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: DEC 15 2014 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)

SELF-REPRESENTED

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
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 filed this nonimmigrant petition 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, a Florida limited liability company established in January states that it engages in the distribution of The petitioner claims to be an affiliate of located in Colombia. The petitioner seeks to employ the beneficiary as manager for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in a qualifying managerial or executive 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, the petitioner asserts that the U.S. company is expanding its current business and the beneficiary will be a manager in the United States. The petitioner submits additional evidence in support of the appeal.

I. THE LAW

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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

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

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

II. THE ISSUE ON APPEAL

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

On the Form I-129, where asked to describe the beneficiary's proposed duties in the United States, the petitioner stated the following:

1. Manages the entire organization. In charge of general operations of the company with control over all departments and divisions.
2. In charge of hire and remove employees, fix salaries and wages of all subordinates.
3. In charge of setup a US based assembly facility, where these controllers can be developed and assembled.
4. Permanently supervise and provide training to supervisor and internal team members and to customer on implementing Train and supervise employees.
5. Lead a team of technicians to assemble and develop the controls.
6. To attend all regular meetings with Legal representation of the company management[.]
7. To keep full and complete record of the doings of the office, and to render a full report of the operations, ensuring the timely fulfillment of all obligations of the company in taxation[.]

In its letter of support, dated March 23, 2013, the petitioner described the beneficiary's proposed position in the United States as follows:

> The main objective of having [the beneficiary] move to The United States:
> - Manages the USA company supervising the work of other supervisors.
> - Establish an assembly and engineering facility in the United States. Close to our customers and suppliers.
> - Provide training to internal team members and to customer on implementing
> - Lead a team of technicians to assemble and develop the controls.
> - Direct the process of assemble some of the products in the United State [*sic*] facility.
> - Follow the strategy and achieve the objective establish on the business plan.
>
> * * *
>
> The proposed duties in the USA are:
> We would like [the beneficiary] to transfer to the United States for the position of general manager. He will direct, control and manage activities of all employees in the United States.
> 1. In charge of general operations of the company with control over all departments and divisions (manages the entire organization) (Dedicating 20% of his time to this duty)
> 2. In charge of hire and remove employees, fix all salaries and wages of all subodinates. (Dedicating 10% of his time to this duty)
> 3. In charge of setup a US based assembly facility, where these controllers can be developed and assembled. (Dedicating 20% of his time to this duty)
> 4. Permanently supervise and provide training to supervisor and internal team members and to customer on implementing (Dedicating 20% of his time to this duty)
> 5. Lead a team of technicians to assemble and develop the controls. (Dedicating 15% of his time to this duty)
> 6. To attend all regular meetings with Legal representation of the company management[.] (Dedicating 5% of his time to this duty)

7. To keep full and complete record of the doings of the office, and to render a full report of the operations, ensuring the timely fulfillment of all obligations of the company in taxation[.] (Dedicating 10% of his time to this duty)

The petitioner submitted its Form W-2, Wage and Tax Statement, for 2012 demonstrating that it employed and paid him $7,500 in wages, tips, and other compensation, and its Form 1099-MISC, Miscellaneous Income, for 2012 demonstrating that it paid $24,309.57 in nonemployee compensation. The petitioner also submitted its Form 1065 Schedule K-1, Partner's Share of Income, Deductions, Credits, etc., for 2011 and 2012 both showing that owned 10% of the U.S. company's shares and the beneficiary owned the remaining 90% of its shares.

Although the petitioning U.S. company is an existing business, it submitted a business plan for its current expansion plans in the United States. The business plan describes the petitioner's organization and management as follows:

> [The petitioner] is headed by and with the help of wife run all the operations.
>
> [The foreign entity] is owned by [the beneficiary] and (wife), [the petitioner] is owned by [the beneficiary] and (father).
>
> * * *
>
> Actions:
>
> - A warehouse must be set up. . . .
> - One full time employee must be hired the first year and at least one more the second year. The cost of each employee is expected to be $40,000 per year. ½ of the cost of one the employees [*sic*] will go to COGS. Each control requires around 12 man hours of assembly time. Smaller controls about 2 or 5. Panels can require about 4 hours.
> - Invest around 15,000 in equipment to setup a shop and electronics lab.

The petitioner submitted its proposed organizational chart depicting the beneficiary as general manager, directly supervising an accountant and an office manager, listed as The office manager's duties are briefly listed as: "control inventory; receive, and verify purchases; pay bills; [and] keep track of office matters." The office manager supervises "assembly workers" and "sales and order processing." The organizational chart does not indicate the number of assembly workers or employees in sales and order processing to be hired. The assembly workers' duties are briefly listed as: "assembly of control boxes and panels; test and configure; code scrips [*sic*] for special applications; [and] customer support." The sales and order processing employees' duties are briefly listed as: "verify all orders, payment, stock, terms; enter orders that need to be processed manually; do follow-up on customers orders; package and ship orders;

The director issued a request for additional evidence ("RFE") on May 22, 2013, advising the petitioner that the information presented for the beneficiary's proposed position in the United States is insufficient. The director specifically advised the petitioner that the U.S. company only has one employee and it remains

unclear how this staffing would support the beneficiary's employment in a managerial capacity. The director instructed the petitioner to submit evidence that the beneficiary's proposed position in the United States will be in a managerial or executive capacity.

In response to the RFE, the petitioner submitted its Form RT-6, Florida Department of Revenue Employer's Quarterly Report, for the first and second quarters of 2013 indicating that it had one employee, during each month in both quarters.

The petitioner also submitted a letter, dated June 19, 2013 and signed by describing the U.S. company's current business as follows:

> Important: as indicated in the business plan, if the L1 visa for [the beneficiary] is approved, the USA Company will setup a US based assembly facility, where these controllers can be developed and assembled. This is the reason why as today date is only 1 employee at the USA Company.
>
> We are waiting for L1 visa to be approved so we can hire [the beneficiary] who will hire all the employees, train and supervise them in order to achieve the objectives established on the business plan.

The petitioner's letter goes on to describe the beneficiary's proposed position in the United States as follows:

> [The beneficiary] will work in a capacity that is managerial position [*sic*].
>
> * * *
>
> 1. In charge of general operations of the company with control over all departments and divisions (manages the entire organization- position is a managerial capacity) (Dedicating 25% of his time to this duty)
> 2. In charge of hire and remove employees, fix all salaries and wages of all subordinates. (Dedicating 10% of his time to this duty)
> 3. In charge of setup a US based assembly facility, where these controllers can be developed and assembled. (Dedicating 20% of his time to this duty)
> 4. Permanently supervise and provide training to supervisor and internal team members and to customer on implementing (Dedicating 15% of his time to this duty)
> 5. Lead a team of technicians to assemble and develop the controls. (Dedicating 15% of his time to this duty)
> 6. To attend all regular meetings with Legal representation of the company management[.] (Dedicating 5% of his time to this duty)
> 7. To keep full and complete record of the doings of the office, and to render a full report of the operations, ensuring the timely fulfillment of all obligations of the company in taxation[.] (Dedicating 10% of his time to this duty)

> [The beneficiary] will direct, control and manage activities of all employees in the United States.

The petitioner submitted a "List of Proposed Employees," dated June 19, 2013, listing the beneficiary as general manager, under "shipping and receiving," a vacant position for "control box assembly worker," and a vacant position for "sales and order processing." The list includes the same briefly listed duties for each position, including interchanging position from office manager to "shipping and receiving."

The director denied the petition on January 27, 2014, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. In denying the petition, the director found that the petitioning U.S. company was established in and has been doing business in the United States, and therefore cannot be classified as a new office. The director observed that the evidence confirms the petitioner only has one employee and as such, it does not appear that the manager will be relieved from performing non-qualifying duties. The director further found that the petitioner has not established that the beneficiary will be involved in the supervision and control of the work of other supervisory, professional, or managerial employees who will relieve him from performing the services of the company.

On appeal, the petitioner reiterates that the U.S. company has only been performing shipping and receiving operations, which is why it only has one employee. The petitioner explains that the beneficiary will be coming to the United States to expand the business into a new venture of assembly, sales, customer support, and eventually product development in the United States. The petitioner goes on to list the same job duties for the beneficiary's proposed position in the United States with the accompanying percentages listed in the initial petition (not the new percentages submitted in response to the RFE).

The petitioner submits a copy of the same business plan previously submitted, along with the beneficiary's resume and its proposed organizational chart, both previously submitted.

Upon review, and for the reasons stated herein, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity in the United States.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not

spend a majority of his or her time on day-to-day operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns or manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

As a preliminary matter, a review of the totality of the record supports the director's finding that the petitioner has not established that it qualifies as a new office. The petitioner has specifically stated that it is doing business in the United States and is seeking to expand its current business from simply shipping and receiving to assembly, sales, customer support, and eventually product development in the United States. The fact that it only has one employee does not negate that it has been doing business, filing taxes, and establishing business relationships with other companies in the United States. The petitioner presents its business and the position of the beneficiary as a proposal for the future, given its expansion plans, and expects that USCIS will consider the evidence in a future tense as it would a new office. However, a 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).

The petitioner first characterized the beneficiary's role as manager and briefly described his duties in very broad terms, noting that he will manage the entire organization; hire and remove employees, fix salaries and wages of all subordinates; setup a US based assembly facility, where controllers can be developed and assembled; permanently supervise and provide training to supervisor, internal team members, and customers on implementing train and supervise employees; lead a team of technicians to assemble and develop controls; keep full and complete record of the doings of the office; and render a full report of the operations, ensuring the timely fulfillment of all obligations of the company in taxation. In its initial letter of support, the petitioner added percentages of time the beneficiary would spend on each duty, which included a combination of qualifying and non-qualifying duties. The petitioner indicated that the beneficiary would spend 20% of his time managing the entire organization; 10% of his time hiring and removing employees, fixing salaries and wages of all subordinates; 20% of his time setting up a US based assembly facility, where controllers can be developed and assembled; 20% of his time permanently supervising and providing training to supervisor, internal team members, and customers on implementing 15% of his time leading a team of technicians to assemble and develop controls; 5% of his time attending all regular meetings with legal representation of the company management; and 10% of his time keeping full and complete records of the doings of the office, and render a full report of the operations, ensuring the timely fulfillment of all obligations of the company in taxation. In response to the RFE, the petitioner submitted the same list of duties, but changed the percentages to reflect 25% of his time spent on managing the entire organization and 15% of his time permanently supervising and providing training to supervisor, internal team members, and customers on implementing The petitioner did not include any additional details or specific tasks related to each duty, nor did the petitioner indicate how such duties qualify as managerial or executive in nature. 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).

In the instant matter, the petitioner has not provided sufficient information detailing the beneficiary's duties at the U.S. company to demonstrate that these duties qualify him as a manager or executive. 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. The petitioner's description of duties fails to provide any detail or explanation of the beneficiary's claimed managerial or executive activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 *supra.*

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." *See* 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. *See* 8 C.F.R. § 214.2(l)(1)(ii)(B)(*3*).

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Here, the petitioner indicated that the beneficiary will devote 40-45% of his time (variation in the percentages submitted initially and in response to the RFE) to hiring, firing, and setting the wages of employees, supervising and training employees, and leading technicians to assemble and develop controls. Although the brief job duties provided by the petitioner for each of the beneficiary's subordinates at the U.S. company do not specifically list education requirements and it appears that experience in a specific field may suffice, the lists of duties provided are not informative enough to demonstrate that the positions themselves require a bachelor's degree, such that they could be classified as professional. Nor do the lists demonstrate that any of the positions are managerial or supervisory in nature. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The petitioner's evidence must substantiate that the duties of the beneficiary and his proposed subordinates correspond to their placement in the 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 managerial position. In the instant matter, the petitioner failed to submit credible evidence of a current organizational structure that would be sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Furthermore, the petitioner has failed to submit evidence that the beneficiary's subordinate employees will relieve him from performing non-qualifying operational duties.

The petitioner has not established, in the alternative, that the beneficiary will be employed primarily as a "function manager." 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 position description that describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. Here, the petitioner did not indicate that the beneficiary qualifies as a function manager. The petitioner did not articulate the beneficiary's duties as a function manager and did not provide a breakdown indicating the amount of time the beneficiary would devote to duties that would clearly demonstrate that he would manage an essential function of the U.S. company.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within an organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. *See* 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.* Here, the beneficiary's proposed position has not been shown to be in a primarily executive capacity. The petitioner failed to demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations.

Based on the deficiencies discussed above, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity in the United States. Accordingly, the appeal will be dismissed.

III. Employment for One Year at a Qualifying Foreign Entity

Beyond the decision of the director, the petitioner has not established that the beneficiary was employed full time by a qualifying foreign entity for one continuous year within the three year period preceding the filing of the petition, as required by 8 C.F.R. § 214.2(l)(3)(iii).

USCIS records indicate that the beneficiary traveled to the United States numerous times in B-1/2 and F-2 status in the three years prior to the date of filing the petition on April 1, 2013. The beneficiary's travel dates are as follows:

- 9 Days: Arrived in the U.S. on 04/13/2010 in B-1 status; Departed the U.S. on 04/21/2010
- 14 Days: Arrived in the U.S. on 06/15/2010 in B-2 status; Departed the U.S. on 06/28/2010
- 22 Days: Arrived in the U.S. on 10/24/2010 in B-2 status; Departed the U.S. on 11/14/2010
- 21 Days: Arrived in the U.S. on 12/09/2010 in B-2 status; Departed the U.S. on 12/29/2010
- 22 Days: Arrived in the U.S. on 02/03/2011in B-2 status; Departed the U.S. on 02/24/2011
- 108 Days: Arrived in the U.S. on 06/10/2011 in F-2 status; Departed the U.S. on 09/25/2011
- 119 Days: Arrived in the U.S. on 10/07/2011 in F-2 status; Departed the U.S. on 02/02/2012
- 71 Days: Arrived in the U.S. on 02/16/2012 in F-2 status; Departed the U.S. on 04/26/2012
- 312 Days: Arrived in the U.S. on 05/03/2012 in F-2 status; Departed the U.S. on 03/10/2013
- 16 Days to the date of filing the petition: Arrived in the U.S. on 03/17/2013 in F-2 status; Filed the petition on 04/01/2013

To review the required one year of continuous employment abroad, we must count back three years from the date that the petition is filed. The regulation at 8 C.F.R. § 214.2(1)(3)(iii) clearly requires that an individual petition filed on Form 1-129 be accompanied by evidence that the beneficiary "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." The definition of "intracompany transferee" also indicates that, if the beneficiary has been employed abroad continuously for one year by a qualifying organization within three years preceding the time of the beneficiary's "application for admission into the United States," the beneficiary may be eligible for L-1 classification. 8 C.F.R. § 214.2(1)(l)(ii)(A).

However, when the definition of "intracompany transferee" is construed together with the regulation at 8 C.F.R. § 214.2(1)(3) and section 101(a)(15)(L) of the Act, the phrase "preceding the time of his or her application for admission into the United States" refers to a beneficiary whose admission or admissions pertained to the rendering of services "for a branch of the same employer or a parent, affiliate, or subsidiary thereof" or for "brief trips to the United States for business or pleasure." Statutes and regulations must be read as a whole, and interpretations should be consistent with the plain purpose of the Act to avoid absurd results. *See generally Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

When a beneficiary has been admitted to the United States for the purpose of working for a branch, parent, affiliate or subsidiary of the qualifying employer abroad, USCIS will look at the three year period preceding his admission as a nonimmigrant for purposes of calculating whether he had the required one year of full-time continuous employment abroad. When the beneficiary has been admitted to the United States for a purpose other than providing services for a qualifying U.S. entity, USCIS will look at the three year period preceding the filing of the petition.

In this matter, because the beneficiary's admission in F-2 status cannot be reasonably described as a brief trip for business or pleasure, the key phrase to be construed is whether the beneficiary's employment in the United States was for or in order to render services to the petitioning organization. We conclude that the beneficiary's period of stay in the United States was not spent for the purpose of rendering services to a branch, parent, affiliate or subsidiary of the foreign employer. To the contrary, the beneficiary's period of stay in the United States was spent as an F-2 derivative spouse and his choice to remain employed with the qualifying foreign entity was merely incidental to his stay in the United States as a family member of an F-1 foreign student and his partial ownership of the foreign entity.

Additionally, F-2 derivative spouses of F-1 foreign students are not authorized to work in the United States; an F-2 derivative spouse's admission and period of stay is tied to the F-1 foreign student. An F-2 derivative spouse's choice to remain employed by the qualifying foreign entity is incidental to his stay and to remain an employee of the foreign entity will not transform his stay into one being *for* the petitioning organization. If the petitioner in this matter had wanted the beneficiary's stay in the United States to be *for* or in order to render services to the petitioning organization or a related U.S. entity, and thus not be interruptive of the one year of continuous employment abroad, the petitioner should have timely filed the appropriate petition seeking his admission *for* employment with its enterprise. *See also* section 10l(a)(15)(L) (again, indicating that an intracompany transferee is one who "seeks to enter" the United States to temporarily render services to a qualifying organization). Importantly, an F-2 derivative spouse is not described as one who seeks to enter the United States to render services; rather, an F-2 derivative spouse is described as "accompanying" or "following to join" the F1 foreign student. *Id.*

Therefore, for the reasons discussed above, the beneficiary's admission in F-2 derivative status on June 10, 2011 and subsequent employment in the United States for the foreign entity was not a "[period] spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof" and, thus, was interruptive of the one year of continuous employment abroad. For this reason, we will look at the three-year period preceding the filing of the petition, and not the three-year period preceding the beneficiary's initial admission in F-2 status in June 10, 2011. In addition, although the beneficiary has spent 36 days outside the United States since his initial admission in F-2 status, these days cannot be counted towards fulfillment of his one year of continuous employment abroad.

While the beneficiary's time spent in F-2 status is interruptive of the one year of continuous year requirement, we will address whether the beneficiary possessed one year of continuous employment abroad between April 1, 2010 and June 10, 2011, which was the beneficiary's first entry in F-2 status.

The regulation at 8 C.F.R. § 214.2(1)(l)(ii)(A) states in pertinent part the following:

> Periods spent in the United States in lawful status *for* a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted towards fulfillment of that requirement.

(Emphasis added).

USCIS records indicate that the beneficiary traveled to the United States in B status at least five times during the 435-day period, commencing on April 1, 2010 to the date of his first entry as an F2 derivative on June 10, 2011, totaling at least 88 days. Thus, while the 88 days in the United States are not interruptive of his one year employment, they are not counted towards the fulfillment of the one year requirement, which leaves the beneficiary with only 347 days of continuous employment abroad, short of completing one year of full-time employment with a qualifying foreign entity within three years preceding the filing of the instant petition. Although the petitioner states that the beneficiary has retained his employment with the foreign entity while in the United States by working remotely, the regulations require that the beneficiary be physically present abroad for at least one continuous year during the three years preceding the filing of the petition.

Accordingly, the petitioner has not established that the beneficiary had at least one continuous year of full-time employment abroad with a qualifying organization during the relevant three-year period, and for this additional reason, the petition cannot be approved.

IV. EMPLOYMENT ABROAD IN A QUALIFYING MANAGERIAL OR EXECUTIVE CAPACITY

Beyond the decision of the director, the petitioner has not established that the beneficiary's position abroad was in a qualifying managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(iv).

On the Form I-129, where asked to describe the beneficiary's duties abroad for the three years preceding the filing of the petition, the petitioner stated the following:

1. Manages the entire organization.
2. Supervises and controls the work of other supervisors and make decisions.
3. Legal representation of the company management.
4. Organized properly the required systems for accounting, payments and other transaction [sic] of the company.
5. Ensure the timely fulfillment of all obligations of the company in taxation.
6. Designate the persons who will work for the company, with authority to hire and fire personal [sic].
7. Train and supervise employees.

In its letter of support, dated March 23, 2013, the petitioner described the beneficiary's position abroad and stated that he heads a staff of nine employees, including en electronic engineer, who oversees all the engineering, design, and new product development, an office manager, who handles the day to day operations of the business, and five other technicians, who work on engineering, quality control, and manufacturing. The petitioner further stated that "[h]is duties and responsibilities in Colombia are substantially the same as the propose[d] duties in the United States as described above." The letter also lists the exact same duties listed on the Form I-129 for the beneficiary's position abroad.

The petitioner submitted an organizational chart for the foreign entity depicting the beneficiary at the top tier as general manager, supervising one position titled "accounting," one position titled "engineering," one position titled "quality control," one position titled "office manager," and two positions titled "assembly manager." One of the assembly managers supervises one position titled "CAD and CAM," and the other

assembly manager supervises two "assembly operators" and one "testing and inspection operator." There is also the word "supervisory" handwritten next to the "engineering" position.

In the RFE, the director advised the petitioner that the record does not contain any information about the beneficiary's subordinates at the foreign entity as the company's manager. The director instructed the petitioner to submit evidence that the beneficiary's position abroad is in a managerial or executive capacity.

In response to the RFE, the petitioner submitted a letter from the foreign entity, dated June 21, 2013 and signed by , describing the foreign entity's current business organization and the beneficiary's position, stating that the beneficiary has been fully responsible for its day to day operations since 2009 and is closely involved in most decisions of the company. The letter also stated that the beneficiary has been the one to hire employees and establish their salaries and benefits. The letter further listed the same duties listed on the Form I-129 and added percentages of time the beneficiary devotes to each duty.

The petitioner also submitted a "List of Employees" from the foreign entity, dated June 10, 2013, listing the beneficiary as general manager overseeing the entire operation. The list does not indicate the titles of the employees' position but does list brief job duties for each, including: one employee whose duties include "research and development; engineers and envelops new products and works on improving the existing ones," two employees whose duties include "bookkeeping/accounting, cost control, verify compliance with fiscal regulations," one employee whose duties include "oversee purchases, process payments, personnel matters," one employee whose duties include "oversee production," one employee whose duties include "product development," one employee whose duties include "inspection and quality control," one employee whose duties include ' layout and product development," one employee whose duties include "intern assigned to documentation and precut development," one employee whose duties include "assembly," and one employee whose duties include "product assembly."

Upon review, and for the reasons stated herein, the petitioner failed to establish that the beneficiary was primarily employed in a qualifying managerial or executive position at the foreign entity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns or manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a

managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

The petitioner first characterized the beneficiary's role at the foreign entity as general manager and briefly described his duties in very broad terms, noting that he will manage the entire organization; supervise and control the work of other supervisors and make decisions; legally represent the company management; organize the required systems for accounting, payments, and other transactions of the company; ensure the timely fulfillment of all obligations of the company in taxation; designate the persons who will work for the company, with authority to hire and fire personnel; and train and supervise employees. In its initial letter of support, the petitioner specifically stated that the beneficiary's duties abroad "are substantially the same as the propose[d] duties in the United States as described above." In response to the RFE, the petitioner restated the same duties listed with the petition and simply added percentages of time the beneficiary spends on each duty, which includes a combination of qualifying and non-qualifying duties. The petitioner indicated that the beneficiary would spend 40% of his time managing the entire organization, supervising and controlling the work of other supervisors, and making decisions; 5% of his time legally representing the company management; 10% of his time organizing the required systems for accounting, payments, and other transactions of the company; 15% of his time ensuring the timely fulfillment of all obligations of the company and keeping a full record of the doings of the office and operations; 10% of his time designating the persons who will work for the company, with authority to hire and fire personnel; and 20% of his time permanently supervising and providing training to supervisor and internal team members. The petitioner did not include any additional details or specific tasks related to each duty, nor did the petitioner indicate how such duties qualify as managerial or executive in nature. 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).

In the instant matter, the petitioner has not provided sufficient information detailing the beneficiary's duties at the foreign entity to demonstrate that these duties qualify his position abroad as a manager or executive. 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. The petitioner's description of duties fails to provide any detail or explanation of the beneficiary's claimed managerial or executive activities in the course of his daily routine abroad. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 *supra.*

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." *See* 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. *See* 8 C.F.R. § 214.2(l)(1)(ii)(B)(*3*).

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Here, the petitioner indicated that the beneficiary will devote approximately 70% of his time supervising and controlling, designating, hiring, firing, and training employees, supervisors, and internal team members. Although the brief job duties provided by the petitioner for each of the foreign entity's employees do not specifically list education requirements, the lists of duties provided are not informative enough to demonstrate that the positions themselves require a bachelor's degree, such that they could be classified as professional. Nor do the lists demonstrate that any of the positions are managerial or supervisory in nature. Thus, the petitioner has not shown that the beneficiary's subordinate employees at the foreign entity are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The petitioner has not established, in the alternative, that the beneficiary is employed at the foreign entity primarily as a "function manager." 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 position description that describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. Here, the petitioner did not indicate that the beneficiary qualifies as a function manager. The petitioner did not articulate the beneficiary's duties as a function manager and did not provide a breakdown indicating the amount of time the beneficiary devotes to duties that would clearly demonstrate that he manages an essential function of the foreign entity.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within an organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. *See* 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.* Here, the beneficiary has not been shown to be employed in a primarily executive capacity. The petitioner failed to demonstrate that the beneficiary's duties at the foreign entity primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations.

Based on the deficiencies discussed above, the petitioner has not established that the beneficiary was primarily employed in a qualifying managerial or executive position at the foreign entity. For this additional reason, the petition cannot be approved.

The AAO maintains discretionary authority to review each appeal on a *de novo* basis. The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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 v. United States*, 229 F. Supp. 2d 1025,1043 (E.D. Cal. 2001), *aff'd* 345 F. 3d 683 (9th Cir. 2003).

V. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, 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 petitioner has not met that burden.

ORDER: The appeal is dismissed.