



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: FEB 27 2014

Office: VERMONT SERVICE CENTER

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, 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 is a Maryland corporation, established in 2002, that is engaged in the manufacture and distribution of outdoor security systems. The petitioner states that it is an affiliate of [REDACTED] located in Israel. The petitioner seeks to employ the beneficiary in the position of U.S. business development manager for a period of three years.

The director denied the petition, finding that the petitioner had not established that it will employ the beneficiary in a qualifying managerial or executive capacity.

On appeal, counsel asserts that the director placed undue emphasis on the size of the petitioning company and failed to consider the beneficiary's eligibility as the manager of an essential function.

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, Petition for a Nonimmigrant Worker, 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.

Finally, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

II. The Issue on Appeal

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

In denying the petition, the director noted the petitioner described the beneficiary's proposed duties in abstract terms that failed to convey his actual level of authority. Further, the director stated that the organizational chart submitted for the petitioner was unclear and that the petitioner had failed to

submit job duties for the beneficiary's subordinates as requested. Based on the petitioner's failure to submit sufficient job duties and evidence relevant to his subordinates, the director concluded that it was more likely than not that the beneficiary would be a first-line supervisor of non-professional employees and would not be relieved from performing non-managerial duties associated with the day-to-day operations of the business.

On appeal, counsel notes that the director's decision was based, in part, on a conclusion that the petitioner had failed to submit certain requested evidence related to the beneficiary's subordinates, including employer's quarterly tax returns for the 4th quarter of 2012 and sufficient duty descriptions. Counsel states that the director's focus on this evidence is erroneous, since the beneficiary will manage an essential function of the company rather than primarily supervising personnel. Counsel asserts that the beneficiary is relieved from primarily performing non-qualifying operational duties by contractors and employees located abroad and that he will perform primarily managerial duties related to the expansion of the foreign company's distribution network in the United States. In support of the appeal, the petitioner submits the beneficiary's e-mail correspondence, copies of distribution and sales representative agreements with companies in the United States, and an additional affidavit from its co-owner, in support of its claim that the beneficiary will be employed in a managerial capacity as a function manager.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that it will employ the beneficiary in a qualifying managerial capacity.

The petitioner states that it is an affiliate of [REDACTED] "a leading technology company specializing in the development, manufacturing, integration, and installation of electronic perimeter security systems." The petitioner indicates that its affiliate has "supplied systems for over 1,000 security projects in more than 25 countries worldwide."

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). On the Form I-129, the petitioner described the beneficiary's proposed duties as follows:

[The beneficiary] will oversee all sales and business development of the U.S. market and expand the company's presence in the U.S. by developing a strategic marketing plan. He will be responsible for growing [the petitioner] by generating new business opportunities and improving the results of the company's under-performing assets by developing imaginative and innovative business development methods and procedures. He will have the authority to make firing and personnel decisions, as well as conduct performance reviews, with regard to these employees. In addition, [the petitioner] will act as the most senior-level employee within the U.S. company. He will be responsible for managing the company on a day-to-day basis and overseeing logistics such as payroll, accounting, budgets, human resources and compliance with federal, state and local regulations. In this regard, he will exercise discretion over the day-to-day operations of [the petitioner].

In a letter submitted in support of the petition, the petitioner further stated:

[The beneficiary] will be expected to leverage his physical presence in the U.S. to increase gross revenues from sales by identifying new business opportunities, developing relationships with new and existing partners and vendors in the United States, negotiating pricing, and creating and overseeing the implementation of marketing strategies and initiatives by providing the Sales Manager with business development projects and initiatives and by organizing presale and after-sale support and training to customers.

[The beneficiary] will also be responsible for growing [the petitioner] by recruiting and hiring 2 additional salespeople, an office manager, and 1-2 technicians. [The beneficiary] will supervise all these employees and will have the authority to make hiring, firing and personnel decisions, as well as conduct performance reviews. He will provide leadership and direction to these employees, including assistance with employee development and training programs, and planning, monitoring and appraising job results. He will establish job expectations and provide coaching to develop business development action plans, while at the same time protecting employees, customers and company assets by maintaining a safe and secure working environment and enforcing safety practices.

. . . . [The beneficiary] will act as the most senior-level employee within the U.S. company. He will be responsible for managing the company on a day-to-day basis and overseeing logistics such as payroll, accounting, budgets, human resources and compliance with federal, state and local regulations. In this regard, he will exercise discretion over the day-to-day operations of [the petitioner].

The director found the initial evidence submitted by the petitioner insufficient to establish that the beneficiary would be employed in a managerial or executive capacity and issued a request for evidence (RFE). The director requested that the petitioner submit a letter from an authorized company representative describing the beneficiary's expected managerial decisions, including his typical managerial duties, and the percentage of time he would spend on each task.

In response, the petitioner submitted a letter from [REDACTED], senior director of business development, extensively describing the beneficiary's proposed duties in the United States. Mr. [REDACTED] stated that the beneficiary will manage a function or component of the U.S. company, in that he will manage "all aspect[s] of the company's business development." He further explained that the beneficiary would spend most of his time (or 75%) on "developing and implementing new business opportunities to increase the revenues of [the petitioner]." [REDACTED] stated that 10% of this time would be devoted to "developing and creating innovative business development methods and procedures and 65% will be spent on implementation of these methods, including identifying new business opportunities." Finally, [REDACTED] asserted that the beneficiary would spend the remaining 25% of his time "organizing pre-sale and after sale support to customers, managing the company's day-to-day activities, and managing Human Resource functions."

█'s letter further listed the following general areas of responsibility and included more specific descriptions of the tasks that would make up each category. The areas of responsibility, and percentages of time spent on each, were as follows:

- Developing and creating innovative business development methods and procedures (10%)
- Identifying new business opportunities, developing relationships with new and existing partners and vendors, and negotiating pricing (50%)
- Overseeing implementation of the market strategies by providing the Sales Manager with projects (15%)
- Organizing pre-sale and after sale-support to customers (10%)
- Managing the company's day-to-day activities such as accounting, budgeting, and compliance issues (10%)
- Managing Human Resource functions such as recruiting and hiring new employees performance reviews, training and payroll (5%)

With respect to the beneficiary's primary responsibility for "identifying new business opportunities, developing relationships with new and existing partners and vendors, and negotiating pricing," Mr. █ stated that the beneficiary's specific tasks would include: (1) Searching for newly published bids, researching bidding companies to determine if they have competing security systems, and bidding on projects; (2) Developing relationships with partners and vendors by contacting them regarding potential new business; inquiring on pending bids and quotes; receiving customer feedback; advising partners and vendors on customer marketing and technical questions; and convincing vendors to buy the petitioner's products over competitors'; and (3) Responding to unsolicited inquiries from potential customers by sending site questionnaires, providing marketing and technical materials, preparing quotes and following up to secure a deal. █ added that the beneficiary will have the responsibility to negotiate prices and payment terms in order to close deals with customers.

The petitioner stated that the beneficiary will manage the essential function of "business development" and emphasized that strategic business development should not be confused with "sales." █ explained that "strategic business development is focused on high-impact events a year rather than a large volume of quarterly transactions, so it has separate goals and incentives from those of Sales." He emphasized that the beneficiary "brings a unique perspective on how to effectively influence clients to do business with [the petitioner]."

The definitions of executive and managerial capacity 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 prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

On appeal, counsel contends that the beneficiary qualifies as a function manager due to his management of an essential function of the organization, or more specifically, the company's

business development operations in the United States. 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 clearly describe the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 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. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

The AAO concurs with counsel that a function manager may be the sole employee of a company. However, the petitioner must also demonstrate that beneficiary, as the sole employee, primarily performs qualifying managerial duties and is not performing the non-qualifying duties associated with the function he manages.

The beneficiary does not qualify as a function manager as the detailed position description provided indicates that he will spend the majority of his time performing non-qualifying operational duties. For instance, the petitioner states that the beneficiary will allocate 50% of his time to "identifying new business opportunities, developing relationships with new existing partners and vendors, and negotiating pricing." Within this area of responsibility, the petitioner detailed mostly non-qualifying tasks consistent with those performed by sales personnel, such as searching for newly published bids, researching competitors, bidding on projects, inquiring on bids and quotes, advising customers on marketing and technical questions, convincing customers to buy company products over those of competitors, reaching out to potential customers directly via email and telephone, preparing customer quotes, and following up with potential customers to secure sales. On appeal, the petitioner submits copies of e-mail correspondence which confirm that the beneficiary performs direct sales and technical support including the provision of quotes, technical training, and coordination of installations, along with certain qualifying duties relevant to expanding the petitioner's distribution and sales network. While the petitioner attempted to distinguish between "business development" and "sales," most of the duties that comprise the beneficiary's responsibility for "identifying new business opportunities" and "developing relationships" require his direct involvement in sales transactions and marketing tasks that cannot be characterized as managerial duties.

Furthermore, the petitioner asserts that 15% of the beneficiary's time will be allocated to "overseeing implementation of the marketing strategies by providing the Sales Manager with projects." However, on appeal, counsel states that the beneficiary is the petitioner's only employee. As such, it is not clear from the record who, other than the beneficiary, is available to perform the duties

formerly performed by the sales manager, such as quoting and designing projects for small and medium sized customers. Although the petitioner has submitted distribution and sales representative agreements with third party companies on appeal, no evidence is provided to support a conclusion that these sales representatives are selling the company's products in the United States.

Lastly, the petitioner also stated that the beneficiary will spend 10% of his time "organiz[ing] pre-sale and after-sale support to customers." This area of responsibility, as described in the record, includes a number of non-qualifying operational duties such as answering customer technical questions, preparing solutions and proposals, performing product demonstrations, tailoring products to meet customer needs, instructing and training customers regarding system use, walking customers through troubleshooting, and ordering and sending replacement items in the event of damaged equipment. While the petitioner indicates that the beneficiary will eventually hire technicians, it is unclear to what extent they would relieve the beneficiary from performing these non-qualifying duties. Nevertheless, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Overall, the petitioner's detailed description of the beneficiary's duties indicates that he will be primarily engaged in the performance of non-qualifying operational duties. As such, the petitioner failed to establish that the beneficiary qualifies for the benefit sought as a function manager. While performing non-qualifying tasks will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial duties. Section 101(a)(44)(A) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. The petitioner has not met this burden.

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 company'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 business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

On appeal, counsel asserts that the director overemphasized the petitioner's lack of subordinates, given that the petitioner claimed that the beneficiary qualified as a function manager, rather than as a personnel manager. However, prior to the appeal, the petitioner noted in the beneficiary's duties, and in the submitted organizational chart, that the beneficiary had a subordinate sales manager and that he would be hiring and overseeing additional staff following approval of the petition. As such, counsel's assertion that the director inappropriately emphasized the petitioner's failure to submit evidence related to subordinate employees is not persuasive. The petitioner consistently indicated that the beneficiary will oversee a subordinate sales manager to whom he would delegate non-qualifying duties. The petitioner has submitted no evidence to support a conclusion that the

petitioner employs a sales manager or any other employees. Additionally, although the petitioner states on appeal that the beneficiary will have the support of employees of the foreign company and contractors, the petitioner has not identified these individuals or explained how they would relieve the beneficiary from performing primarily non-qualifying operational duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The petitioner also asserts it will be hiring additional employees, including two sales persons, two technicians, and an office manager, to presumably handle the operational aspects of the business. However, the prospect of future employees is not relevant to establishing the beneficiary's eligibility. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Regardless, even if the AAO were to consider the prospect of future employees, the petitioner has not submitted any evidence to establish that the hiring of additional employees is imminent. 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)).

Again, although a function manager may be a company's sole employee, the petitioner must also demonstrate that this employee is primarily engaged in qualifying managerial tasks. In the present matter, the petitioner has failed to meet this burden given the predominance of operational duties in the beneficiary's job description and the absence of employees, contractors or other staff to perform the non-qualifying tasks associated with the U.S. business. While the AAO does not doubt that further business development efforts are essential to the petitioner's success, or that the beneficiary will exercise discretion in conducting these efforts, the petitioner has failed to establish that the beneficiary will be engaged in primarily managerial duties, such that he could qualify for the benefit sought as a function manager.

Lastly, counsel contends that the director improperly considered the nature and size of the petitioning company in denying the petition. Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). Counsel also correctly observes that it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Counsel contends that USCIS failed to properly consider the aforementioned "elements" referenced in *Systronics Corp. v. INS*. However, a company's small personnel size or whether it may be a

"shell" company are only examples of discrepancies that may be taken into account when analyzing the small stature of a company, but are not elements that *must* be considered. Indeed, USCIS may consider the totality of the evidence along with the small size of the company. In this matter, the evidence reflects that the beneficiary is primarily performing non-qualifying operational duties rather than qualifying managerial duties. Again, while the beneficiary would act as an important representative of the foreign employer in the United States, and would have wide discretion to develop business opportunities for the petitioner, the petitioner has not demonstrated that the beneficiary's role will require him to perform duties that are primarily managerial in nature. In fact, the beneficiary's duty description directly states that he will be primarily engaged in performing non-qualifying duties. Therefore, USCIS's holding is based on the conclusion that the beneficiary will not be performing primarily managerial duties; this decision does not rest on the size of the petitioning entity.

For the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a qualifying managerial capacity in the United States. Accordingly, the appeal will be dismissed.

III. 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.