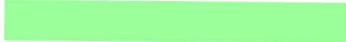


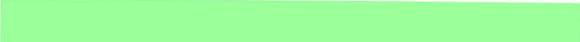
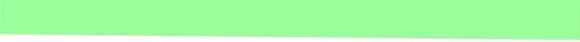


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAR 18 2014** Office: CALIFORNIA 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, California 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 is an Indiana limited liability company, established in 2011, that is engaged in competitive racing. The petitioner states that it is an affiliate of [REDACTED]. The beneficiary was previously granted one year in L-1A status in order to open a "new office" in the United States as the petitioner's business development manager. The petitioner now requests a three-year extension of the beneficiary's status.¹

The director denied the petition, concluding that the petitioner did not establish that it will employ the beneficiary in a qualifying managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the petitioner has submitted sufficient evidence to establish that the beneficiary will be employed in a qualifying capacity as a function manager.

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.

¹ An extension of stay may be authorized in increments of up to two years. *See* 8 C.F.R. § 214.2(l)(15).

- (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.

Further, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) states that a petitioner seeking an extension of a "new office" petition must submit the following:

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

II. The Issues on Appeal

A. Managerial or executive capacity in the United States

The sole issue to be addressed on appeal is whether the petitioner has established that the beneficiary will be employed in a qualifying executive or managerial 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.

1. Facts

The petitioner states that it was established in the United States in order to participate in competitive racing. Specifically, the petitioner asserts that it competes in the league in the United States through which a driving team and/or driver may reach the professional Series following success at this level and another development level called the . The petitioner stated on the Form I-129 that it had one employee at the time of filing.

In a letter submitted at the time of filing, the petitioner stated that the beneficiary, in his capacity as Business Development Manager, would ensure that the U.S. company continues to expand its presence in the United States, participate in professional racing, market professional racers, and obtain international sponsors. The petitioner indicated that the beneficiary has contracted with a company that will perform mechanical and engineering services and stated that he "will devote virtually all of his time in the United States to the commencement and management of the essential functions of the U.S. business." Further, the petitioner stated that the beneficiary will "perform the assignments necessary to manage the essential functions of obtaining new sponsors, building our brand, and growing our team."

The petitioner submitted an organizational chart identifying the beneficiary in the "proposed position" of Business Development Manager, and indicated that he would oversee the following "outsourced" services: sales and marketing department, finance/accounting, technical support, and administration. The petitioner submitted a partial copy of an "Agreement for Engineering and Mechanical Services" between the petitioner

The petitioner did not identify any other contracted service providers at the time of filing.

The director issued a request for evidence (RFE) in which he instructed the petitioner to submit the following: a detailed description of the beneficiary's duties including the percentage of time he allocates to specific tasks; a more detailed organizational chart showing the company's organizational hierarchy and staffing levels, including the names, job titles, summary of duties and salaries for all subordinates; copies of the petitioner's state quarterly wage reports for all four quarters of 2012; and, if applicable, an explanation regarding any claimed staff who do not appear on the quarterly wage reports.

In response to the director's request for evidence, the petitioner submitted the following duty description for the beneficiary:

- Direct and coordinate the day-to-day essential functions of both racecar competition, marketing and engineering functions through the work of contractors such as chair meetings as projects are finalized and make key corporate decisions consistent with the petitioner's goals and policies (25%);
- Liaise with to develop marketing and sponsor activities that best meet the petitioner's goals; provide direction to to optimize sponsors and marketing opportunities and make marketing-related decisions by incorporating recommendations and findings made by with the ability to incorporate his own input (25%);
- Execute short-, mid-, and long-term marketing strategies and plans by taking into consideration relevant factors such as current and anticipated market conditions, shift in market trends, competitor's business conditions, etc. that are unique to the motorsports world (20%);
- Oversee the work of personnel including mechanics and engineers to manage the petitioner's "engineering function", i.e., research and design of components and systems; incorporation of technology including the transfer of cutting edge methods in improving efficiency; investigation of recurring equipment failures and diagnose of faulty operation of motorsports design, etc. (20%);
- Establish budgets for marketing and engineering functions by identifying target industries and potential sponsorship opportunities; determine, implement and monitor expenditures in conjunction with outside professionals such as and manage monthly, quarterly, and annual budgets (5%); and
- Determine ideal allocation of corporate resources and asserts to streamline marketing and engineering activities and develop a staffing plan for recruiting additional personnel consistent with the anticipated growth of the petitioner's operations (5%).

The petitioner further stated that:

Given the foregoing, [the beneficiary] meets the definition of a "functional manager": (1) he manages essential functions of the organization such as "marketing" and "engineering" and, in turn, manages the organization as a whole; (2) manages these essential functions through the work of independent contractors . . . ; (3) functions at a senior level through the exercise of independent discretionary authority to make key decisions for the petitioner; and (4) exercises discretion over the day to day operations of the organization (as well as "marketing" and "engineering" functions) through the work of independent contractors. . . .

The petitioner submitted a revised organizational chart identifying the beneficiary's supervision of the following outsourced departments: (1) Marketing & Sponsorship Acquisition – [REDACTED] (\$75,000 estimated cost); (2) Finance – [REDACTED] (3) Technical, Mechanical and Engineering – [REDACTED] (\$5,000 per month); and (4) Administration – [REDACTED] (\$75,000 estimated cost). The petitioner also stated that the beneficiary was in the process of recruiting a team manager and provided a job description for this proposed position. Finally, the petitioner stated that the beneficiary "directs the services of the offshore head mechanic in Venezuela to coordinate all aspects of equipment design and vehicle components and systems in the U.S." The petitioner emphasized that the beneficiary's responsibilities "include a great deal of delegation, business development strategy development, and meetings with his team."

The petitioner submitted a copy of its "Professional Services Agreement" with [REDACTED] along with a Statement of Work (SOW) for a project with a start date of May 11, 2012 and an estimated end date of July 31, 2012. The petitioner did not provide any subsequent statements of work issued pursuant to this agreement. According to the SOW, [REDACTED] was to perform the following services: provide a business plan outline and template; identify the resources necessary and develop an approach for completing the business plan; coordinate data gathering and content creation; compile all information and data in to the final business plan; coordinate marketing and sponsor acquisition strategy activities as requested; and "other management services" as requested. The SOW indicated that [REDACTED] principal, would serve as a Program Manager/Business Consultant at a rate of \$125 per hour, with total estimated annual fees amounting to \$75,000. Although the SOW indicates that [REDACTED] will invoice the petitioner on a monthly basis, the petitioner did not provide copies of any invoices or evidence of any payments to [REDACTED]

The petitioner also indicated that the beneficiary had negotiated an extension to the petitioner's agreement with [REDACTED] will provide five professional mechanical engineers and two professional project engineers. The petitioner provided a copy of the agreement which indicates that the petitioner will pay a service fee of "\$2000 and \$5000 per month for services rendered." The petitioner did not provide evidence of any payments made to [REDACTED]

In denying the petition, the director noted that the petitioner has no employees other than the beneficiary and instead claims to allocate all of its work to independent contractors and consultants. The director concluded that the petitioner had not established that the beneficiary has supervisory control over these contractors, identified the amount of time he allocates to the claimed supervisory duties, or provided evidence that the contract employees relieve the beneficiary from primarily performing non-qualifying operational duties.

On appeal, counsel asserts that the beneficiary qualifies as a function manager, noting that he acts at a senior level within the company and directs independent contractors who perform the operational functions of the business, including a "marketing and sponsorship function" and a "technical, mechanical, and engineering function." Counsel contends that the beneficiary delegates all non-qualifying operational duties to independent contractors. Counsel further states that the beneficiary's independent contractor subordinates have acknowledged their supervision by the beneficiary. Finally, counsel maintains that the beneficiary directs and supervises a head mechanic employed by the foreign company, and that this head mechanic oversees subordinate engineers and mechanics abroad, thereby relieving the beneficiary from primarily performing the non-qualifying operational duties of the business. The petitioner submits additional evidence related to its business in support of the appeal, including articles in racing publications and general information regarding the 2012 [REDACTED] series.

2. Analysis

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 managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). Here, the petitioner has submitted a vague list of duties that fails to convey what the beneficiary actually does on a day-to-day basis. For instance, the vague duties include chairing meetings as projects are finalized and making key corporate decisions consistent with the petitioner's goals and policies, liaising with the petitioner's marketing contractor to develop marketing and sponsorship acquisition strategies, executing marketing strategies, overseeing the incorporation of technology to improve efficiency, establishing budgets and monitoring expenditures, and determining the allocation of corporate resources. Most of these duties are poorly defined, as the petitioner has not submitted specific examples of key corporate decisions made, goals or policies of the company, marketing or sponsorship strategies implemented, the amount of budgets or expenditures monitored or corporate resources allocated, during the last year. 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).

On appeal, counsel's primary assertion is that the beneficiary qualifies as a function manager through his supervision of the petitioner's "marketing and sponsorship acquisition function" and the "technical, mechanical, and engineering function." Counsel points to the petitioner's contract with [REDACTED] noting that the beneficiary supervises the activities of this company in formulating a marketing and sponsorship plan. Also, counsel states that the petitioner oversees independent contractors from [REDACTED] a company which handles the operational matters of maintaining competitive racecars.

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 detailed description of the beneficiary's duties, 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).

In this matter, the petitioner has not provided sufficient evidence to demonstrate that the beneficiary qualifies as a function manager. The petitioner claims that contractors relieve the beneficiary from performing non-qualifying duties associated with marketing, mechanical/engineering, administrative and financial activities. Although the petitioner has submitted a contract to support that it consults with [REDACTED] on technical racing matters, and a contract indicating that the company contracted with [REDACTED] Solutions for the development of its five-year business plan and marketing/acquisition strategy, the petitioner has not submitted evidence to support the level of engagement of these contractors to demonstrate that they relieve the beneficiary from performing non-qualifying operational duties inherent to the business.

In a request for evidence, the director asked the petitioner to submit a U.S. organizational chart indicating all of the beneficiary's subordinates, including job titles, a summary of duties, educations and salaries. However, the petitioner only vaguely states that it engages independent contractor companies to perform the operational tasks of the business, and fails to explain with specificity the number of contractors it employs, their specific tasks, or their level of engagement.

Most importantly, the petitioner has not documented its payments to the claimed contractors. For instance, the petitioner's organizational chart and supporting contracts reflect that the beneficiary oversees [REDACTED] Solutions at an estimated cost of \$75,000, [REDACTED] at an estimated cost of \$5,000 per month, and [REDACTED] at an undisclosed cost. However, in each case, the petitioner has not submitted supporting evidence to demonstrate that it has paid [REDACTED] the proffered amounts during the term of their agreements. Further, in the case of [REDACTED], the terms of the agreement with this entity specify that a total of seven engineers or mechanics would be provided, but the petitioner did not identify them or describe the scope of their services. In the case of [REDACTED], no explanation was provided as to the petitioner's relationship with this institution, nor did the petitioner provide related supporting evidence, beyond statements evidencing the existence of the petitioner's bank account. 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)).

In fact, the minimal evidence submitted suggests that the petitioner's relationship with [REDACTED] was limited to that company's assistance with the petitioner's business plan and development of its initial strategies. The petitioner has submitted only one Statement of Work associated with its service agreement with [REDACTED] for a project that had an estimated end date of July 31, 2012. As noted above, the petitioner has

provided no evidence of any payments made to [REDACTED] and no evidence that this company was ever contracted to perform the petitioner's day-to-day marketing functions on a long-term or continuous basis. Further, although the petitioner's organizational chart indicates that [REDACTED] also serves as the company's administrative services provider, the evidence does not support such a finding.

As such, the petitioner has not submitted sufficient evidence to support its claim that independent contractors primarily perform the non-qualifying duties associated with the petitioner's major functions. Further, although the petitioner indicates that the beneficiary will hire a team manager in the future, the petitioner has not indicated who is currently responsible for performing the duties of the proposed position, if not the beneficiary. As such, the petitioner has not established that the beneficiary is relieved from primarily performing non-qualifying operational duties inherent to operating a competitive racing team. While performing non-qualifying tasks necessary to produce a product or service 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 or executive duties. Section 101(a)(44) 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. For the reasons discussed above, the petitioner has not met this burden.

The petitioner states that in addition to the above referenced independent contractors the beneficiary also supervises a head mechanic and subordinate engineers and mechanics who work for the petitioner's foreign affiliate. However, the petitioner has failed to articulate how these foreign employees support the petitioner's operations in the United States and has not submitted evidence to support their claimed contribution to the petitioner's operations. Once again, 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Pursuant to section 101(a)(44)(C) of the Act, 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 qualifying managerial or executive position.

On appeal, counsel also relies on an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. First, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are

not similarly binding. However, even if the unpublished decision were taken under consideration as binding, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision, other than noting that the beneficiary is also the sole employee of the petitioner. In fact, as noted above, the petitioner has submitted insufficient evidence regarding its operations and the engagement of its independent contractors, necessary to determine whether the beneficiary could be primarily engaged as a function manager.

In conclusion, the petitioner has failed to submit a detailed description of the beneficiary's duties sufficient to establish that he will be employed in a qualifying managerial capacity. Further, the petitioner has not submitted sufficient evidence to support the assertion that it regularly engages independent contractors to relieve the beneficiary from primarily performing the non-qualifying operational duties of the business. Although the petitioner indicates that it will hire employees in the future, 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).

Therefore, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity in the United States. For this reason, the appeal must be dismissed.

B. Financial Status and Doing Business

Beyond the decision of the director, the petitioner has not demonstrated that it has been doing business during the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B), nor submitted evidence of the financial status of the United States operation pursuant to 8 C.F.R. § 214.2(l)(14)(ii)(E).

In the present matter, the petitioner has not established that it is doing business in the United States as defined by the regulations. The submitted Form I-129 at Part 5, Items 14 and 15 related to the petitioner's gross and net annual income, states only "start-up," suggesting that the petitioner has not accrued any income during the last year. Further, the petitioner has not submitted any current financial documentation to demonstrate that it is earning any income or regularly providing goods or services. See 8 C.F.R. § 214.2(l)(14)(ii)(E). Additionally, the petitioner's most recent Form 1065 U.S. Return of Partnership Income submitted on the record indicates that the petitioner did not earn any income during 2011. Therefore, the evidence presented is not sufficient to establish that the petitioner is currently doing business as defined by the regulations or to demonstrate the current financial status of the company. For this additional reason, the petition cannot be approved.

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).

(b)(6)

NON-PRECEDENT DECISION

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III. Conclusion

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. 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.