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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
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U.S. Citizenship  
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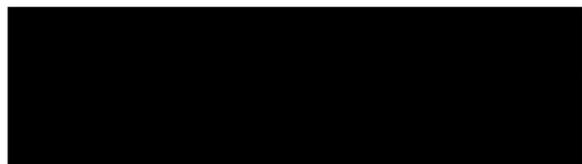


DATE: **JAN 11 2012** Office: CALIFORNIA SERVICE CENTER FILE:

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:



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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
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 AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's employment as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a [REDACTED] states that it operates a manufacturing consulting and lean coaching business. It claims to be a subsidiary of [REDACTED] located in London, England (U.K.). The beneficiary was previously granted L-1A status for a period of ten months, from June 2008 to April 2009, to open a new office in the United States, and the petitioner now seeks to extend his status so that he may continue to serve in the position of [REDACTED]

The director denied the petition, concluding that the petitioner failed to 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 for the petitioner asserts that the beneficiary is employed both in an executive and managerial position fully satisfying all requirements of the two statutory definitions. Counsel submits a brief and additional evidence in support of the appeal.

#### **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. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

### *Facts and Procedural History*

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on February 2, 2009. The petitioner indicated on the Form I-129 that it is operating a manufacturing consulting and lean coaching business with four employees and a gross annual income of \$1.7M.

The petitioner submitted a letter in support of the petition detailing the beneficiary's duties as follows:

- [A]ssist senior management to establish effective policies and strategies related to the implementation and integration of effective lean manufacturing processes and technology into client systems and operations. [Petitioner] management will then utilize the directives and policies imparted by [the beneficiary] to employees who will provide the execution of the actual on-site implementation and integration.
- [C]reat[e] policies for [the petitioner] related to quality assurance and client satisfaction.
- [C]oordinate and oversee the primary function of [the petitioner's] business operations which is the implementation of efficient management and manufacturing systems for our clients using his experience, both in the technical and managerial aspects of lean manufacturing process techniques.
- [D]efine and develop plans for implementation of goals with clients to increase efficiency and will meet with management to review the status of projects.
- [O]versee identifying, contacting, negotiating, contracting, and implementing our [petitioner] services to clients.
- [I]dentify client operational performance deficits and appropriate levers and build a detailed understanding of major operational opportunities.
- [O]versee the performance of diagnostic gap analysis for all key metrics (cost, quality, productivity, lead time, delivery, reliability, safety), and will assist in performing operational analyses to determine levels of waste, variability, and inflexibility.
- [P]erform benchmark visits and initial rough-cut assessment of proposed improvement levers, [as] well as provide diagnostic presentations to client.
- [A]ssist clients in developing top team strategy and vision, confer with top management, review and oversee production system development and implementation, be involved with future-state design, planning and implementation, and support pilot projects.
- [R]esponsible for personnel decisions in the U.S. including recruitment, hiring, promotion, performance reviews, and employment decisions, including employment assignments.
- [W]ill have a great deal of latitude in his actions and will report only to the Managing Director. Will be responsible for creating budgets and for fiscal decisions.
- [R]esponsible for establishing effective policies and long-term strategic planning for the implementation and expansion of our U.S. operations.
- [R]esponsible for creating, directing, establishing goals, and implementing the larger-scale strategic vision for [the petitioner].
- [E]xpected to meet with clients, either first hand or via teleconference, to ascertain client satisfaction levels and to discuss and address client concerns or issues either before, during, or after the integration process.

- [R]eview corporate structure, assess and resolve strategic and operating challenges, thereby improving our overall goals, objectives, policies, strategies, administrations, organization, and operation.
- [A]pply his knowledge in both the industry and our customer's specific businesses, and thereby will be able to assess the demand for products and services by our customers and identify potential customers by maintaining existing business and generation of new business from existing customers.
- [A]dvice management on means of obtaining new customers and retaining existing customers.
- [A]nalyze our company's annual revenues, employment policies and expenditures, and will develop solutions for increased profitability.
- [I]nterview our employees and observe our operations and prepare reports to management to improve our organization during this critical expansion period.
- [M]eet with executives of our company and conduct studies and surveys to obtain data and recommend solutions including initial development of business plans, strategic/creative briefings and work closely with all of our departments to effectively implement our budgets and goals and policies.

The petitioner also submitted an organizational chart that lists the beneficiary as director, four named subordinates with Senior Specialist titles, one to-be-determined subordinate with Senior Specialist title, and one to-be-determined subordinate with Specialist title. The organizational chart also shows future plans to hire three additional Senior Specialists and two Specialists in 2009.

The director issued a request for additional evidence ("RFE") on April 1, 2009 instructing the petitioner to submit, *inter alia*, the following: (1) indicate the total number of employees at the U.S. location where the beneficiary will be employed; (2) a copy of the U.S. company's organizational chart clearly identifying the beneficiary's position and the employees he supervises by name and job title, including a brief description of job duties, educational level, annual salaries/wages and immigration status for all employees under the beneficiary's supervision; (3) a more detailed description of the beneficiary's duties in the U.S. including the percentage of time spent in each of the listed duties; (4) copies of the U.S. company's quarterly wage reports for all employees for the last four quarters; and (5) copies of the U.S. company's payroll summary evidencing wages paid to employees.

In response to the RFE, the petitioner submitted a letter of support detailing the beneficiary's duties and included an approximate percentage breakdown of his duties as follows:

- 20% - Establish policies and strategies related to the implementation, diversification of client base, and integration of services
- 30% - Supervision of specialized knowledge personnel and employment decisions including performing assessments and recruitment of new personnel
- 20% - Meetings with management and personnel to track project progress, business development, coordination of activities
- 30% - Client relations (contact, negotiate, contract, implement services, troubleshoot, diversification)

The petitioner submitted a new organizational chart that lists the beneficiary as director, two named subordinates with Coaching Senior Specialist titles, and three to-be-determined subordinates with Lean Coach titles. The petitioner stated that the beneficiary's two subordinate employees hold L-1B status and are compensated by the petitioner's parent company.

The petitioner also submitted a comprehensive position description for the beneficiary's subordinates, the [REDACTED] that states in part:

\* \* \*

A Senior Lean Coaching Specialist assists senior management in identifying, contacting, negotiating, contracting, and implementing [the petitioner's] services to clients and identifies client operational performance deficits and appropriate levers and build[s] a detailed understanding of major operational opportunities. A Senior Lean Coaching Specialist performs diagnostic gap analysis for all key metrics (cost, quality, productivity, lead time, delivery, reliability, safety), and assists in performing operational analyses to determine levels of waste, variability, and inflexibility. A Senior Lean Coaching Specialist performs benchmark visits and initial rough-cut assessment of proposed improvement levers, and [sic] well as providing diagnostic presentations to client.

In relation to the business development activities, a Senior Lean Coaching Specialist utilizes knowledge of [the petitioner's] processes and procedures to help expand U.S. operations and increase the company's presence in the North American market and advises management on means of obtaining new customers and retaining existing customers. A Senior Lean Coaching Specialist analyzes our company's annual revenues, employment policies and expenditures, and develops solutions for increased profitability, as well as meeting with the executives of our company and conducting studies and surveys to obtain data and recommend solutions including initial development of business plans, strategic/creative briefings and work closely with all of our departments to effectively implement our budgets and goals and policies.

\* \* \*

The director denied the petition on May 20, 2009, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive position under the extended petition. In denying the petition, the director observed that the position description submitted indicates that the beneficiary will be involved in providing the services of the company.

In support of the appeal, counsel submits a brief in which he asserts that the director reached an inappropriate conclusion. Counsel states:

[The beneficiary's] managerial duties were explained in the original L-1A filing in March of 2008 which was approved in June of 2008. Similar details were included in this extension application. Petitioner evidenced that [the beneficiary] met the statutory definition of Manager and Executive when he first entered the U.S. and that the position was relatively unchanged on extension, except the expansion of managerial and executive responsibilities due to the company's success. Despite the extension demonstrating the growth of the company, [the director] now denied an extension.

Counsel's suggestion that the extension petition should be adjudicated similar to the initial petition for a new office because it is based on similar job duties is tenuous. The requirements for a new office and a new office extension petition differ in that the initial new office petition was afforded more leniency in order to establish the business in the U.S. The expectation is that the U.S. business supports an executive or managerial position on extension. The prior approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, a new office petition is governed by the regulations at 8 C.F.R. § 214.2(l)(3)(v) while the extension petition is governed by 8 C.F.R. § 214.2(l)(14)(ii). After one year,

USCIS will extend the validity of the new office petition only if the entity demonstrates that it has been doing business in a regular, systematic, and continuous manner "for the previous year." 8 C.F.R. § 214.2(l)(14)(ii)(B). There is no provision in USCIS regulations that allows a petitioning corporation additional petitions under the "new office" regulatory accommodation for managers and executives. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension of the prior approved L-1 petition.

The additional evidence submitted by counsel consists of a letter from the petitioner and numerous news articles about companies in the U.S. embracing the lean coaching methods.

#### *Discussion*

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a primarily 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). 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.* 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 will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The AAO does not doubt that the beneficiary will have the appropriate level of authority over the petitioner's business as its director. However, the definitions of executive and managerial capacity each 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").

In the instant matter, the petitioner and counsel provided several statements on the beneficiary's duties. In the percentage breakdown of the beneficiary's duties, the petitioner describes the beneficiary's duties in very broad terms, noting he will "[e]stablish policies and strategies related to the implementation, diversification of client base, and integration of services – 20%," be responsible for "[c]lient relations (contact, negotiate, contract, implement services, troubleshoot, diversification) – 30%," and engage in "[s]upervision of specialized knowledge personnel and employment decisions including performing assessments and recruitment of new personnel – 30%." Some of these duties merely paraphrase the statutory definition of executive capacity and managerial capacity. See section 101(a)(44)(A) and (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. 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.).

Additionally, the percentage breakdown of the beneficiary's duties do not correlate with the detailed duties provided by the petitioner. Based on the amount of detail and number of duties provided for the beneficiary's role with the customer/client, it does not appear that the percentage breakdown is accurate. In denying the petition, the director cited some of the beneficiary's responsibilities such as, meeting with new and existing clients, providing information, addressing concerns, troubleshooting problems, establishing new relationships, and increasing client base and stated that the beneficiary appears to be providing a service or a product of the company.

Furthermore, duties, such as, "create policies related to quality assurance," "oversee diagnostic gap analysis and assist with operational analysis," "perform benchmark visits and initial assessments as well as provide diagnostic presentations to client," "assist clients in developing top team strategy and vision and be involved with planning and implementation of future-state designs," "meet with clients to ascertain client satisfaction," "assess the demand for products and services by customers and identify potential customers by maintaining existing business and generation of new business from existing customers," and "advise management on means of obtaining new customers," do not appear to be included in the percentage breakdown provided by the petitioner. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as those mentioned above, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing 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). Collectively, this brings into question how much of the beneficiary's time can actually be devoted to managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. The petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of these percentages, the record does not demonstrate that the beneficiary will function primarily as a manager or executive.

In fact, there are a number of duties that overlap the beneficiary's and his subordinates' position description, such as "identify client operational performance deficits and appropriate levers and build a detailed understanding of major operational opportunities;" "perform diagnostic gap analysis for all key metrics (cost, quality, productivity, lead time, delivery, reliability, safety), and perform operational analyses to determine levels of waste, variability, and inflexibility;" "perform benchmark visits and initial rough-cut assessment of proposed improvement levers, [as] well as provide diagnostic presentations to client;" "advise management on means of obtaining new customers and retaining existing customers;" "analyze our company's annual revenues, employment policies and expenditures, and will develop solutions for increased profitability;" and "meet with executives of our company and conduct studies and surveys to obtain data and recommend solutions including initial development of business plans, strategic/creative briefings and work closely with all of our departments to effectively implement our budgets and goals and policies." It appears that the beneficiary will spend a good portion of his time promoting and providing services to customers/clients and his subordinates will not relieve him of such duties.

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).

In evaluating whether the beneficiary manages 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). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a 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.

The two organizational charts submitted by the petitioner are contradictory. The initial organizational chart shows four named subordinates and two pending hires; the chart submitted in response to the RFE shows two named subordinates and three pending hires. The petitioner failed to clarify the inconsistencies presented by the organizational charts. 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).

On appeal, counsel contends that the beneficiary is both an executive and a manager and satisfies all requirements of the two statutory definitions. Based on the evidence on record, however, the beneficiary cannot be considered an executive or a manager as the evidence of record does not demonstrate that he will be primarily performing executive or managerial duties. Counsel also states:

[The beneficiary] is fulfilling the requirement of supervision of others through [the petitioner's] relationship with client. Additionally, [the beneficiary], acting in a managerial capacity, supervises the work and clientele of other supervisory, professional or managerial employees, . . . when [the petitioner] provides its lean engineering manufacturing services to clients in the manufacturing, automotive, and related industries. Please note that managing others include where the others are not employees of the same company as the beneficiary. For example, 9 FAM 41.54 n.8.2-1 allows supervisions to include supervising non-employees such as independent contractors.

While the AAO recognizes that the use of independent contractors is an acceptable form of supervision, this assertion that the supervision of the client's employees validates the beneficiary's role as a manager for the petitioner is not persuasive. The beneficiary is not supervising the client's employees in their duties for the petitioner, nor are the client's employees independent contractors who perform services for the petitioner. Rather, he is merely verifying that they are following the client's goals and objectives through [the petitioner's] program. Even if the AAO were to accept that the beneficiary supervises the client's employees, counsel or the petitioner have neither presented evidence to document the existence of these employees nor identified the services these individuals provide to the petitioner. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998).

Further, in his brief, counsel cited the Foreign Affairs Manual (FAM) as an authority supporting the petitioner's argument. It must be noted that the FAM is not binding upon USCIS. See *Avena v. INS*, 989 F.

Supp. 1 (D.D.C. 1997); *Matter of Bosuego*, 17 I&N Dec. 125 (BIA 1979). The FAM provides guidance to employees of the Department of State in carrying out their official duties, such as the adjudication of visa applications abroad. The FAM is not relevant to this proceeding.

On appeal, counsel contends that the beneficiary is a "function manager." Counsel states:

In addition to qualifying as an executive, [the beneficiary] also qualifies as a manager of a critical function, which is the expansion of [the petitioner] in the North American market. [The beneficiary] also acts in a managerial capacity . . . because he performs the higher function of directing the U.S. expansion while also having direct managerial functions. [The beneficiary] is neither producing a product, nor providing services, but handling significant expansion in the world's largest market. This is a function that is critical to [the petitioner] . . .

The petitioner also submitted a letter in support of the appeal, which states:

The strategic expansion in North America, which [the beneficiary] directs, is expected to constitute [18%] of the company work in the next five years. Though the size of our U.S. operation is small, [the beneficiary] directs the function of expansion in North America which is [a] critical and major component revenue function of our international organization.

Here, the petitioner claims that the beneficiary manages the essential function of expanding North American operations. 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 written job offer 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 *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. The petitioner failed to articulate the beneficiary's duties as a function manager and failed to provide a breakdown indicating the amount of time the beneficiary spends on duties that would demonstrate he manages the essential function of expanding North American operations. In fact, the breakdown provided by the petitioner in response to the RFE does not list any duties related to the company's expansion of North American operations.

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 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.* The beneficiary in this matter has not been shown to be employed in a primarily executive capacity under the extended petition. The petitioner failed to demonstrate that the beneficiary's duties will focus on the broad goals and policies of the organization rather than day-to-day operations. In fact, the majority of the beneficiary's duties listed above are non-executive in nature and overlap the duties listed for his subordinates.

The AAO further notes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, however, federal courts have generally agreed that USCIS "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 (9<sup>th</sup> 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)). It is appropriate for USCIS 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).

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a primarily managerial or executive position. The petitioner failed to establish that the beneficiary's subordinates relieve him from performing non-qualifying duties related to promoting and providing services of the company in that the beneficiary and his subordinates share some of the same duties.

The petitioner currently employs the beneficiary and two subordinates. The petitioner indicates that it will hire additional employees in the future; however, 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).

On appeal, counsel noted that USCIS approved the initial petition that had been previously filed on behalf of the beneficiary. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v.*

*Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). Again, the requirements for a new office and a new office extension petition differ in that the initial new office petition was afforded more leniency in order to establish the business in the U.S. A new office petition is governed by the regulations at 8 C.F.R. § 214.2(l)(3)(v) while the extension petition is governed by 8 C.F.R. § 214.2(l)(14)(ii). If the business is not sufficiently operational and the beneficiary is not primarily performing executive or managerial duties after one year, the petitioner is ineligible by regulation for an extension of the prior approved L-1 petition.

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The beneficiary in this matter has not been shown to be employed in a primarily managerial or executive capacity under the extended petition. The AAO will uphold the director's determination that the petitioner has not grown to the point where the beneficiary is primarily engaged in managerial or executive duties. Accordingly, the appeal will be dismissed.

### **III. Conclusion**

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.