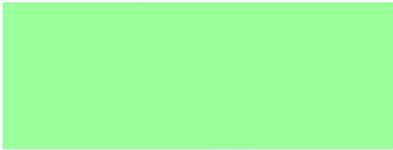




**U.S. Citizenship
and Immigration
Services**

(b)(6)



DATE: **MAR 26 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 in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, ("the director") denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will remain denied.

This nonimmigrant petition was filed seeking to classify the beneficiary 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 was organized under the laws of the State of Ohio as a limited liability company in February 2009. On the Form I-129 (Petition for a Nonimmigrant Worker), the petitioner noted that it employed one individual. The petitioner did not list its gross or net annual income. The Form I-129 lists the petitioner's type of business as "development and management of residential and commercial real estate." The Form I-129 Supplement L indicates that the petitioner is an affiliate of [REDACTED] which is owned by [REDACTED]. According to the petition, the beneficiary is to be employed in the United States by the petitioner as its general director for an initial period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in either a 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. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the evidence of record is sufficient to satisfy the petitioner's burden of proof in that the evidence establishes that the beneficiary would be employed in a primarily managerial or executive position.

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 the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a parent, subsidiary, or affiliate of the foreign employer.

If the beneficiary will be serving the United States employer in a managerial or executive capacity, a qualified beneficiary may be classified as an L-1A nonimmigrant alien. If a qualified beneficiary will be rendering services in a capacity that involves "specialized knowledge," the beneficiary may be classified as an L-1B nonimmigrant alien. *Id.*

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;

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

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

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

The regulation at 8 C.F.R. § 214.2(l)(3) provides 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.

II. The Issue on Appeal

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

In the petitioner's letter appended to the petition, the petitioner stated that it is engaged in the development and management of residential and commercial real estate in Cleveland, Ohio. The petitioner noted that it owned four single-family properties, a 32-unit multi-family building, and a mixed residential-commercial complex consisting of eight apartments and four retail units. The petitioner asserted that the company was positioned to expand its investments and subsequent acquisitions represented management challenges requiring the beneficiary's presence. The petitioner described the beneficiary's background and his 100 percent ownership of the affiliated entity in Russia where he held the position of executive director. The petitioner claimed that its current manager and ten percent partner lacked the expansion management experience to take the company forward on his own.

In the letter in support of the petition, the petitioner identified the proffered position as that of general director and noted that the beneficiary as general director would "manage and direct the entire US operation." The petitioner stated:

[The beneficiary] will develop Company's vision, implement the strategic plan, and establish standard operating policies and procedures. He will establish an operations budget and then coordinate and implement [the petitioner's] operations so as to maximize investments and optimize organizational efficiency. He will plan, direct and oversee the purchase, sale, and potential development of real estate properties, execute deeds, conveyances, notices, leases, checks, drafts, bills of exchange, contracts, and other instruments in the name of the company. He will also manage all investments including borrowing as opportunities warrant.

[The beneficiary] will oversee and control the procurement and expenditure process. He will negotiate service contracts with outside vendors for janitorial, security, landscaping, trash removal and other services, to achieve the highest levels of performance at the lowest cost.

[The beneficiary] will supervise and establish standards for tenant selection, negotiation, and analysis of credit risk. He will coordinate with leasing brokers and real estate agents to quickly turn around vacant space and to maximize occupancy and positive cash flow.

[The beneficiary] will recruit, hire and manage all administrative, maintenance, engineering, accounting staff, and the management teams for Company's various multiunit properties.

[The beneficiary] will provide continuous leadership to staff. He will develop and consistently apply Company's policies regarding appropriate professional behavior ensuring that the Company's values are consistently reflected throughout all operations.

[The beneficiary] will collaborate with outside counsel, brokers, lenders, bankers, public authorities, and other significant players in the market for benefit and on behalf of the Company. He will represent the company in dealings with brokers, agents, tenants, employees, public authorities, and within the industry.

The petitioner also provided its business overview noting that it currently uses accountants, bookkeepers, custodians, plumbers, carpenters, sales personnel, landscape companies, roofers, etc. on a part-time contractor basis. The petitioner indicated that as more properties are acquired, the day-to-day operations will require additional workers, additional supervisors, and management personnel. The petitioner stated that the beneficiary's local duties would be to "directly augment the operations while simultaneously recruiting, hiring, training, and mentoring a team to support the ongoing operations and expansion."

The director issued a request for evidence (RFE) instructing the petitioner to submit, *inter alia*, the following: (1) a more detailed specific description of the beneficiary's duties in the United States, including the amount of time required to perform the managerial or executive duties; (2) the petitioner's detailed line and block organizational chart, showing the current organizational hierarchy; and (3) State Quarterly Wage Reports.

In response, the petitioner provided a slightly revised description of the beneficiary's proposed duties indicating the beneficiary would spend 40 percent of his time on the following:

- Direct, establish, and implement company's vision plan, and business objectives, as to maximize investments and optimize organizational efficiency. Establish organizational policies and the responsibilities and procedures for attaining such objectives. Develop a strategic plan to advance company's mission and objectives and to promote revenue, profitability and growth as an organization;
- Oversee operations to insure efficiency, quality, service, and cost-effective management of resources;
- Direct, plan, oversee negotiations surrounding the acquisition, development, or sale of properties;
- Plan, develop, direct, and implement strategies and standards for tenant selection, tenant retention, negotiations, analysis of credit risk.

The petitioner noted the beneficiary would spend 20 percent of his time on the following:

- Prepare budgets, including those for funding and implementation of programs. Direct company's budget to fund operations, to maximize investments, or to increase efficiency;
- Manage investments including borrowing as needed;
- Review activity reports and financial statements to determine progress and/or suggest changes;
- Analyze data to determine the appropriate course of action concerning the preparation of long term logistics planning, operating and budgets;
- Oversee and control the procurement and expenditure process.

The petitioner stated the beneficiary would spend 20 percent of his time on the following:

- Recruit, hire, manage, and mentor the executive, administrative, engineering, accounting team;
- Conduct periodic management meetings. Provide continuous leadership;
- Develop and consistently apply Company's policies regarding appropriate professional behavior ensuring that the Company's values are consistently reflected throughout all operations;
- Oversee and evaluate the performance of the management team for compliance with established policies and objectives of the company and contributions in attaining company objectives;
- Make decisions related to the compensation of all agents and employees of the company.

The petitioner added that the beneficiary would spend 18 percent of his time on the following:

- Initiate, negotiate, execute deeds, conveyances, notices, leases, checks, drafts, bills of exchange, contracts and/or other instruments on behalf and in the name of the company;
- Represent the company in dealings with brokers, agents, tenants, employees, public authorities, and within the industry;
- Work with outside counsel, brokers, lenders, bankers, public authorities, and other significant players in the market for benefit and on behalf of the Company.

The petitioner claimed that the beneficiary would spend 2 percent of his time on the following:

- Promote the good will of the company with vendors, customers, leasing officers, employees, general public and within the industry. Represent the company;
- Perform other duties as needed.

Counsel for the petitioner reiterated that while the company had not hired any workers, maintenance work had been performed by independent contractors; that the current managing partner lacked expansion management experience to move the company forward on his own; and accordingly the beneficiary was needed in the United States in order to ensure the company's ongoing operational stability and profitability. The petitioner did not provide its organizational chart and did not provide state quarterly tax returns. The director denied the petition determining the petitioner had not

provided probative evidence establishing the beneficiary would perform in a primarily managerial or executive capacity.

On appeal counsel for the petitioner asserts that the director erroneously denied the petition based on a superficial analysis of a small fraction of the beneficiary's proposed duties. Counsel references the Department of Labor's Occupational Outlook Network (O*NET) database which reports that the duties of a chief executive officer includes preparing budgets and negotiating or approving contracts. Counsel contends that the beneficiary as the leader and face of the company performs tasks typical of someone in a managerial or executive position. Counsel repeats the petitioner's description of proposed duties and time allocation to perform the duties and provides a proposed organizational chart and job descriptions for the proposed employees as well as copies of the petitioner's canceled checks issued to various contractors.

III. Analysis

Upon review, the petitioner's assertions are not persuasive. The petitioner has not established that the beneficiary would be employed in the United States in a managerial or executive capacity as defined at 101(a)(44)(A) or (B) of 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). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner does not clarify whether it is claiming that the beneficiary will be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity. On review, the petitioner's description of the beneficiary's duties fails to establish that the beneficiary will be engaged in primarily managerial or executive duties. While the AAO does not doubt that the beneficiary will exercise discretionary authority over the U.S. company as its principal owner, the record does not provide probative detailed descriptions of the proposed duties sufficient to satisfy either definition.

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 petitioner does not have a subordinate level of managerial employees for the beneficiary to direct. Although the petitioner claims that it utilizes a number of contractual employees, the petitioner did not present either a list of those contractual employees or other evidence substantiating

its regular use of independent contractors. On appeal, counsel provides copies of eight canceled checks issued by the petitioner covering a time period between January 2012 and August 2012. Five of the canceled checks were issued by the petitioner to various individuals for unknown reasons and total approximately \$2,000. The remaining three checks were issued for cleaning, carpet, and electrical services and total approximately \$740. These eight checks do not establish that the petitioner routinely employs third party contractors to perform the day-to-day operational duties of the organization. Additionally, the record does not include information or explanations describing how the services of any contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. The AAO acknowledges the petitioner's desire to install the beneficiary as its general director to assist the petitioner in its expansion; however, the petitioner does not provide documentary evidence of such expansion. 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'r 1998).

Moreover, although the petitioner provided a lengthy job description, the petitioner has not provided a substantive description identifying the beneficiary's daily job duties. While the general description identifies tasks that are undoubtedly necessary to operate and expand the business, the petitioner has not indicated how such duties qualify as either managerial or executive in nature. 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. Although afforded a second opportunity to provide the deficient information, the petitioner failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine in response to the RFE. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava, Id.*

The petitioner indicated that the beneficiary would spend 40 percent of his time directing and implementing the company's business objectives, establishing organizational policies, overseeing operations, directing and overseeing negotiations for the acquisition, development, and sale of properties, as well as planning, directing, strategies and standards for tenants. Again, as observed above, the petitioner has not provided evidence that the beneficiary has anyone to direct or oversee. Although preparing budgets and overseeing the procurement and expenditures process may be a duty performed by some chief executive officers, the petitioner has not provided a concrete description of these duties and has not provided explanatory information describing what the beneficiary will actually do in carrying out these duties 20 percent of the time. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient.

The petitioner's indication that the beneficiary will recruit, hire, and manage professional employees, conduct management meetings, provide leadership, and evaluate the performance of the management team, without documentary evidence establishing the employment of any individuals, underscores the lack of data necessary to establish the proffered position is an executive or managerial position when the petition was filed. The petitioner's statement that the beneficiary will spend 20 percent of his time initiating and negotiating deeds, leases, checks, and contracts and representing the company in dealings with brokers, agents, tenants, and others as well as promoting

the good will of the company with outside vendors, customers, and the general public is the only information that hints at what the beneficiary will actually do for the petitioner. This information, however, emphasizes that the beneficiary will be performing operational tasks and does little to persuade that the beneficiary will be performing primarily managerial or executive duties.

Beyond the required description of the job duties, United States 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. While several of the duties described by the petitioner may generally fall under the definitions of managerial or executive capacity, the lack of specificity raises questions as to the beneficiary's actual duties. Overall, the position description alone is insufficient to establish that the beneficiary's duties will be primarily in a managerial or executive capacity, particularly when this is not a new office petition.¹ 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 (BIA 1988).

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary will perform the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary will *primarily* perform these specified responsibilities and will 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 fact that the beneficiary owns and manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 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"). The AAO will uphold the director's determination that the petitioner failed to establish that the beneficiary will be employed in a bona fide managerial or executive capacity for the U.S. business entity.

IV. Conclusion

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

ORDER: The appeal is dismissed.

¹ The petitioner was established in 2009 and this petition was filed in 2012. Moreover, the petitioner acknowledges in its response to question 12 of Supplement L to the Form I-129 that the beneficiary is not coming to the United States to open a new office.