



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **DEC 15 2014** Office: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an 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 Nevada limited liability company, is self-described as a financial advisory services firm. It claims to be an affiliate of the beneficiary's foreign employer in Israel, [REDACTED]. The petitioner seeks to extend the beneficiary's L-1A status so that he may continue to serve as its President.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

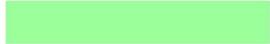
The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the evidence of record establishes that the beneficiary will function in a qualifying managerial capacity. Counsel submits a brief 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(1)(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 (1)(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.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

II. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity under the extended petition.

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.

A. Facts

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on April 7, 2014. The petitioner indicated that it is a financial advisory service, with five employees and a gross annual income of \$72,481.

In a letter submitted in support of the initial petition, the petitioner described the beneficiary's duties as follows:

His duties are the customary duties of a President and CEO. During the past year of his transfer and currently Mr. [REDACTED] is very actively involved in the day-to-day operations of the business. He has full authority to hire staff and has wide latitude in making decisions about the goals and management of the organization.

The petitioner included a copy of the business plan for the United States organization for the forecasting period of 2014-2017. The plan explains that the business delivers three services including individual credit restoration, employee benefits, and business credit restoration. The plan states that the beneficiary established and managed the company by matching the operating processes to customer requirements as well as the hiring and training of all employees.

The business plan describes the organizational structure as consisting of two managing partners who focus on "strategic business development" and four employees. A brief description of each position was included in the plan. The business development associate "generates new and follow up leads to secure new partnerships." The account manager is responsible for establishing a "close relationship with the customers" and developing financial solutions for clients. Legal counsel is responsible for "formal credit and workout related communication, contract review and advice, litigation support and legal representation where

necessary.” Finally, the administrative support personnel maintains the accounting books, answers customer inquiries, and performs other administrative duties as needed.

The petitioner provided a copy of an organizational chart showing the beneficiary as an "Executive" along with another executive, [REDACTED]. Reporting to the two executives are three positions: (1) Admin Support (hired), (2) Business Development Manager (not yet hired), and (3) Credit Restoration Manager (not yet hired). Reporting to the business development manager are two business development positions, only one of which is filled. Reporting to the Credit Restoration Manager are two positions, only one of which is filled. In sum, the petitioner currently employs two executives, an admin support, one business development position, and one credit restoration specialist. The intermediary managerial positions have not yet been filled according to the chart.

The petitioner also included a copy of payroll information, including a payroll report for the period dated March 1 through March 15, 2014. The report includes the employees listed on the organizational chart as the admin support position, business development position, credit restoration specialist, and a fourth unidentified employee. The two executive positions were not listed on the payroll report.

The director issued a request for additional evidence ("RFE") in which she instructed the petitioner to submit evidence to show that the beneficiary will serve in a managerial or executive position in the United States. Specifically, the director noted that the petitioner failed to submit (1) a detailed description of the beneficiary's duties in the United States including percentage of time required to perform the duties; (2) a copy of the U.S. company's State Quarterly Wage Report for the quarter prior to filing; and (3) an organizational chart listing the duties and educational backgrounds of the beneficiary's subordinates.

The petitioner submitted a letter in response, stating that the beneficiary will perform the following duties:

- Oversight of the Marketing and Sales functions: marketing and PR, defining customer acquisition strategies, monitoring progress and analyzing market and industry trends
 - o Time allocation: approx. 20%
- Monitoring the day-to-day operations of the business: ensuring cost-effective management of resources, maintaining highest quality of service and customer satisfaction, developing operations within the strategic plan, mission and objectives of the organization
 - o Time allocation: approx. 20%
- Strategic planning: continuously reviewing the mission and vision of the organization; realigning business plans with organizational goals and monitoring market dynamics
 - o Time allocation: approx. 10%
- Delegating: establishing standardized routines to transition to sales and operations managers, monitoring performance, coaching and advising
 - o Time allocation: approx. 10%
- Financial planning: aligning available resources with organizational development plans; monitoring cash flow and balance sheet position; regular review of revenues, expenses, assets, liabilities and taxes
 - o Time allocation: approx. 10%

- Hiring: defining resources requirements and sourcing personnel; defining motivational strategies; setting performance targets and monitoring performance
 - o Time allocation: approx. 10%
- Business Development: representation of the company at events; establishing business partnerships; maintaining and expanding existing business relations
 - o Time allocation: approx. 20%

The petitioner gave a further explanation of the beneficiary's authority relating to organizational management, organizational goal setting and policies, discretionary decision making latitude, and supervision from partners.

The petitioner provided an organizational chart similar to the one submitted in the initial petition, but showed the addition of an employee hired into the second credit restoration position, now titled "Credit Restoration, Legal Support." The petitioner also provided a list of name, title, salary, and qualifications for each employee. The petitioner claims that the employee holding the "Credit Restoration Specialist, Legal Support" position holds a law degree from the [REDACTED]. The Credit Restoration Specialist and Administrator were paid at a rate of \$2,500 per month. The Credit Restoration Specialist/Legal Support and Business Development/Sales associate were paid at a rate of \$1,500 per month.

The petitioner included a copy of the State of Nevada, Employment Security Division, Employer's Quarterly Contribution and Wage Report for the quarter ending March 31, 2014. The wage report showed all of the employees listed in the letter, as well as a fifth unidentified employee, [REDACTED]. The petitioner included undated and signed employment contracts for each employee listed in the letter.

The director denied the petition, finding that the petitioner had not established that the beneficiary will be employed in a managerial or executive capacity. The director determined that based on the organizational structure described, the beneficiary would be assisting in the day-to-day non-supervisory duties of the business. The director also stated that the description of the beneficiary's position did not contain sufficient specifics to demonstrate what the beneficiary does on a daily basis. The director further found that the beneficiary did not supervise professional or managerial level subordinates, nothing that the future hiring of employees has no bearing on whether the beneficiary's proposed duties will qualify as primarily managerial or executive.

On appeal, counsel asserts that the beneficiary's position is primarily managerial or executive in nature. Specifically, counsel asserts that the beneficiary's duties meet the definition of executive and managerial. Counsel claims that the director omitted a job duty and failed to analyze the beneficiary's duties with respect to the executive nature of his position. Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989) and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), for the proposition that the beneficiary does not have to manage supervisory employees if he supervises "a large number of persons are large enterprise." Finally, counsel states that the evidence submitted meets the preponderance of the evidence standard.

B. Analysis

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). 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 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 manages a business or a component of 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 position descriptions the petitioner submitted at the time of filing and in response to the RFE are insufficient to establish that the beneficiary will be primarily performing managerial duties. Specifically, duties such as "business development," "establishing standardized routines," and "continuously reviewing the mission and vision of the organization," "monitoring the day-to-day operations of the business," and "aligning available resources with organizational development plans," are vague and do not convey a specific understanding of what duties the beneficiary will perform as an executive at a credit restoration business. 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 has failed to provide sufficient detail or explanation of the beneficiary's 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Furthermore, even though the petitioner claims that the beneficiary directs and manages the business operations, it does not claim to have anyone on its staff to actually perform the daily first-line managerial duties of its operations. Rather, based on petitioner's organizational chart in the initial petition and in response to the RFE, the positions of Business Development Manager and Credit Restoration Manager are vacant. While the petitioner plans to hire additional staff, it has not established that it employed sufficient staff to perform all day-to-day non-managerial functions of the credit restoration firm. If the beneficiary will be performing the first-line management functions, or the day-to-day operational tasks of the business, the AAO notes that 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Finally, in addition to the vague duties submitted by the petitioner, the organizational structure does not support an executive level position. 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.* At the time of filing, the petitioner has a single tiered organizational structure where the beneficiary directly manages four subordinate employees. The petitioner has not shown how this structure qualifies as "complex" in order to support a finding that the position is executive in nature.

The statutory definition of "managerial capacity" allows for both "personnel managers" and a "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).

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.

Based upon the job descriptions submitted in the business plan and in response to the RFE, the only position that may be considered professional level is the position of legal specialist. The position descriptions submitted for this employee in the initial petition and in response to the RFE are vague and inconsistent, and thus we are unable to determine the true nature of the duties for this position. In the initial organizational chart, the credit restoration positions are entitled "Specialist 1" and "Specialist 2," with no specific reference to the legal nature of the position. The business plan does not have a description for a credit restoration position, but lists a position for legal counsel. This position is responsible for "formal credit and workout related communication, contract review and advice, litigation support, and legal representation where necessary." Neither organizational chart, however, show a position strictly entitled "Legal Counsel." The job title on the organizational chart submitted in response to the RFE is "Credit Restoration, Legal Support." In the employee contract, the duties for the position are described as "managing legal correspondence, credit disputes, formal correspondence, and other tasks as assigned by management." Therefore, based on the inconsistent and vague position titled and descriptions submitted in both the initial petition and in response to the RFE, the duties and level of responsibility for the position of "Credit Restoration, Legal Support" cannot be determined. 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).

Furthermore, the petitioner claims in response to the RFE that the employee placed in this position holds a "law degree from [REDACTED]" but fails to include a copy of the claimed degree. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Finally, the petitioner states that the position of legal specialist will be paid a salary of \$1,500 a month. Therefore, the position would be paid \$1,000 a month less than the administrative support position and the Credit Restoration Specialist/Special Negotiator calling into question the professional level of the position. 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).

When examining the managerial or executive capacity of a beneficiary, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

Counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. First, the AAO notes that counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp.*, where the Fifth Circuit Court of Appeals decided in favor of the legacy Immigration and Naturalization Service (INS), or *Mars Jewelers, Inc.*, where the district court found in favor of the plaintiff. With respect to *Mars Jewelers*, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

In both *National Hand Tool Corp.* and *Mars Jewelers, Inc.*, the courts emphasized that the former INS should not place undue emphasis on the size of a petitioner's business operations in its review of an alien's claimed managerial or executive capacity. The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. However, consistent with both the statute and the holding of *National Hand Tool Corp.*, the AAO has required the petitioner to establish that the beneficiary's position consists of primarily managerial or executive duties and that the petitioner will have sufficient personnel to relieve the beneficiary from performing operational and/or administrative tasks. Like the court in *National Hand Tool Corp.*, we emphasize that our holding is based on the conclusion that the beneficiary is

not primarily performing managerial duties; our decision does not rest on the size of the petitioning entity. 889 F.2d at 1472, n.5.

Based on the foregoing discussion, the petitioner has failed to establish that it will employ the beneficiary in a managerial or executive capacity under the extended petition. The appeal will be dismissed.

Beyond the decision of the director, the record contains insufficient evidence to establish that the overseas company employed the beneficiary in a primarily managerial capacity. The organizational chart submitted with the initial petition shows the beneficiary as president, overseeing an operations manager and sales associate.

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

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

ORDER: The appeal is dismissed.