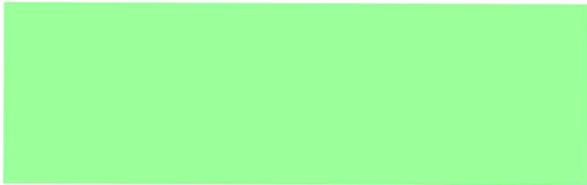


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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090

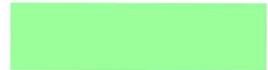


U.S. Citizenship  
and Immigration  
Services



DATE: **JUN 16 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 California corporation that operates as an exporter, importer, and distributor of electronic components and scientific equipment. The petitioner has now filed this nonimmigrant visa petition seeking to employ the beneficiary as its associate director of business development in the nonimmigrant visa category of an L-1A 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 concluding that the petitioner failed to establish that the beneficiary will be employed in the United States 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.

#### 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 record shows that the petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on July 26, 2013. Included among the petitioner's supporting evidence was a statement, dated July 24, 2013, signed by [REDACTED] the petitioner's chief financial officer and senior vice president. The statement indicated that the beneficiary's U.S. position would be comprised of two components – managing the business development function and serving as the "primary interface" between potential or existing suppliers and the petitioner's foreign parent entity. The petitioner stated that management of the business development function would involve the following job duties: identifying potential U.S. business partners and developing business

relationships with U.S. suppliers; developing means to increase the company's sales; moderating business relationships between the foreign parent entity and the petitioner's existing U.S. suppliers; reviewing research findings to determine which products to export; directing the business development project team in Japan; participating in monthly sales manager meetings via teleconference or in person to recommend suppliers and products to the Japanese entity; and arranging site visits to U.S. manufacturers by the Japanese entity's technical and sales staff. The petitioner indicated that the business development function would consume 80% of the beneficiary's time. The petitioner indicated that the other component – supplier interface and relationship management – would consume 20% of the beneficiary's time and would be comprised of the following job duties: serve as the key liaison between the foreign entity and U.S. suppliers; contact suppliers to expedite matters as necessary; monitor relations between the foreign parent entity and U.S. suppliers; and oversee the business development activities performed abroad by the foreign entity's employee in the management office.

On August 8, 2013, the director informed the petitioner that the record lacked sufficient evidence to establish eligibility for the nonimmigrant visa petition sought herein. Among the deficiencies addressed, the director found that the previously provided job description was insufficient to establish that the beneficiary would be employed in a qualifying managerial or executive capacity. Accordingly, the director instructed the petitioner to submit, in part, a supplemental job description listing and describing the beneficiary's typical managerial job duties and indicate what percentage of time would be allocated to each item listed. The director asked the petitioner to discuss how the beneficiary would meet each of the four components of the statutory definition of managerial capacity.

The petitioner responded to the RFE with an undated statement containing a percentage breakdown, a portion of which was included in the director's decision. The following is the percentage breakdown in its entirety:

Management of the Business Development Function – 80%

- Collaborate with local U.S. consultant to determine new business/market trends in the USA, specific to the technology sector of interest, towards finding new leads for products and technology companies seeking representation in Japan. – 15%
- Based on business/market trends, [the beneficiary] will develop business methods and strategies with detailed information gathered from research on new companies with high technology products targeting start-ups and well established companies of particular interest to [the petitioner's] customers and market. – 15%
- Introduce [the parent entity] to new identified companies and begin the dialogue process to determine business potential. Institute additional investigation with detailed information exchanges, presentations, technical specifications and other vetting processes to determine level of interest, suitable product/customer placement, etc. – 15%
- If [the beneficiary] discretionarily determines that the parties and products are a good fit, he will establish, negotiate and sign nondisclosure agreements, pursue and negotiate exclusive representation/distribution agreements to continue the next step in developing the business[.] – 10%

- After establishing successful new business relationships with principals, he will direct the Business Development Project Team members at [the parent entity] in Japan on appropriate next actions such as begin marketing the new principals to customers, ascertain what/if demo units and or samples are needed, begin the quoting process and flow of information to the proper channels, etc. – 15%
- Conduct monthly meetings via teleconference and/or face to face to direct the Business Development Project Team members in Japan and share information on business development strategies and resulting follow-up business. – 5%
- Attend two or three trade shows/exhibitions per month in the U.S. For each show, at least two days will be spent on advance preparation, such as research into the exhibitors and their product portfolios.

Supplier Interface and Relationship Management – 20%

- Visit established U.S. partner companies of [the petitioner] regularly to maintain and improve business relationships, meet with their management team, receive factory tour, present on current market status, update principals on sales forecasts and business conditions in Japan, resolve urgent order issues. – 20%

The petitioner added that the beneficiary will use his "sales and technical expertise" to promote the Japanese parent company and its services to potential U.S. business partners. The petitioner stated that the beneficiary would not have any direct subordinates in the U.S. office.

After reviewing the petitioner's submissions, the director determined that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. Therefore, on November 12, 2013, the director issued a decision denying the petition. The director found that the beneficiary cannot be deemed a function manager because he would be primarily involved in the performance of operational tasks rather than tasks that are indicative of the management of a function.

On December 12, 2013, U.S. Citizenship and Immigration Services (USCIS) received the petitioner's appeal.

Upon review, and for the reasons stated below, we find that the petitioner has failed to establish that the beneficiary will be employed in a primarily managerial or an executive capacity.

### 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, we will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are 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, we review 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 the beneficiary's actual job duties and role in a business.

As previously stated in the director's decision, the petitioner must first show that the beneficiary performs the high-level responsibilities that are specified in the definitions of managerial or executive capacity. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend his or her time primarily performing 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 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. Alternatively, 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 job duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function.

Here, while the petitioner states that the beneficiary is a function manager who would oversee the work of subordinate employees, the record does not establish that the beneficiary will perform as a function manager. Namely, the job descriptions and time allocations that were used to describe the beneficiary's proposed employment indicate that the beneficiary would spend his time primarily performing non-qualifying job duties that are related to the function he is supposed to manage. More simply put, despite the petitioner's claims that the beneficiary will manage the business development function in an effort to grow the company's business, the petitioner indicated that the beneficiary would seek out leads for obtaining business partners to collaborate with the foreign parent entity; approach potential business partners, provide them with information, and make presentations to determine their respective levels of suitability to partner up with the petitioner's foreign parent entity; engage in contract negotiation; conduct research in preparation for trade shows and attend trade shows monthly; and visit existing business partners to meet with management teams

and apprise them of current market conditions, tour business premises, and resolve issues with problematic orders. These are all underlying tasks that comprise the business development function and cumulatively they would consume approximately 65% of the beneficiary's time.

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). In the present matter, the evidence on record shows that the beneficiary would allocate 65% of his time to the performance of non-qualifying tasks. Therefore, despite the professional nature of the beneficiary's tasks, the beneficiary cannot be said to be employed in a qualifying managerial or executive capacity when the primary portion of his tasks do not fall within the prevue of what is deemed as qualifying.

In the petitioner's supporting appeal statement, dated February 21, 2014, the petitioner focuses on the need to hire a manager with the proper "technical experience and a successful sales record" showing the ability to sell in the Japanese markets. However, the petitioner's business needs cannot outweigh the statutory criteria, expressly requiring that the beneficiary's time in his proposed position be allocated to tasks within a qualifying capacity. The petitioner's statement expressly stating that "[e]ach individual person at our office performs an essential function" strongly indicates that the beneficiary would not only manage an essential function, but would also perform the key tasks associated with that function. Despite the petitioner's intention to hire additional personnel sometime in the future is not relevant and cannot be considered to determine eligibility, as the petitioner's eligibility must be established 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). Here, the record shows that at the time of filing, the petitioner did not have any employees, other than the beneficiary's proposed position, to perform the non-qualifying job duties associated with the essential business development function. It therefore cannot be concluded that the petitioner has the personnel necessary to relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying tasks. Thus, in addition to the beneficiary's job description, the petitioner's limited staffing composition further indicates that the beneficiary would spend his time primarily performing business development functions. The petitioner's claim that the beneficiary's proposed position would be limited to primarily managing the business development function is not supported by the evidence on record. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Lastly, in an effort to give the petitioner and the beneficiary the benefit of considering the beneficiary's proposed employment under the statutory definition of managerial capacity as well as the statutory definition of "executive capacity," we note that 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. 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 carries out the day-to-day, non-executive functions of the organization. In the matter at hand, 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. Therefore, the beneficiary has not been shown to be employed in a primarily executive capacity.

The AAO will uphold the director's determination that the petitioner has not established that the beneficiary will be employed in a primarily managerial or an executive capacity in the United States. Accordingly, the appeal will be dismissed.

#### IV. 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.