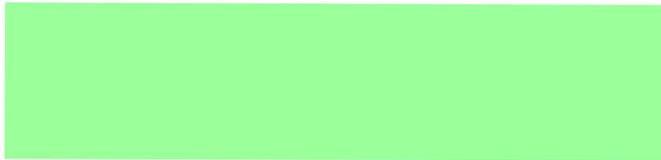


(b)(6)

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

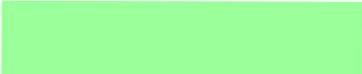
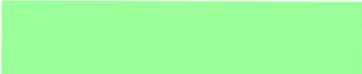


U.S. Citizenship
and Immigration
Services



DATE: **DEC 17 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: 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,

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

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 is a Michigan corporation that operates as a retailer of academic books. The petitioner seeks to employ the beneficiary as its president for one year. Accordingly, 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 director denied the petition, finding that the petitioner had failed to establish that the beneficiary would be employed in a managerial or an 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, the petitioner submits a brief asserting that the beneficiary will fill the positions included in the petitioner's proposed organizational chart "once he has the requisite permissions/visas" to commence his employment in the United States.

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. Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on July 2, 2013, claiming a gross annual income of \$3,069,247. The petitioner stated that it was established in 2010 and had no employees at the time of filing. In a separate supporting statement, dated June 18, 2013, the petitioner explained that it has been selling books online through various web-based retailers, including [REDACTED] and [REDACTED] and thus has been managed remotely by its vice president. The petitioner claimed that the beneficiary would be employed in an executive capacity and provided a list of the twelve job duties the beneficiary would perform in his part-time employment with the U.S. entity. The petitioner added that the beneficiary will have "the ultimate authority and discretion" and will be the top-most executive within the

petitioning corporation. The petitioner anticipated that the beneficiary's U.S. presence would allow the company to go from being web-based to "having a physical presence in universities and campuses."

In addition to the supporting statement, the petitioner provided a copy of its 2012 U.S. corporate tax return, showing a gross annual income of over \$3 million, and several statements for its U.S.-based business bank account.

On July 19, 2013, the director issued a request for additional evidence ("RFE") in which he informed the petitioner that the job description that it originally provided was not sufficiently detailed and thus did not establish that the beneficiary would primarily perform job duties within a qualifying managerial or executive capacity. The director indicated that the petitioner could remedy this documentary deficiency by listing the beneficiary's job duties and indicating what percentage of time the beneficiary would dedicate to each job duty assigned to him. The director instructed the petitioner to submit, *inter alia*, the following: (1) the petitioner's organizational chart illustrating the organizational structure and staffing levels as well as the employee names, job titles, and summary of job duties; (2) copies of the petitioner's state quarterly wage report for the 2013 second quarter and the petitioner's payroll summary and W-2 Forms showing wages paid to the petitioner's employees; and (3) copies of employment agreements showing any newly hired employees.

In response to the RFE, the petitioner provided a statement, dated August 9, 2013, explaining that the petitioner "has been operating on the outsourcing and sub[-]contracting model for the expert fulfillment services." The petitioner further stated that this business model was no longer optimal based on the organization's increase in sales. Accordingly, the petitioner stated that the beneficiary's job duties upon commencing employment with the U.S. entity would include the following components: (1) administrative functions, which would include establishing sales and administrative departments, creating job positions accordingly, and recruiting personnel over whom the beneficiary would have complete hiring and firing authority; (2) business development, which would entail contacting "top online booksellers and portals"; and (3) technical expertise, which would entail the initiation of [REDACTED] and supervision of software development, [REDACTED] and programming as well as contributing to the beneficiary's "proprietary softwares [*sic*] and [u]tilities," which he creates by building on existing software and customizing it for the petitioner's specific uses.

The petitioner stated that it has no paid employees and that "[t]he work functions have been so far kept to a minimum and the heavy workload outsourced to capable agencies" The petitioner did not provide a percentage breakdown of the beneficiary's proposed job duties as requested in the RFE.

On November 13, 2013, the director denied the petition, finding that the petitioner had failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity as claimed. The director found that the job description offered by the petitioner in response to the RFE was deficient in that it lacked details about the beneficiary's specific daily tasks. The director further found that the petitioner's lack of supporting personnel indicates that the beneficiary would be primarily engaged in performing the organization's daily non-supervisory duties and that the beneficiary would not be elevated to a managerial or executive position as a result of the company's lack of a subordinate personnel.

On appeal, the petitioner reiterates prior claims made regarding the remote operation of the petitioning entity and stresses the need for the beneficiary's U.S. presence in order to expand its business operations. The

petitioner assures the AAO that the beneficiary "is very well settled [and] leads a high lifestyle" in Canada and is therefore "not seeking admittance into [the] USA in pursuit of any life style [*sic*] enhancement," but rather is seeking to enter the United States to pursue his professional endeavors.

Upon review, and for the reasons stated herein, the petitioner has failed to overcome the director's basis for denying the petition. A comprehensive analysis of the relevant factors is provided in the discussion below.

III. The Issue On Appeal

The sole issue addressed by the director is whether the petitioner established that it will employ the beneficiary in a managerial or an 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 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.* 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). Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that may 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").

In the instant matter, the petitioner's claim that the beneficiary would be employed in a qualifying executive capacity is not supported by the evidence of record, which indicates that the petitioner has no staff in the United States and that the beneficiary, upon arrival, would have to commence his employment by performing the various operational tasks that are required of a new office petitioner, such as recruiting and hiring new staff and in the meantime carrying out the various marketing and sales functions that would otherwise be performed by a subordinate personnel. Despite the fact that the petitioner does not have an actual physical presence in the United States and has been operating remotely, the petitioner does not fit the criteria of a "new office" as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F). The record shows that the petitioner has filed two consecutive tax returns for 2011 and 2012 and has opened bank accounts in the United States to show that it has maintained operations in the United States for more than one year. As such, the regulatory provisions that

apply to any entity that has been operational in the United States for less than one year since the filing of the petition cannot be applied to the filing entity in this matter. *See id.* That being said, the job description the petitioner offered in response to the RFE, while lacking the requested percentage breakdown, contains sufficient information to allow for the conclusion that upon commencing his position with the petitioning U.S. entity the beneficiary's time would not be primarily allocated to the performance of qualifying tasks within a managerial or executive capacity. Rather, the beneficiary would be required to perform all those tasks that are necessary to open a business and make that business operational.

As indicated in the petitioner's August 9, 2013 RFE response letter, the beneficiary would have to assume the task of establishing an organizational hierarchy, which would include creating positions and job titles and subsequently recruiting and hiring employees to fill the newly created positions. In the meantime, given the petitioner's lack of subordinate employees, the beneficiary would have to assume all of the underlying tasks that are required to keep the petitioner operational, including marketing and selling the petitioner's services by contacting potential clients and/or business partners and carrying out certain IT functions by customizing software to fit the petitioner's specific needs. While not specifically addressed in the petitioner's statement, there is no evidence that the beneficiary would be relieved from having to perform various administrative and bookkeeping tasks as well as human resources tasks, such as training newly hired employees. In fact, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties would actually be managerial or executive in nature and what proportion would consist of the types of non-qualifying tasks discussed above. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Despite the beneficiary's top-most position within the petitioner's organizational hierarchy and his unlimited discretionary authority over the U.S. company as its president, the record indicates that the petitioner did not have the capability to relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying operational tasks. As indicated by the petitioner in its various supporting statements, the petitioner had no employees at the time of filing, nor would have any employees until the beneficiary commences employment in the United States and recruits a subordinate staff. It is noted, however, that 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. 1978). Therefore, despite the beneficiary's intention to come to the United States and recruit a subordinate staff to support his position at the top of the organization's hierarchy, we cannot overlook the fact that the petitioner had no subordinate staff at the time of filing and thus was unable to relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying tasks.

While no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988). Merely establishing that the beneficiary performs tasks at a professional level is not sufficient unless those tasks rise to the level of managerial or executive capacity. Here, the record strongly indicates that the non-qualifying operational tasks, rather than the qualifying managerial or executive tasks, would comprise the primary portion of the beneficiary's proposed position.

The petitioner has not established, in the alternative, that the beneficiary is 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 will perform as a function manager. The petitioner did not articulate the beneficiary's duties as those of a function manager and did not provide a breakdown indicating the amount of time the beneficiary would devote to duties that demonstrate that the beneficiary would manage an essential function of the U.S. company.

Turning to the term "executive capacity," the statutory definition 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. 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.*

While the definition of "executive capacity" does not require the petitioner to establish that the beneficiary supervises a subordinate staff comprised of managers, supervisors and professionals, it is the petitioner's burden to establish that someone other than the beneficiary would carry out the day-to-day, non-executive functions of the organization. Here, as previously indicated, the beneficiary has not been shown to be employed in a primarily executive capacity. Despite the petitioner's claims, the evidence of record does not 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.

Therefore, in light of the adverse findings discussed in the above analysis, it cannot be concluded that the beneficiary would be employed in a qualifying managerial or executive capacity and on the basis of this determination the instant petition cannot be approved.

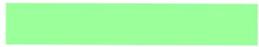
IV. Beyond the Director's Decision

Beyond the decision of the director, we find that the record shows at least one additional ground of ineligibility that was not addressed in the denial. 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).

In the present matter, the record lacks evidence to show that the beneficiary meets the regulatory filing requirement specified at 8 C.F.R. § 214.2(l)(3)(iii), which asks the petitioner to provide 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. The record shows that the director's RFE did not exclusively focus on the beneficiary's proposed employment with the petitioning entity. Rather, the director informed the petitioner that it failed to provide a detailed description of the beneficiary's job duties abroad to establish that he was employed in a qualifying managerial or execution capacity. The director indicated that the petitioner could remedy this deficiency by providing a detailed job description, complete with the beneficiary's specific job duties and their assigned time allocations, as well as the foreign entity's organizational chart showing the entity's staffing levels and organizational hierarchy.

Although the petitioner responded to the director's request, the information was not provided in accordance with the director's specific instructions, which asked the petitioner to describe the beneficiary's job duties and indicate what percentage of time the beneficiary allocated to each item listed. Rather, the petitioner indicated that the beneficiary's job duties fell into one of two categories – strategic, which included business development and corporate duties, or operational, which included sales and marketing, purchasing, accounting and financial management, logistics, IT management, and human resources and administrative tasks. The petitioner only indicated whether certain categories of job duties have been performed on either a weekly or daily basis, but failed to assign specific time allocations to any individual tasks.

Furthermore, in reviewing the job description, it appears that the beneficiary's time was comprised of both qualifying and non-qualifying job duties. For instance, the petitioner indicated that the beneficiary presides over board of directors meetings and has discretion over sanctioning discounts and credits and approval and release of purchase lists, which are qualifying executive job duties. However, the job description also indicates that the beneficiary carries out non-qualifying tasks, such as attending trade shows, visiting customers both domestically and internationally, assisting with web development to expedite an IT project, and providing training and orientation to new staff. As previously stated, while the beneficiary need not allocate 100% of his time to managerial- or executive-level tasks, the time spent performing qualifying tasks should exceed the time to be spent on operational and administrative job duties. Here, given the lack of time allocations in the job description pertaining to the foreign entity, it cannot be concluded that the beneficiary's employment abroad consisted primarily of tasks within a qualifying managerial or executive capacity and on the basis of this additional finding, the instant petition does not warrant approval.



V. Conclusion

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.