes to a petition on appeal in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).¹

It must also be noted that the petitioner's attempt to change the beneficiary's job duties and level of responsibility in its response to the Request for Evidence was also inappropriate. As indicated above, the petitioner clearly asserts in the initial petition and supporting documentation that the beneficiary will be employed as the "vice president," that he will report to a "chief operating officer," and that he will supervise the account managers. However, in response to the Request for Evidence, the petitioner attempts to change the beneficiary's job title to "chief operating officer" and to claim that the beneficiary will supervise a "vice president" who, in turn, will supervise the account managers. The purpose of the Request for Evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a Request for Evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. Therefore, the AAO will consider the job title (vice president), and the

¹It is noted that, even applying the more lenient "new office" criteria found at 8 C.F.R. § 214.2(l)(3)(v), the petitioner has failed to establish its eligibility for the benefit sought. The record is devoid of evidence establishing that the United States operation has secured sufficient physical premises to house the new office, that a sufficient investment has been made in the United State operation, or the scope, nature, and financial goals of the enterprise. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

associated level of responsibility (direct supervisor of account managers), ascribed to the beneficiary in the initial petition.²

In view of the above, when examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. As explained above, a petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary will act in a "managerial" or "executive" capacity. In support of the petition, the petitioner has submitted a vague and non-specific job description which fails to sufficiently describe what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary will "create and manage sales and business development plans" and "obtain new, profitable business." However, the petitioner does not define these plans nor does it explain specifically what new and profitable business the beneficiary will obtain. Furthermore, the petitioner does not clarify what, exactly, the beneficiary will do in coaching and managing the sales staff given that the petitioner does not appear to employ any account managers. The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description which includes inflated job duties does not establish that the beneficiary will actually perform managerial or executive duties. 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190.

It appears that the beneficiary will primarily perform non-qualifying administrative or operational tasks which will not rise to the level of being managerial or executive in nature. For example, the job duties ascribed to the beneficiary are primarily related to selling and marketing the petitioner's services. However, sales and marketing duties are non-qualifying administrative or operational tasks, and the petitioner has not established that a subordinate staff is available to relieve the beneficiary of the need to perform these tasks. The United States operation's plan to hire additional staff members to assist the beneficiary in the performance of his duties is not relevant to the instant petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or

²It is also noted that, on appeal, counsel attempts to supplement the record with additional evidence addressing the beneficiary's proposed job duties. However, the director specifically requested that the petitioner provide a detailed job description for the beneficiary in the Request for Evidence. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248; *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). As it appears that the beneficiary will primarily perform the tasks associated with the sales and marketing duties ascribed to him, it has not been established that the beneficiary will be "primarily" employed as a manager or an executive. 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).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. First, as indicated above, the record is not persuasive in establishing that the beneficiary will supervise any employees. It appears that the beneficiary's subordinates, the account managers, have not yet been hired. Second, even assuming that the account managers have been hired, the petitioner has not described these employees as having supervisory or managerial responsibilities. To the contrary, these employees are described as performing the tasks necessary to provide a service. In view of the above, the beneficiary would appear to be primarily a first-line supervisor of non-professional workers, the provider of actual services, or a combination of both. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

Moreover, even though the petitioner asserts that the account managers must possess bachelor's degrees, the petitioner has not established that these workers are truly "professional" employees. In evaluating whether the beneficiary will manage professional employees, the AAO 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. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). In this matter, the petitioner has not ascribed duties to the account managers which would truly require a bachelor's degree for entry into the field of endeavor. The United States operation's subjective preference to employ account managers having bachelor's degrees will not establish that the positions are truly "professional" in nature. Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.³

³While the petitioner has not argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. 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. 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 written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. 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. 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.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will act primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary will do on a day-to-day basis. Moreover, as explained above, it appears that the beneficiary will be primarily employed as, at most, a first-line supervisor and will primarily perform the tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that CIS "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)). Furthermore, it is appropriate for CIS 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). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

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. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to document that the beneficiary's duties will be primarily managerial. Also, as explained above, the record establishes that the beneficiary will primarily be, at most, a first-line supervisor of non-professional employees and will perform non-qualifying operational or administrative sales and marketing tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties will be managerial, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

In this matter, the petition contains serious inconsistencies regarding the proposed staffing of the United States operation. As indicated above, the petitioner initially asserts that the beneficiary will be employed as the "vice president." In response to the Request for Evidence, the petitioner attempts to completely change the beneficiary's level of authority and claim that the beneficiary will be employed as the "chief operating officer." The petitioner offered no explanation for this fundamental change in responsibilities, which undermines the genuineness of both the position offered to the beneficiary and the United States operation in general. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Accordingly, the petitioner has failed to establish that the beneficiary will primarily perform managerial or executive duties, and the petition may not be approved for that reason.

Beyond the decision of the director, the petitioner failed to establish that the beneficiary was employed abroad for at least one continuous year in a position that was managerial or executive in nature. 8 C.F.R. §§ 214.2(l)(3)(iii) and (iv).

The petitioner described the beneficiary's duties abroad in a letter dated October 10, 2006 as follows:

[The beneficiary] has been the business director for [the foreign employer] here in Portugal over the last five years. In this position he has been responsible for not only the development of all commercial endeavors but also for the day-to-day responsibilities of a six person sales team. His responsibilities and accomplishments are demonstrated in the continued expansion of our investor and developer client base.

The beneficiary's duties were also described in the Form I-129 as follows:

Manager of 6 person team. Service to key accounts. Development of new business. Recruitment of sales people. Marketing and advertising. Organization of financing for customers.

Upon review, the record is not persuasive in establishing that the beneficiary was employed abroad in a managerial or executive capacity. The petitioner failed to specifically describe the beneficiary's job duties abroad. Specifics are clearly an important indication of whether a beneficiary's duties were 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, *aff'd*, 905 F.2d 41. Furthermore, although vague, the job duties ascribed to the beneficiary appear to be primarily non-qualifying sales and marketing tasks, first-line supervisory tasks related to the supervision of a sales team, and the provision of actual services to clients. Absent detailed descriptions of the duties of both the beneficiary and his purported subordinates, it is impossible for CIS to discern whether the beneficiary was "primarily" engaged in performing managerial or executive duties abroad and, more specifically, whether he supervised and

