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

(b)(6)

DATE: MAR 0 4 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 extend the beneficiary's status as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Florida corporation established in April 2011, claims to engage in the import and export of car parts. The beneficiary was previously granted one year in L-1A status in order to serve as the general manager of the petitioner's new office and the petitioner now seeks to extend his status.

The director denied the petition concluding that the petitioner failed to establish that it would employ the beneficiary in a primarily managerial or executive capacity. The director also observed that the evidence of record did not clearly establish that the petitioner had been doing business for the previous year.[1]

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the petitioner established that it has been doing business and that it will employ the beneficiary in a managerial or executive capacity under the extended petition. Counsel submits a brief and additional evidence in support of the appeal.

I. THE LAW

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

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

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

[1] The director's observation that the petitioner failed to establish that it has been doing business is not supported by the weight of the evidence in the record and the director's comments in this regard will be withdrawn.

(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. MANAGERIAL OR EXECUTIVE CAPACITY IN THE UNITED STATES

The primary issue addressed by the director is whether the petitioner established that the beneficiary will be employed 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.

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.

A. Facts

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker on October 26, 2012. On the Form I-129, the petitioner indicated that it engaged in the import/export of car replacement parts, sales of auto parts and other supplies. The petitioner stated that it had a gross annual income of $339,003.00 in 2011 and three current employees at the time of filing. The petitioner described the beneficiary's duties as General Manager as follows:

> Engages in long-range planning, develops strategies and programs to the company's expansion plans, directs market research, identifies business opportunities in the U.S.; Implements the corporation's accounting practices and financial policies, analyzing reports, audits, deciding investment risks, budget, allocation of resources; Reports to the Parent Company's management of all executive decisions in the U.S. operation, ensuring compliance with company's procedures and policies, and surveys viability of insertion of its new products; establishes sales strategies and marketing goals; evaluates performance of the company and its staff, and determines areas of cost reduction and program improvement.

In a letter submitted in support of the petition, counsel for the petitioner further described the beneficiary's duties as:

- Decision, direction and budgets;
- Sourcing and negotiating future distribution partnerships;
- Improving and maintaining direct relationship with customers;
- Formulating and implementing administrative and financial policies and procedures;
- Evaluating the performance of the company and staff and to determine areas of cost reduction and program improvement;
- Engaging in long-range planning and identifying business opportunities in the US;
- Cash management;
- Hiring and training professionals to work in the company and establishing their duties and responsibilities;
- Analyzing financial information, such as price, future trends, and investment risks, making investment decisions, estimating forecast of business and preparing plans of action;
- Maintaining and reviewing account records; and
- Directing efficacy of export and distribution activities of company's products and directing dissemination of technical support service in accordance with corporate marketing strategy.

In addition, counsel letter included a chart of the beneficiary's general areas of responsibility and indicated the percentage of time the beneficiary would allocate to each area on a monthly basis, noting that the beneficiary's priorities would change from month-to-month. The areas of responsibility were listed as follows:

> Directing market research, expansion and strategizing sales: efficacy of wholesale, export and distribution activities of company's products (10-30%)
>
> Supervising employees and reviewing records, policies and procedures (9-25%)
>
> Formulating and implementing sales procedures (10-15%)

Evaluating the performance of the company and staff to determine areas of cost reduction and program improvement (5-20%)

Engaging in long-range planning and identifying business opportunities in the US (5-15%)

Analyzing financial information, such as price, future trends, and investment risks, making investment decisions, estimating forecast of business and preparing plans of action (10-30%)

Cash management (5-15%)

Acquisition of new clients and business relationships (5-20%)

Maintaining and reviewing account records (5-15%)

Hiring and training professionals to work in the company and establishing their duties and responsibilities (5-10%)

Decisions, direction and budgets (5-30%)

The petitioner also included a proposed organizational chart depicting the "planned line up of employees who will form the Petitioner's team in its second year." The chart depicted the beneficiary as general manager and indicated that he supervises a purchase manager who, in turn, supervises a purchase representative. The chart also depicted vacancies for the positions of controller, secretary, and subcontractors.

Counsel stated that the purchase manager "[f]inds suppliers for materials, goods and services; Approves purchase orders; Approves bid proposals from prospective suppliers; Ensures products and goods are cost effective; Analyzes and anticipates new trends, among other duties." In addition, counsel indicated that the purchase representative "prepares the purchase orders, solicits bid proposals from prospective suppliers and reviews requisitions from the company for goods and services, etc." Counsel indicated that neither of the filled positions requires a bachelor's degree.

On January 7, 2013 the director issued a request for evidence (RFE) asking the petitioner to submit additional evidence to demonstrate that the petitioning business can support a managerial or executive position. The director requested the petitioner's bank statements for the months of October, November and December 2012 and Internal Revenue Service (IRS) Forms 941, Employers Quarterly Federal Tax Return, for all four quarters of 2012.

The quarterly tax returns the petitioner provided in response to the RFE confirmed the petitioner's employment of the beneficiary and his two claimed subordinates as of the date of filing. The petitioner's Florida Form UCT-6, Employer's Quarterly Report indicated the beneficiary's subordinates each earn a quarterly salary of $3,840.00.

On April 19, 2013, the director denied the petition concluding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity under the extended petition. The director's decision relied upon the beneficiary's overly broad job description and the petitioner's low staffing levels. The director found that the beneficiary would be supervising two non-professional employees and that the subordinate staff would not relieve him from performing non-qualifying duties associated with the day-to-day operation of the business. The director further found that the submitted position description failed to specify what the beneficiary would actually do on a day-to-day basis as the general manager of the petitioner's import-export business.

On appeal, counsel provides another description of the beneficiary's duties stating that the beneficiary would oversee the petitioning company's operations, ensure that the petitioning company's database meets the parent company's accounting practices and policies, and develop strategies to contribute to the petitioning company's operational plans. He further explains that the beneficiary would have "wide discretionary power to approve price negotiation and agreements with strategic business partners to maximize the company's revenues and presence in the American marketplace."

Counsel included another chart reflecting the beneficiary's duties yet this chart is different and broader in its terms than the one provided with the initial petition. The chart indicates, in part, the following:

> Establish and carry out the company goals, policies, and procedures, 6 hours weekly
>
> Direct and oversee Petitioner's financial and budgetary activities, 4 hours weekly
>
> Manage general activities related to making products and providing services, 4 hours weekly
>
> Consult with other executives from the Parent company, staff, and board members about general operations, 2 hours weekly
>
> Establishes sales strategies and marketing goals, evaluating performance of the company and its staff, and determines areas of cost reduction and program improvement, 3 hours weekly
>
> Implements the corporation's accounting practices and financial policies, analyzing reports, audits, deciding investment risks, budget, allocation of resources, 4 hours weekly
>
> Engages in long-range planning, develops strategies and programs to the company's expansion plans, directs market research, identifies business opportunities in the U.S., 2 hours weekly

Negotiate or approve contracts and agreements, 3 hours weekly

Hiring and training professionals to work in the company and establishing their duties and responsibilities, 2 hours weekly

Analyzing financial information, such as price, future trends, and investment risks, making investment decisions, estimating forecast of business and preparing plans of action, 2 hours weekly

Decisions, Direction and Budgets, 8 hours weekly

Further, the petitioner provides an undated organizational chart depicting the beneficiary as "Director." The chart depicts five staffed positions as follows: (1) [redacted] that "a professional was hired to assume the position as Purchase Manager in order to relieve the General Manager from the day-to-day tasks," but the current chart does not identify a purchase manager.

The petitioner also submits its IRS Form 1120 U.S. Corporation Income Tax Return for 2012 which lists officer compensation at $13,800 and salaries and wages as $15,360.

B. Analysis

Upon review, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity under the extended petition.

In examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Published case law clearly supports the pivotal role of a clearly defined job description, as the actual duties themselves 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).

Counsel's initial description of the beneficiary's duties included broad areas of responsibility such as long-range planning, expansion strategies, market research and business development; however, it failed to provide a more detailed understanding of how the beneficiary would spend his day engaged in those responsibilities. Some of the duties related to routine operational responsibilities including "maintaining and reviewing records" and engaging in financial tasks such as analyzing reports, audits, budget and resource allocation. Counsel did not provide insight into the beneficiary's general duties or explain the beneficiary's daily activities while performing such broad responsibilities including "[d]irecting market research", "expansion and strategizing sales" or engaging in long-range planning and identifying business opportunities in the US." Counsel's list of 11 duties and the chart depicting the beneficiary's duties with a percentage of time allocated to each area of responsibility is vague and fails to adequately explain what the beneficiary actual does on a day-to-day basis.

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 any 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).

Further, the AAO observes that all of the sales invoices submitted in support of the petition identify the beneficiary's name as the petitioner's "sales person." As the petitioner did not indicate that the beneficiary would be directly involved in sales, this evidence raises questions regarding the accuracy and completeness of the various broad descriptions provided by counsel. Further, the petitioner did not claim to employ any sales employees at the time of filing or in response to the RFE. It was only on appeal that the petitioner changed the position title of the individual identified as the "purchase manager" to "external sales." 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).

On appeal, counsel supplements the record with a second chart depicting the beneficiary's duties which assigns a number of hours and a percentage of time to each general area of responsibility. This document is inconsistent with the first chart submitted with the initial petition. While some of the duties are the same or similar they offer no greater detail. Areas of responsibility not previously identified include "Manage general activities related to making products and providing services" while other areas such as "acquisition of new clients and business relationships" and "cash management" were omitted. Counsel did not provide an explanation for these changes or for the reallocation of the time spent engaged in the various areas of responsibility. Therefore, it is not possible to determine which duty description most accurately defines the beneficiary's actual role and the petitioner had not explained the inconsistencies. 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. at 591-92.

The AAO does not doubt that the beneficiary will have discretionary authority over the petitioner's import/export business. However, 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 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 AAO acknowledges that 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 performed and would perform were/are only incidental to the position in question. 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). Here, the petitioner has failed to provide detailed, consistent and credible descriptions of the beneficiary's actual duties sufficient to establish that he would perform primarily qualifying tasks under the extended petition.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. The petitioner submitted evidence establishing that it had three employees, including the beneficiary, at the time this petition was filed. The petitioner indicated that both of the beneficiary's subordinate employees performed duties associated with purchases. The petitioner did not claim to employ any sales, import/export, administrative or financial employees, nor did it claim to utilize the services of independent contractors.

On appeal, the petitioner submits a new undated organizational chart depicting the beneficiary as the director, and identified five subordinate employees including a secretary executive, manager of import/export, external sales, [redacted] sales, and a resale company. Counsel does not assert or provide evidence that the named individuals were employed in these positions when the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Id at 248.*; *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), 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. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily

performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

As noted above, at the time of filing, the petitioner indicated that both of the beneficiary's subordinate employees were engaged solely in duties related to purchasing goods for re-sale. The record reflected no personnel to perform duties related to import/export, warehousing, shipping and receiving, sales, day-to-day bookkeeping and invoicing tasks, and administrative functions. While this is a relatively new business, the petitioner must demonstrate that it is sufficiently staffed to relieve the beneficiary from performing primarily non-qualifying duties. The petitioner has not established that the two employees on staff at the time of filing relieved the beneficiary from performing non-qualifying functions or that it had a reasonable need for him to perform duties that are primarily within a qualifying managerial or executive capacity.

As noted, the petitioner indicates that it plans to hire or has hired additional staff subsequent to the filing of the petition. However, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. Accordingly, the appeal will be dismissed.

The director's remaining observation that the petitioner failed to establish that it has been doing business for the previous year is not supported by the weight of the evidence in the record and is therefore withdrawn. The petitioner submitted tax returns, sales invoices, purchase invoices, a valid commercial lease agreement and banking records sufficient to establish that it has been doing business.

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, the petitioner has not met that burden.

ORDER: The appeal is dismissed.