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



U.S. Citizenship
and Immigration
Services

DATE: JUL 25 2013

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:

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg

Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The director subsequently granted two motions to reconsider and affirmed his decision to deny the 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 Georgia corporation, established in 2008, engaged in the gas station and convenience store business. The petitioner states that it is a wholly owned subsidiary of [REDACTED]. The beneficiary was previously granted one year as an L-1A nonimmigrant intracompany transferee as the company's vice president in order to open a "new office" in the United States. The petitioner now seeks to extend the beneficiary's employment for an additional three years.¹

The director denied the petition, concluding that the record did not establish that the petitioner will employ the beneficiary in either a managerial or executive capacity. The petitioner subsequently filed two motions to reopen and reconsider. The director granted both motions to reconsider and in each instance affirmed his initial finding.

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 director's previous conclusions are erroneous. Specifically, counsel notes that the director analyzed whether the beneficiary qualified as a manager, but did not consider the petitioner's claim that the beneficiary qualifies as an executive.

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.

¹ An extension of stay may only be authorized in increments of up to two years. *See* 8 C.F.R. 214.2(l)(15).

- (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(l)(14)(ii) states that a petitioner seeking an extension of a “new office” petition must 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

The sole issue to be addressed on appeal is whether the petitioner has established that the beneficiary will be employed in the United States in an 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 asserts that the director erred in concluding that the beneficiary was not acting primarily in a qualifying managerial or executive capacity in the United States. Counsel states that the beneficiary will be employed in an executive capacity, and that the director erred by considering only whether the beneficiary would be employed in a managerial capacity. Counsel maintains that the director failed to provide meaningful analysis in his decisions and only reiterated the record and law in reaching his conclusion. Counsel states that the petitioner had, at the time of filing in December 2009, hired appropriate staff, paid them, and provided the business with adequate resources to support the beneficiary in a

qualifying managerial and executive capacity. Counsel also asserts that the director put undue emphasis on the small size of the petitioner's business in denying the petition.

The AAO does not find counsel's assertions persuasive. 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 an executive or managerial capacity.

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 Form I-129 Petition for a Nonimmigrant Worker, the petitioner provided the following duty description for the beneficiary:

- Supervising a team of general managers who manage Finance, Accounts, and Sales and Operations departments.
- Complete managing [*sic*] the responsibilities of major operations in the United States which include the following:
 - a) Supervising a team of top management personnel who manage the business operations of [the petitioner] in the United States.
 - b) Providing key strategic management discretionary directives for the business operations to stay ahead in the business.
 - c) Manage finance, accounts policies and operations strategies.
 - d) Set guidelines for accounting, financial and operational management.
- Communicate company's financial status to top management and implement management recommendations regarding accounting and finance.
- Make hiring, discharging and promotion decisions for the Finance, Accounts, and Sales and Operations departments.
- Develops effective human resources management plans and strategies for the company.
- He is responsible for overseeing and managing new business implementation and business integration related activities to ensure that business processes and systems support are aligned with business growth strategies.
- He provides input to strategic planning process. Analyzes business systems and processes, both individually and holistically, and ensures they are documented.
- He provides direction, guidance, momentum and vision for the organization and focuses on advancing the mission and goals of the organization.
- Manage creation of motivating environment so as to increase sales and ensure efficiency.
- Managing and making key decisions about stock control.
- Strategize analysis and interpreting trends to facilitate planning.
- Strategize use of information technology to record sales figures and for data analysis and forward planning.

- Manage standards for quality, customer service and health and safety.
- Develop strategy for promoting the organization locally by supervising liaising with local schools, newspapers and the community in general.
- Develop and manage strategy on organizing special promotions, displays and events.
- Update management on business performance, new initiatives and other pertinent issues.
- Maintain awareness of market trends in the retail industry, understanding forthcoming customer initiatives, and monitoring what local competitors are doing.
- Initiate changes to improve the business.
- Develop strategy to retain both consumer and business client relationships through effective sales and service management.
- Develop communication strategy for the company.
- Develop Etailing (Retailing + Electronic Systems) strategy.

In a Request for Evidence (RFE), the director stated that the petitioner had not sufficiently described the beneficiary's duties to demonstrate that he was employed in a qualifying executive or managerial capacity. In response to the director's observation, the petitioner submitted the same duties previously submitted on the record with some additional elaboration regarding the nature of each duty category above. For instance, the petitioner emphasized the beneficiary's management of vendors and suppliers. The petitioner stated: "He is responsible for continuous and smooth provisions of all goods and services to provide enhanced customer experience to our customers maintaining loyal customer base." Further, the petitioner noted the beneficiary's responsibility for the petitioner's retail strategy, his responsibility for the overall planning and guiding of the corporation's operations, and for "getting products in the right stores and reaching consumers at those stores."

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).

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 submitted duty description are overly vague and provide little probative value as to the beneficiary's actual day-to-day activities. For instance, the petitioner states in the job duty description that the beneficiary will be responsible for directives to management, major economic objectives, the formulation of policies, the strategic planning process, business systems and processes and vision. However, the petitioner provides no specifics or supporting documentation regarding strategies, visions, objectives, policies, plans, guidelines, or initiatives created or implemented during the first year of operations. In fact, the duty description

suggests that the beneficiary is managing a large multi-store retail enterprise and not one gas station/convenience store, as is reflected on the record. In sum, the lack of specificity and supporting documentation surrounding these offered duties calls into question whether they represent the beneficiary's actual primary duties in light of the petitioner's current stage of development. 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); *Ayvr 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.*

Additionally, the evidence submitted by the petitioner does not establish that the beneficiary primarily performs executive or managerial duties. The petitioner states directly that a major duty of the beneficiary will be managing vendors and suppliers. For instance, the petitioner stated that the beneficiary would be "responsible for continuous and smooth provisions of all goods and services." As such, the record indicates, despite the submittal of vague duties noting the provision of certain qualifying duties, that the beneficiary is engaged in non-qualifying day-to-day operational duties. However, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of an executive. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

On appeal, counsel asserts that the director erred in finding that the beneficiary did not qualify as a manager, since the petitioner claimed that he would be employed in an executive capacity.² 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.*

² The AAO observes that petitioner's previous counsel, prior to the motions to reopen and reconsider, stated that the beneficiary qualified as a manager through his direction and control of other managers and supervisors. As such, the AAO does not concur with counsel's assertion that the director erred in analyzing whether the beneficiary would be employed in a managerial capacity.

The petitioner has not provided sufficient evidence to establish that it will employ the beneficiary in an executive capacity. The petitioner submitted a 2009 organizational chart reflecting that the beneficiary supervises two subordinates, [REDACTED] - Operations and Sales Manager and [REDACTED] Finance and Accounts Manager.³ The operations and sales manager is asserted as overseeing [REDACTED] Assistant Manager who supervises three sales associates [REDACTED] and [REDACTED]. Additionally, the previously mentioned finance and accounts manager is shown to supervise [REDACTED] Accountant. Lastly, the organizational chart reflected that the beneficiary is supervised by [REDACTED] President. Therefore, the provided organizational chart indicated that one of the beneficiary's two subordinates is also his supervisor, and raises questions as to whether the beneficiary actually supervises the president/finance and accounts manager.

Further, the petitioner provided an IRS Form 941 for the 4th quarter of 2009 that indicating that only two of the three referenced sales associates were paid wages during this quarter, namely Ms [REDACTED] and Mr. [REDACTED]. The IRS Form 941 for the 4th quarter of 2009 demonstrates that Ms. [REDACTED] was paid \$4,500 and that Mr. [REDACTED] was paid only \$567 during the quarter. Therefore, the evidence reflects that only one sales associate worked substantial hours during the 4th quarter of 2009. Despite this apparent lack of employees necessary to perform the day-to-day functions of the business, the petitioner's organizational chart reflected that the organization had four managerial employees.

In short, the petitioner did not demonstrate that, as of December 2009, it employed sufficient employees to operate the business and allow its managers to work primarily in their asserted managerial and supervisory roles. Indeed, counsel states directly in a brief submitted in support of its second motion to reopen and reconsider that the organization was "managerially top-heavy" in 2009. When examining the managerial or executive capacity of a beneficiary, USCIS reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position.

Due to the top heavy nature of the organization in 2009, the AAO finds it doubtful that the beneficiary's subordinates were acting primarily as managers and directors of major departments as asserted. Further, the beneficiary's other subordinate manager, the operations and sales manager, has duties that overlap with

³ The AAO will only consider evidence relevant to the petitioner's operations as of December 2009, the date upon which the petitioner filed for extension as a new office. The petitioner has submitted substantial evidence relevant to its operations after December 2009. However, 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).

those of the beneficiary such as “forecasting and strategic planning to ensure sales profitability,” “analyzing business development and marketing trends” and “examining and recommending changes to procedures” thereby casting doubt on his asserted managerial role and the beneficiary’s stated duties. The petitioner offered no explanation for its need for two employees at one gas station to perform duties of this nature. 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). Therefore, the petitioner has not established that the beneficiary has a subordinate level of managerial employees, as asserted, necessary for the beneficiary to primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. The totality of the record does not support a conclusion that the beneficiary's subordinates are managers or supervisors. Instead, the record reflects that the beneficiary's subordinates, notwithstanding their job titles, more likely than not perform the actual day-to-day tasks of operating the petitioner's gas station and retail store.

Further, the petitioner has also not submitted sufficient evidence to establish that the beneficiary primarily performs duties focused on the direction of management and establishment of goals and policies, as consistent with the statutory definition of executive capacity. As previously discussed herein, the petitioner has submitted vague and non-probative duties for the beneficiary, which only generally recite executive functions without providing necessary detail and supporting documentation. Also, the duties submitted for the beneficiary suggest he is primarily focused on non-qualifying day-to-day operational duties, such as managing relationships with vendors and suppliers and handling inventory for the petitioner. 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. As such, the petitioner also has not demonstrated that the beneficiary primarily performs duties focused on the direction of management and establishment of goals and policies.

Counsel additionally contends on appeal that the director placed undue emphasis on the small size of the business in denying the petition and dismissing the subsequent motions. Counsel correctly observes 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). However, 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. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. See *Systronics*, 153 F. Supp. 2d at 15.

Further, in the present matter, 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.

The director correctly noted the lack of lower-level employees necessary to perform the day-to-day activities of the business. Therefore, in the current matter, it was appropriate for the director to consider the size of the business in conjunction with the absence of employees who would perform the non-managerial or non-executive operations of the company. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive capacity.

In conclusion, the petitioner has submitted a vague and unsupported duty description for the beneficiary and has not established with sufficient evidence that the beneficiary's subordinates relieve him from involvement in non-qualifying duties associated with the day-to-day operations of the petitioner's retail business. Therefore, the petitioner has not established that the beneficiary acts primarily in an executive capacity as asserted and the appeal must be dismissed.

III. Conclusion

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