(b)(6)

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: JUL 17 2013 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Acting 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 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 is a California limited liability company, established in 2010, engaged in the manufacture and sale of industrial gear units. The petitioner states that it is a wholly owned subsidiary of Boneng Transmission (Suzhou) located in China. The beneficiary was previously granted one year as an L-1A nonimmigrant intracompany transferee as the company's Sales and Marketing Director in order to open a "new office" in the United States.[1] The petitioner now seeks to extend the beneficiary's employment for an additional three years.[2]

The director denied the petition, concluding that the petitioner had not established that the beneficiary is employed primarily in a qualifying executive or managerial capacity in the United States.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the petitioner has established with the preponderance of the evidence that the beneficiary's position in the United States is in a managerial and executive capacity.

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.

---

[2] The AAO notes that an extension of stay may only be authorized in increments of up to two years. *See* 8 C.F.R 214.2(l)(15).

(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(l)(14)(ii) states that a petitioner seeking an extension of a "new office" to submit 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.

II. The Issue on Appeal:

A. Employment with the petitioner in a managerial or executive capacity:

The first issue to be addressed on appeal is whether the petitioner has established that the beneficiary is employed in the United States in a primarily executive or managerial capacity as required by 8 C.F.R. § 214.2(l)(3).

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.

On appeal, counsel contends that the director erred by not providing specific reasons to support her conclusion that the petitioner had failed to establish that the beneficiary was employed in a managerial or executive capacity. For instance, counsel notes the director's use of the words "appears" and "may" and her failure to reference specific evidence in finding that the beneficiary was acting only as a salesperson, and not as a manager or executive, consistent with the Act. Counsel further asserts that the beneficiary acts as a manager through his supervision of professional staff holding required baccalaureate level degrees. Lastly, counsel maintains that the beneficiary is firmly established as an executive as defined by the Act.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary performs primarily executive or managerial duties with the petitioner, as required by the Act.

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 Petition for a Nonimmigrant Worker, the petitioner described the beneficiary's duties with the petitioner, including percentages of time spent on each task, as follows:

- Plan, direct, and man[a]ge the distribution and movement of [foreign employer] products and services to our United States-based customers in order to improve the company's sales performance (15%);
- Coordinate sales distribution networks through establishing sales territories, quotas, and goals (15%);
- Hire, train, and as necessary, terminate from employment, United States-based sales staff for company (NOTE: sales-staff employees will typically possess a baccalaureate degree plus a minimum of five years' experience in industrial sales or technical service with mechanical products) (20%);
- Establish and monitor training programs for [petitioner] sales representatives to develop optimal sales and service programs (25%);
- Analyze sales statistics, through daily contact with dealers, distributors, and in-house sales staff, to determine sales potential, inventory requirements, and to monitor the preferences of customers (10%);
- Prepare budgets, approve budget expenditures, and review operational records and reports to project sales and determine profitability (10%);
- Confer with [foreign employer] department heads to plan advertising services and secure information on equipment and customer specifications (10%);
- Confer with potential United States-based customers regarding equipment needs and advises on types of equipment available; determine prices schedules and discount rates [for] United States-based customers.[3]

The director found that the beneficiary's job duties lacked sufficient specificity. In a Request for Evidence (RFE), the director asked petitioner to provide a more detailed description of the beneficiary's duties with the petitioner, including the percentage of time the beneficiary devoted to each duty. In response, the petitioner resubmitted the duties set forth above, but provided further explanation of each category and reallocated the percentages of time spent on each tasks as follows:

- Plans, directs, and manages the distribution and movement of [foreign employer] products and services to our United States-based customers in order to improve the company's sales performance (20%);
- Coordinates sales distribution networks through establishing sales territories, quotas, and goals (15%);
- Hire, train, and as necessary, terminate from employment, United States-based sales staff for company (20%);
- Establishes and monitors training programs for [petitioner] sales representatives to develop optimal sales and service programs (5%);
- Analyzes sales statistics, through daily contact with dealers, distributors, and in-house sales staff, to determine sales potential, inventory requirements, and to monitor the preferences of customers (5%);

[3] The AAO notes that in the originally submitted duties include no percentage reflecting time spent on the last task provided by the petitioner. Also, the listed percentages add up to 105%.

- Prepares budgets, approves budget expenditures, and review operational records and reports to project sales and determine profitability (15%);
- Confers with [foreign employer] department heads to plan advertising services and secure information on equipment and customer specifications (15%);
- Confers with potential United States-based customers regarding equipment needs and advises on types of equipment available (5%).

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).

The petitioner has not provided sufficient detail regarding the beneficiary's daily duties as necessary to conclude that the beneficiary spends a majority of his time on managerial and executive tasks. 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. Portions of the duty description are overly vague and provide little probative value as to the beneficiary's actual day-to-day activities, such as planning, directing and managing the distribution and movement of products and services; coordinating sales distribution networks; establishing sales territories, quotas, and goals; analyzing sales statistics; preparing and approving budgets; and conferring with U.S. based customers on equipment needs. In each case, the petitioner has not provided specifics, examples, or supporting documentation to give the provided duties sufficient credibility or probative value, including products and services distributed; sales distribution networks established; sales territories, quotas, or goals created; customers monitored and worked with; or advertising programs created. In fact, the duties set forth above could be the duties of any sales or marketing manager or executive. In sum, the lack of specificity, and supporting documentation, surrounding these offered duties calls into question their credibility. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). 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. *Id.*

Further, the record does not support that the beneficiary performs the duties specified above and that the beneficiary primarily performs executive or managerial duties as defined by the Act. For instance, on appeal, counsel states that the beneficiary spends 75% of his daily time training and supervising petitioner staff. The organizational chart provided for the petitioner reflects that the beneficiary has four subordinates, including an administration and marketing coordinator and three territory sales managers, However, a support letter submitted on appeal reflects that two of the stated territory sales managers, both ended their employment with the petitioner in July 2012 and August 2012 respectively. Further, quarterly wage documentation for the State of Ohio from the 4th quarter of 2012 reflects that the petitioner has only three employees, the aforementioned territory sales manager, the beneficiary, and

identified on the record as the chief financial officer of the petitioner. As such, the petitioner has only established that the beneficiary has one subordinate employee, thereby casting material doubt on counsel's assertion that the beneficiary spends 75% of his time training and supervising subordinate staff. Additionally, the petitioner's assertion that the beneficiary spends a significant portion of his time (over 25%) training, hiring and firing subordinates is left in doubt given the limited number of his subordinates. Further, it is doubtful that the beneficiary could spend 15% of his time establishing sales territories, quotas, and goals when the beneficiary has only one subordinate sales representative. Additionally, certain evidence on the record suggests that the beneficiary is primarily performing non-qualifying day-to-day operational tasks and not those of a manager or executive. For example, the petitioner submitted sales invoices on the record that list the beneficiary as the direct customer sales contact, suggesting that the beneficiary is performing the duties of a salesperson rather than primarily managing and supervising other sales representatives, as asserted. 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. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In short, the lack of subordinates reporting to the beneficiary casts doubt on whether the beneficiary primarily performs managerial and executive tasks.

On appeal, counsel maintains that the beneficiary's duties are managerial because all of his territory sales staff typically must possess a baccalaureate degree and substantial technical experience. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(*2*). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(*3*). 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).

The AAO does not find counsel's assertion convincing. As noted previously, the petitioner has established that the beneficiary has only one subordinate employee, [redacted] territory sales manager. Despite suggesting that the beneficiary's subordinates are required to hold baccalaureate degrees and over five years of industrial sales and technical service experience, the petitioner has not provided any evidence to establish that the beneficiary's subordinate holds a baccalaureate degree or advanced knowledge in a given field gained by a prolonged course of specialized instruction. 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)). As such, the petitioner has not established that the beneficiary has subordinate professionals, as defined by law. Therefore, the petitioner has not established with sufficient evidence that the beneficiary qualifies as a personnel manager.

Additionally, the AAO does not concur with counsel's assertion that the beneficiary is established as an executive as defined by the Act. 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 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 petitioner has not provided sufficient evidence to establish the beneficiary as an executive. As noted, the petitioner has provided a vague duty description for the beneficiary that lacks credibility and probative value. The petitioner did not provide specifics or supporting documentation related to claimed goals and policies implemented or managed by the beneficiary. Therefore, the record does not include sufficient evidence to conclude that the beneficiary is primarily focused on directing management and establishing goals and policies. Further, the beneficiary's only subordinate is not established as a manager or supervisor, as there are no other established subordinate employees to supervise. As such, consistent with an executive, the beneficiary is not shown to have a subordinate level of managers to direct. In fact, the petitioner's organization is top heavy with three claimed managerial employees and has only one employee, the territory sales manager, devoted to operational tasks thereby casting doubt on the assertion that the beneficiary performs primarily executive level tasks. As noted by the statue, a beneficiary will not be deemed an executive simply because they hold an executive title or because they direct the enterprise, but they must establish with sufficient evidence that the beneficiary operates in an elevated position within a complex organizational hierarchy. However, the petitioner has not met this burden. Again, 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)).

In conclusion, the petitioner has not submitted sufficient evidence to establish that the beneficiary primarily acts in a managerial or executive capacity as required to extend the petition. Therefore, the appeal must be dismissed.

B. Financial status of the petitioner:

Beyond the decision of the director, the petitioner has provided insufficient evidence related to the current financial status of the petitioner as required by 8 C.F.R. § 214.2(l)(14)(ii)(E).

The regulations specifically require that a new office seeking extension submit evidence of the financial status of the United States operation. *See* 8 C.F.R. § 214.2(l)(14)(ii)(E). Further, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the

petition to establish the new office. At the time the petitioner seeks an extension of the new office petition, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year as necessary to support the beneficiary primarily in an executive or managerial capacity. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year to support the beneficiary's stated role, the beneficiary is ineligible for an extension.

In the instant matter, the petitioner has not sufficiently articulated its current financial position necessary to demonstrate that it has been doing business for the previous year and that it is capable of supporting the beneficiary in an executive or managerial capacity. Although the petitioner submits bank records which suggest that the petitioner has received various wire transfers from the foreign employer, presumably to support the petitioner's operations, the petitioner has not submitted definitive statements as to the petitioner's current financial position or information related to its essential development during the one year new office period. For instance, no evidence or explanation is provided on the record as to progress or accomplishments in the first year, or revenue accrued by the petitioner in 2012, the year within which the petitioner operated as a new office for approximately eleven months. Again, 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)). Additionally, the limited number of current employees working for the petitioner casts doubt on whether the petitioner is operational as necessary to remunerate the beneficiary. Further, a significant number of the positions asserted in the petitioner's organizational chart remain unfilled, including the following positions: operation & engineering manager, product application engineers, warehouse manager, administration & marketing coordinator, and bookkeeper. The limited number of positions filled within the petitioner's organization suggests that the petitioner has not developed as necessary during the first year of operations. Although the petitioner states that it plans on hiring further employees in the future, this assertion is not relevant to establishing whether the petitioner is currently operating as necessary to support the beneficiary's stated executive or managerial position. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

In sum, the petitioner has not established its current financial position as necessary to demonstrate that it can support the beneficiary in a primarily executive or managerial capacity. For this additional reason, the appeal will be dismissed.

C. Deference and unpublished decision:

Counsel additionally asserts on appeal that deference should be given in the current appeal based upon the previously approved petition. As previously mentioned, the regulations dictate specific evidence that must be submitted by a new office after one year to establish that the business is fully operational and capable of supporting the beneficiary in a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(14)(ii). The purpose of this evidentiary requirement is for United States Citizenship and Immigration Service (USCIS) to assess the progress of the business and determine whether, after one year, the beneficiary is eligible. As such, the favorable adjudication of a new office petition has little bearing on the current petition for

extension. Indeed, the petitioner is held to a greater standard under the current petition as it must establish that the beneficiary *is* primarily performing executive or managerial duties and not simply providing evidence as to how the beneficiary *will* act in such a capacity. Each nonimmigrant petition filing is a separate proceeding with a separate record and a separate burden of proof. *See* 8 C.F.R. § 103.8(d). 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).

Further, counsel cites another AAO decision where the AAO sustained a petitioner appeal and asserts this case is comparable to the current matter. First, counsel's reference to an unpublished AAO decision is not convincing. 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. Regardless, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. In fact, the cited unpublished decision involved a new office petition, not an extension, as in the present matter.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

III. Conclusion

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.