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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: MAR 29 2013 Office: VERMONT 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, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks to employ 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 is a Texas corporation established on November 30, 2010. It operates a gas station and convenience store. The petitioner is an affiliate of based in Afghanistan. The petitioner seeks to employ the beneficiary as President for an initial period of three years.

The director denied the petition, finding the petitioner failed to establish that it will employ the beneficiary in a managerial or executive capacity.

The petitioner subsequently submitted a timely appeal.[1] The director declined to treat the appeal as a motion and forwarded it to the AAO. On appeal, the petitioner states that the director erred in stating that the petitioner failed to provide information regarding its organizational structure and the job duties of its employees, that it appeared the beneficiary would perform non-executive and non-managerial duties, and that the beneficiary's job duties are unclear. The petitioner also submits additional evidence.

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.

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[1] Despite the Service Center letter issued regarding the untimeliness of the appeal, evidence in the record indicates the appeal was in fact submitted timely.

(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.

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.

III. Issues on Appeal

The director denied the petition based on the finding that the petitioner failed to show that it will employ the beneficiary in a managerial or executive capacity.

The petitioner is a Texas corporation established in 2010. It claims to be an affiliate of the Afghani companies The petitioner purchased a gas station, convenience store, and the land on which these are situated on November 11, 2010. The petitioner has an estimated gross annual income of $3,100,000 and an estimated net annual income of $450,000. At the time of filing, the petitioner claimed one employee. The petitioner seeks to employ the beneficiary as President for which it will pay him a salary of $15,000 per year.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner listed the beneficiary's proposed job duties as follows:

- Determine and formulate policies and providing overall direction to the company, handling long-term and overhead planning, and establishing a vision for the company.
- Direct the organization's financial or budget activities to fund operations, maximize investments, and increase efficiency.
- Analyze operations to evaluate the performance of the company and its staff in meeting objectives, and to determine areas of potential cost reductions, program management or policy change.
- Review reports submitted by managers.
- Appoint managers and delegate responsibilities to them.

The director issued a lengthy Request for Evidence (RFE) instructing the petitioner to provide, *inter alia*, a copy of its latest U.S. federal income tax returns, evidence to show that the company is of sufficient size to support a managerial or executive position, a more detailed description of the beneficiary's duties with a breakdown of the number of hours spent on each duty on a weekly basis, information regarding the proposed number of employees that will be under the beneficiary's management, and descriptions of the job duties of these employees.

The petitioner responded with a brief and additional evidence. The documents submitted include a copy of the petitioner's 2011 federal income tax returns, organizational charts for the two foreign companies, and an illegible organizational chart for the petitioner. The brief lists the following as the number of hours devoted to each of the petitioner's proposed job duties:

> Strategic planning – 5 hours per week[;]
> Set goals, and develop policies and procedures – 12 hours per week[;]
> Review financials and evaluate operations – 12 hours per week[;]
> Evaluate expansion opportunities – 3 hours per week [;]
> Business development/marketing – 4 hours per week[;]
> Attend meetings with vendors and management – 4 hour [*sic*] per week[.]

In the brief, the petitioner stated it has eight employees who perform all non-managerial duties of the company. It states there are three subordinate supervisors and/or professional employees under the beneficiary's management, including a Store Manager, Advertising Manager and Operations Manager. The brief includes lists of the job duties for the Store Manager and the Operations Manager. The Store Manager's listed responsibilities include monitoring sales and coordinating prices of gas and convenience store products; locating and purchasing merchandise for sale; hiring and training new employees; managing staff, preparing work schedules, and assigning specific duties. The Operations Manager's listed responsibilities include greeting and assisting customers and responding to any complaints; hiring, training, and evaluating staff; directing and instructing staff and assigning their specific duties; inventorying stock and reordering when necessary.

The brief emphasizes that the beneficiary will have total authority over company operations. It states that the beneficiary will spend 100% of his time on executive and managerial duties.

The director subsequently denied the petition, finding the petitioner failed to demonstrate that the petitioner will be employed in a managerial or executive capacity. Specifically, the director stated that it appeared the beneficiary would supervise only one manager, and that it failed to provide detailed descriptions of the job duties of its employees.

The petitioner now submits a timely appeal accompanied by a brief and additional evidence. The documents submitted include a business plan for the petitioner, which states:

> In addition to maintaining all current employees of the business, [the beneficiary] intends to create a total of ten (10) new full-time positions. The addition of franchised food in the store's restaurant area, beer and wine sales, and a renewed marketing strategy will create the need for additional full-time employees. No less than three (3) cooks for the franchise restaurant, three (3) cashiers for the restaurant, a marketing manager, and four (4) additional cashiers for the convenience store will be added to the current staff to supplement the changes in business operations.

The business plan contains a "proposed organizational chart" for the petitioner which shows the beneficiary at the top of the chart as the store owner. Below him are the advertising manager and the store manager. Under the Store manager are two hired cashiers, two hired cooks, and ten employees who have yet to be hired. Thus, the chart shows six employees other than the beneficiary.

The petitioner also submitted a stand-alone organizational chart. At the top of the chart is the beneficiary as the store owner. Below him are an advertising manager, a store manager, and a manager. Below the store manager and manager the chart shows two cashiers, two cashier/stockers, and a cook. Thus, this chart show seven employees other than the beneficiary.

IV. Analysis

The director denied the petition after finding that the petitioner failed to show it would employ the beneficiary in a managerial or executive capacity.

When examining the managerial or executive 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 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.* In addition, the definitions of executive and managerial capacity each have two parts. To meet these definitions, the petitioner must first show that the beneficiary performs the high level responsibilities specified in the definitions. Second, the petitioner must prove the beneficiary will *primarily* perform these specified responsibilities and will not spend a majority of his time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

In response to the RFE, the petitioner submitted a list of the beneficiary's job duties with the number of hours per week that each will require. According to the list, the petitioner will conduct strategic planning; set goals, and develop policies and procedures; review financials and evaluate operations; evaluate expansion opportunities; conduct business development/marketing; and attend meetings with vendors and management.

This list of proposed job duties is too vague to satisfactorily demonstrate that the beneficiary will spend his time performing managerial or executive duties. Reciting vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The actual duties themselves will reveal the true nature of the employment. *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).

Although the petitioner also included a lengthier written explanation of the beneficiary's duties, this other description was equally as vague and generic. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. Based on the evidence submitted, it is unclear what "strategic planning" and "setting policies and goals" means in terms of the beneficiary's day-to-day activity. Likewise, the petitioner provides no details regarding how the beneficiary will "evaluate operations and expansion opportunities." It gives no information regarding "meetings with vendors and management." 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 above-cited duties are not sufficiently detailed to satisfy the petitioner's burden of proof.

In addition, the petitioner does not clarify whether the beneficiary is claiming to 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. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

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).

The petitioner does not allege that the beneficiary will supervise professionals. Instead, it alleges that the petitioner will oversee other supervisory employees. In its Form I-129, filed on May 18, 2012, the petitioner indicated that it had one employee. In its response to the RFE dated June 17, 2012, however, the petitioner indicated that it had eight employees, three of whom are managers.

As an initial matter, the petitioner's claims regarding its number of employees are inconsistent, changing from one to eight. 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). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Although it is theoretically possible that the beneficiary could have hired employees after the initial submission of its petition, 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).

On appeal, the petitioner submits two new organizational charts, one as a stand-alone chart and one contained in the petitioner's business plan. Although submitted simultaneously, these two charts also contain inconsistencies. Whereas the chart contained in the business plan shows a store manager and an advertising manager, the stand-alone chart adds a third manager who appears to be in a position similar to that of the store manager. In its brief submitted in response to the RFE, the petitioner claims it will manage the store manager and the operations manager. Again, 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, supra*.

As required by section 101(a)(44)(C) of the Act, 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. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. 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).

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

In this case, although the petitioner states that the beneficiary will manage other supervisory employees, its list of job duties does not indicate that the beneficiary will primarily spend his time on these managerial tasks. None of the beneficiary's proposed job duties explicitly involves managing employees. However, even if "evaluating operations and reviewing financials" and "meeting with vendors and managers" are both considered purely managerial in nature, they account for a combined 16 hours out of a 40 hour work week. Thus, even with this generous interpretation of what constitutes a managerial duty, the petitioner has failed to show that the beneficiary will spend the majority of his time on managerial tasks.

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. § 204.5(j)(5). In this case, the petitioner does not claim that the beneficiary manages any particular function.

The petitioner does, however, allege that the petitioner will be employed in an executive capacity. 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 AAO does not doubt that, as president and owner, the beneficiary would have wide latitude and discretion over the petitioner. However, as stated above, the petitioner has failed to provide a list of executive-level duties with sufficient specificity to show what the beneficiary will actually be doing on a daily basis. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988). Without more specificity and detail, the petitioner has failed to show

that the beneficiary would not primarily be performing tasks necessary for the petitioner to provide its services.

For the foregoing reasons, the petitioner has failed to demonstrate that it will employ the beneficiary in a managerial or executive capacity.

V. Conclusion

The petitioner has not established that it will employ the beneficiary in a managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). 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.