



U.S. Citizenship
and Immigration
Services

[REDACTED]

D7

DATE: **DEC 31 2012** Office: VERMONT SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional *information that you wish to have considered*, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you.

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's status as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Florida corporation established in March 2010, states it is engaged in the automobile export business. It is a wholly owned subsidiary of [REDACTED] located in Russia. The beneficiary was previously granted one year in L-1A status in order to open a new office in the United States as the petitioner's President and General Manager, and the petitioner now seeks a two-year extension of his status.

The director denied the petition, concluding that the petitioner failed to establish that it will employ the beneficiary in a qualifying executive or managerial capacity. The director reasoned that the petitioner had not shown that the beneficiary was supervising subordinate managers, professionals or supervisors and therefore that he did not qualify as a personnel manager under the regulations. Further, the director concluded that the record failed to establish that organizational structure of the petitioner was sufficient to support the beneficiary in a managerial or executive capacity, and that due to the lack of employees, it is likely that beneficiary will be primarily performing non-qualifying duties consistent with the provision of goods or services and the day-to-day operation of the enterprise.

On appeal, counsel asserts that the record does indeed establish that the beneficiary functions as a personnel manager, a function manager and an executive and contends that the director clearly erred in not reaching this conclusion. Counsel maintains that the beneficiary qualifies as a personnel manager because he oversees and manages the petitioner's entire operation and delegates the day-to-day operations to his managerial or professional subordinates. Further, counsel asserts that the beneficiary qualifies as an executive because he directs the management of the organization, establishes its goals and policies, and exercises independent discretionary authority. Counsel also contends that the beneficiary qualifies as a function manager since he establishes standards for the day-to-day operations of an essential function. Finally, counsel maintains that the director placed undue influence on the small size of the business and incorrectly based his determination on the number of employees reporting to the beneficiary.

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 (1)(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.

Further, the regulation at 8 C.F.R. 214.2(1)(14)(ii) states that a petitioner seeking an extension of a one year "new office" petition accompany their Form I-129 petition with the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (1)(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.

II. Discussion

As stated, the director denied the petition finding that the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or executive capacity under the extended petition.

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.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that it will employ the beneficiary in a *qualifying managerial or executive capacity* under the extended petition.

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). In support of the I-129 Nonimmigrant Worker Petition, the petitioner submitted the following job duties:

- Direct and manage activities and operations in connection with the business development of the U.S. subsidiary Company including the development of the U.S. Company's marketing, sales and investments - 45%
- Oversee all other financial aspects of the company and set and implement strategic policies and objectives - 20%

- Plan, formulate and implement administrative and operational policies and procedures - 10%
- Supervise and exercise total executive authority over in-house subordinate employees - 10%
- Coordinate international strategic planning of the business development and Act as liaison and representative for the Petitioner's foreign parent company in the U.S. with the Parent Company in Russia - 15%

The director found that the petitioner had not sufficiently described the beneficiary's duties to qualify as a manager or executive under the Act and asked that the petitioner submit a more detailed description of the beneficiary's duties with the petitioner, including the time spent performing managerial or executive duties. In response to the director's Request for Evidence, the petitioner submitted the following description of the beneficiary's job duties:

Managerial:

- A. Establish goals and policies of [the petitioner] (10%);
- B. Supervise and exercise total executive control over in-house subordinate employees and outsourced employees (10%);
- C. Oversee company operations [sic] subordinate employees to ensure productions efficiency, quality, service, cost-effective management of resources (15%);
- D. Negotiating with car dealership managers to obtain best pricing (10%);
- E. Leading international business development initiatives (10%);
- F. Meeting with the Marketing and Sales Manager and Logistics to discuss revenue, cost and sales goals (8%);
- G. Analyzing and preparing financial statements for shareholders in the United States and Russia (8%);
- H. Plan, develop, and delegate the implementation of strategies for generating resources and/or revenues for the company (10%);
- I. Formulating, directing and coordinating marketing activities and policies to promote [the petitioner's] services to clients in Florida and Russia (5%);
- J. Review activity reports and financial statements to determine progress and status in attaining objectives, and revise objectives and plans in accordance with current conditions (5%);

Administrative:

- K. Oversee company financial results in order to promote revenue, profitability, and growth as an organization (5%);
- L. Approve company operational procedures, policies, and standards (2%);
- M. Negotiating contracts with buyers, sellers and outsourced employees (2%);

Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient: the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has provided no specifics as to how the beneficiary will carry out the general tasks and goals listed above as a part of his

daily duties. In fact, portions of the duty description are so overly vague that they provide little or no probative value as to the beneficiary's day-to-day activities, and appear to be simply repetitive of the statutory language. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). For instance, the petitioner claims the beneficiary "sets goals and policies" of the petitioner, but provides no specifics regarding the nature of these goals and policies. Further, the petitioner provides no examples of the mentioned "business development initiatives" or "strategies for generating resources and/or revenues for the company." 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, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Further, the beneficiary's duty description, and the record generally, suggest that the beneficiary will not primarily perform managerial or executive duties, but instead will be primarily engaged in performing non-qualifying duties. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Although the petitioner does delegate certain duties as "managerial" and some as "administrative," certain duties referenced as managerial are indeed not those traditionally deemed managerial or executive pursuant to the Act. For instance, the following duties listed as managerial are in fact consistent with running the day-to-day operations of the enterprise and therefore non-qualifying duties: (1) overseeing company operations (15%); (2) negotiating with car dealership managers to obtain best pricing (10%); and (3) analyzing and preparing financial statements (8%). As such, approximately 33% of the managerial duties listed by the petitioner are indeed non-qualifying duties, thereby casting doubt related to the petitioner's conclusion that the beneficiary spends 91% of his time performing managerial duties. 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).

Portions of the record, outside the duty description, further support that the beneficiary will be primarily performing non-qualifying duties consistent with the day-to-day operations of the enterprise. For instance, the beneficiary is clearly offered in the original job duties submitted with the original petition as primarily performing non-qualifying duties consistent with the day-to-day operation of the business. Indeed, the petitioner stated in its letter submitted in response to the director's RFE that the beneficiary "decides which vehicles to purchase, from whom, and sets the sales price." Additionally, the evidence in the record supports that the beneficiary is making all purchases for the petitioner and not delegating these duties to his Sales and Marketing Manager as claimed. In fact, nearly all of the vehicle purchases submitted on the record are signed by the beneficiary himself, suggesting he was directly involved in these purchases as the letter of January 5, 2012 suggests. Practically none of the vehicle transactions documented in the record have been completed by anyone other than the beneficiary. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Again, the definitions of executive and managerial capacity 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 prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

In the job duty description above, the petitioner lists duties that are consistent with supervising personnel and claims on appeal that the beneficiary qualifies as a personnel manager because he manages personnel and delegates day-to-day operations to these personnel. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). The petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. 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). 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."

Here, the petitioner has not established that the beneficiary will direct subordinate managers or supervisors. See § 101(a)(44)(A)(ii) and Section 101(a)(44)(B) of the Act. The petitioner states that the beneficiary will supervise the following employees: (1) Office Manager; (2) Sales and Marketing Director; and (3) a Logistics Manager. On appeal, counsel claims the Sales and Marketing Director as a manager, offering an organizational chart in which the Logistics Manager, primarily responsible for shipping and storage of vehicles, reports to the aforementioned Sales and Marketing Director. However, at the time of filing the petition, the petitioner clearly indicated that it had only three employees: the beneficiary, the office manager, and the sales and marketing manager. The initial organizational chart indicated that both subordinates would report directly to the beneficiary and that neither would supervise subordinate personnel. 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 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'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). 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'r 1998).

Further, as discussed, the record in general does not support that the beneficiary is delegating the day-to-day operations of the petitioner to his claimed subordinates, allowing him to act as a personnel manager under the Act. As noted, practically every day-to-day activity, such as the buying and selling of automobiles; their shipping back to Russia; and other related contracting, is shown to be completed by the beneficiary himself, based on the submitted documentation. As such, the petitioner has not submitted sufficient evidence, beyond an unsupported organizational chart and subordinate job duty descriptions, to establish that the beneficiary supervises other managers or supervisors to qualify him as a personnel manager under the Act.

Counsel further contends that the director erred in finding that the beneficiary's subordinates are not professionals, claiming that both the Office Manager and the Sales and Marketing Manager are professional employees with "professional educations." The AAO does not concur with this assessment. The petitioner has offered little to establish the beneficiary's subordinates as professionals other than showing that the Office Manager has a bachelor's degree and claiming the Sales and Marketing Manager has a "university level engineering degree." The AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the duties attributed to the beneficiary's subordinates. Moreover, the petitioner does not contend, or provide evidence to illustrate, that any of these positions require a bachelor's degree but only states that these subordinates happen to have degrees. As such, the beneficiary's subordinates have not been established as professionals according to the Act.

Counsel also asserts on appeal that the beneficiary qualifies as a function manager. Counsel contends that the director incorrectly focused on the number of employees reporting to the beneficiary as determinative of his status as a manager. Indeed, counsel maintains that one could qualify as a function manager without any employees at all and refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1A nonimmigrant classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. 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 are not similarly binding.

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 detailed account of the proffered position that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 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. 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* (citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)).

In the present matter, the petitioner has not established that the beneficiary qualifies as a function manager. As noted by the director, the petitioner does not claim that the beneficiary manages a separate department, subdivision, function or component of the petitioner, but indeed states that he oversees the whole of the organization. Although the counsel has identified a list of duties deemed "key functions" that the beneficiary performs, this list provides little insight as it includes many day-to-day operational duties such as selecting service providers, purchasing vehicles, and working directly with auctioneers dealerships and transportation companies. As such, the petitioner has not identified with specificity the essential function managed by the beneficiary, as required by law, nor provided the percentage of time he spends on managing a specific function. Again, the petitioner only offers that the beneficiary manages the whole of the U.S. operation. Claiming that the beneficiary is the only manager in the company and responsible for its overall operation does not qualify him as a function manager as that term is defined above. The petitioner must still establish that the beneficiary performs primarily managerial duties, and as discussed, the totality of the evidence on the record suggests that the beneficiary is primarily performing day-to-day operational duties.

On appeal, counsel also maintains that the beneficiary is employed in an executive capacity due to his direction of the management of the organization, his full discretionary authority, and his focus on establishing the "goals and policies" of the petitioner. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of 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 he has an executive title or because he "directs" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

Here, the petitioner has failed to show with a preponderance of the evidence that the beneficiary is an executive. In fact, the petitioner has done little more than directly recite the statutory definition of "executive capacity" when explaining the beneficiary's duties. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). As noted, the petitioner has not provided any specific examples of how the beneficiary sets "goals and policies" for the organization, and has shown little other than that he is the senior employee in charge of the U.S. company. Having discretionary authority over an organization alone does not establish the beneficiary's employment in an "executive capacity" under the Act.

In fact, the totality of the evidence establishes that the beneficiary will be primarily conducting the day-to-day operations of the enterprise, such as purchasing vehicles, selecting suppliers and arranging for the shipment of said vehicles back to Russia. Therefore, the failure to show with supporting evidence that the beneficiary effectively delegates day-to-day functions to other managerial or professional employees, and his performance of non-qualifying duties, suggests that beneficiary is primarily focused on the day-to-day operations of the enterprise and not focusing on setting the broad goals and policies of the organization consistent with the statutory definition of "executive capacity." 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Further, the petitioner has not established that the beneficiary dictates to subordinate managerial employees within a complex organizational hierarchy. In fact, as stated, the petitioner has not established a single other supervisory, managerial, or professional employee working for the beneficiary. While the AAO does not doubt that the beneficiary exercises authority over the company as its president and general manager, the petitioner has not established that he performs primarily executive duties as defined by the Act.

In conclusion, the petitioner has not established with sufficient evidence that the beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition. Accordingly, the appeal will be dismissed.

III. Conclusion

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.