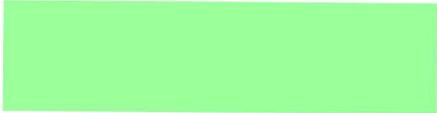
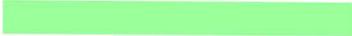




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAR 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:

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,

f 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 appeal will be dismissed.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker (Form I-129) seeking to classify the beneficiary as a 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, is a real-estate firm involved in the purchase, rental, and sales of commercial properties. It claims to be an affiliate of [REDACTED] the beneficiary's foreign employer in Brazil. The beneficiary was previously granted one year in L-1A classification in order to open a new office and the petitioner seeks to extend his status so that he may continue to serve as its Chief Executive Officer.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily 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 for review. On appeal, the petitioner asserts that the evidence of record establishes that the beneficiary will function in a qualifying executive capacity. The petitioner provided a statement on the Form I-290B, Notice of Appeal or Motion, and submitted additional evidence.

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.

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.

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

- (v) 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. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity under the extended petition.

A. Facts

The petitioner filed the Form I-129 on June 12, 2012. The petitioner indicated in the letter submitted with the Form I-129 that it is a real-estate investment firm.

The petitioner stated that, the beneficiary, as its Chief Executive Officer, is responsible for directing the overall management of the organization. He will plan, develop, and establish overall policies; be responsible for ensuring achievement of defined outcomes in the company plan; confer with company officials to plan business objectives; review activity reports and financial statements; direct and coordinate formulation of financial programs; and evaluate performance of other employees.

In support of the petition, the petitioner provided copies of its bank statements, Internal Revenue Service (IRS) Form 1065 U.S. Return of Partnership Income for 2009, 2010, and 2011, IRS Form 941 Employer's Quarterly Federal Tax Return for the fourth quarter of 2011 showing payments made to one employee, and the IRS Form W-2 for 2011 for the beneficiary.

The director issued a request for additional evidence ("RFE") instructing the petitioner to submit, *inter alia*, the following: (1) a detailed explanation of the type of business the U.S. petitioner operates; (2) a more detailed description of the beneficiary's duties in the United States including percentage of time required to perform the duties and employee's under the beneficiary's supervision; (3) evidence of the number of contractors utilized and the duties performed by each contractor; (4) a

copy of the Form 941, Employer's Quarterly Federal Tax Return for all four quarters of 2011 and the first and second quarters of 2012.

Former counsel for the petitioner submitted a letter in response, stating that the company was established to "buy, rent and sell residential and commercial properties." Counsel explained that the properties being selected are sold at foreclosure or short sale and each property is remodeled to rent or sell. The petitioner provided no other explanation as to the current status of the organization including sources of income from the projects, target market, current number of properties held, and number of targeted acquisitions per year.

The petitioner provided a list of duties for the beneficiary as follows:

- a) Select and establish the company's goals and objectives and plan and supervise the execution of the same;
- b) Control and direct the assets and finances of the company, and establish improvements to increase the profitability of investments;
- c) Hire and fire employees, and enter into agreements with independent contractors;
- d) Lead and guide the team, teach and train in new investment projects and maintain level of motivation;
- e) Make proposals to purchase, rent, or sell properties;
- f) Aim to achieve net profit of minimum 8%.

The petitioner's response to the RFE also included the following duty description, with the percentage of time allocated to each duty:

- 20% to establish the goals and functions of each one the staff [*sic*], so that they can adapt natural, with a minimum of stress;
- 30% on sales and contracts proposals;
- 30% make decisions regarding new undertakings, to avoid complacency and waste due to lack of activity.
- 20% of time spent to report and present investment alternatives to the partnership.

The petitioner attached the requested IRS Forms 941 for all four quarters of 2011 and the first and second quarter of 2012. The Form 941 for the quarter in which the petition was filed showed that the petitioner has one employee.

The petitioner also provided an organizational chart showing the beneficiary as manager. Reporting to the manager appears to be a variety of divisions and personnel. The divisions include payroll, bank investments, contracts, purchase real estate, material, sales & marketing, title company, and material. The chart does not provide a clear picture of what employees work or will work for the company. The chart identifies an individual in the position of an agent and broker for a third party employer, [REDACTED]. The chart also identifies an individual in an accounting position for [REDACTED], another third party employer. The chart does not identify any employers working directly for the petitioner.

The petitioner also included a copy of a proposal for construction work for a property in [REDACTED] FL; four sale and purchase contracts from [REDACTED]; a buyers real estate disclosure and transaction brokerage agreement from [REDACTED] bid documents from auction.com; a termite agreement; and receipts for lease payments.

The director denied the petition finding that the petitioner had not established that the beneficiary will be employed in a managerial or executive capacity. The director noted that the beneficiary is the only employee of the company. Therefore, while the petitioner listed a number of duties that would normally be required or associated with an executive, the petitioner failed to establish that the beneficiary will actually be carrying out those duties. Furthermore, the director found that the beneficiary is not managing a staff of subordinate supervisory, professional, or managerial employees who will relieve him from performing the services of the corporation.

On appeal, the petitioner asserts that the beneficiary's duties support a finding that he will continue to serve in a managerial or executive position. As evidence of the beneficiary's executive duties, including responsibility for company profits, the petitioner attaches the following documents to the appeal: its bank statement from August of 2011; real estate tax assessment for 2011 and 2012 from [REDACTED] IRS Form 1120, U.S. Corporation Income Tax Return for 2009 and 2012. Furthermore, the petitioner asserts that the company ended the year 2012 with profits and will therefore hire employees in 2013. The petitioner also asserts that it used service contractors. The petitioner states that neither "immigration," nor "attorneys," reported an "exact date required to hire its own employees."

B. Analysis

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a primarily 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). 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 time on day-to-day 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 beneficiary's job descriptions submitted in the initial petition, and in response to the RFE, are insufficient to establish that the beneficiary will be primarily performing managerial or executive duties. Duties such as "select and establish the company's goals and objectives," "control and direct the assets and finances of the company," and "lead and guide the team," do not give a clear picture of what the beneficiary would actually be doing on a day-to-day basis as the Chief Executive Officer of

a real estate development business. Reciting the beneficiary's vague job responsibilities or broadcast 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).

A critical analysis of the nature of the petitioner's business undermines counsel's assertion in response to the RFE that subordinate employees or contractors relieve the beneficiary from performing non-qualifying duties. Rather, it appears from the record that the beneficiary is the only individual available to run the real estate development business. Therefore, it is reasonable to conclude, and has not been proven otherwise, that the beneficiary is performing all other functions associated with the business. Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. 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. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988).

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. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; See 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. See 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See 101(a)(44)(A)(ii) of the Act.

The record contains insufficient information to demonstrate that the petitioner's organization would support a managerial or executive position. The record shows that the beneficiary is the only full-time employee available to perform the day-to-day tasks of the real-estate development business. While the petitioner's organization chart shows other employees, the petitioner's IRS Form 941 for the relevant quarter shows that none of the additional employees have been hired as of the date of filing. On appeal, the petitioner claims that the organization will hire employees in 2013, after the filing date. The petitioner, however, 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).

Furthermore, the petitioner claims to have contracted employees available to perform some of the services of the organization. The director requested evidence of such contractors in the RFE. In response, the petitioner claims to have submitted evidence regarding the use of a brokerage firm, termite service, and a construction contractor for one property. While these services may be of use to the petitioner's business, the petitioner failed to show how the use of these contracted services directly relieves the beneficiary of the non-qualifying duties associated with the real-estate development business such as making decisions regarding company finances, requesting bid quotes and deciding on property improvements, and making decisions regarding new investments or markets.

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, United States Citizenship and Immigration Services (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.

The proposed position of the beneficiary is a Chief Executive Officer of real estate development business in which the beneficiary is the only employee. The petitioner has not demonstrated that the beneficiary, as a personnel manager, will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. *See* section 101(a)(44)(A)(ii) of the Act. Furthermore, the petitioner has not established that it will employ a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial or executive duties. Regardless of the beneficiary's position title, the record is not persuasive that the beneficiary will function at a senior level within an organizational hierarchy.

In the present matter, the totality of the record does not support a conclusion that the beneficiary will manage a function or manage subordinates who are supervisors, managers, or professionals. Instead, the record indicates that the beneficiary and his subordinates will perform the actual day-to-day tasks of providing the petitioning company's real estate development business. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial under the statutory definitions.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex 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.* As described above, the petitioner has not provided a sufficient position description to establish that the beneficiary's actual duties are executive in nature, nor has the petitioner established how its current organizational hierarchy would support an executive level position.

Based on the foregoing discussion, the petitioner has failed to establish that it will employ the beneficiary in a managerial or executive capacity and the appeal will be dismissed.

III. Conclusion

The appeal will be dismissed for the above stated reasons. 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.