



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **NOV 17 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker under 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 petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant visa petition seeking to extend the beneficiary's employment as an L-1A intracompany transferee employed pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act ("the Act"), U.S.C. § 1101(a)(15)(L). The petitioner states that it is engaged in the convention and exhibition business. The Form I-129, Petition for Nonimmigrant Worker, indicates that the petitioner has ten employees and a gross annual income of \$632,060. The petitioner claims to be a subsidiary of [REDACTED] in China and seeks to extend the beneficiary's employment in the position of general manager for a period of three years.<sup>1</sup>

The director denied the petition, concluding that the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or executive capacity.

Through counsel, the petitioner subsequently filed a Form I-290B, Notice of Appeal or Motion. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, the petitioner asserts that the evidence establishes that the beneficiary's position meets both of the definitions of managerial or executive capacity. The petitioner contends that the director erred by mischaracterizing the nature of the beneficiary's responsibilities and by disregarding the beneficiary's placement in the company's organizational hierarchy.

### 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.

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<sup>1</sup> An extension of L-1 status is limited by regulation to a period of two years. See 8 C.F.R. § 214.2(l)(15)(ii).

- (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

- (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. Managerial or Executive Capacity

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, Petition for a Nonimmigrant Worker, on February 25, 2014 seeking to extend the beneficiary's employment as its general manager. The petitioner indicated on the Form I-129 that it was established in 2011 to operate a convention and exhibition business arranging trade shows for Chinese exhibitors in Las Vegas. The petitioner also indicated that it has ten employees and a gross annual income of \$632,060.

On the Form I-129, the petitioner states that "[the beneficiary] has extensive international marketing duties and authorities for the [redacted] business development worldwide." The petitioner further states that the beneficiary "handles [the petitioner]'s business efforts on a daily basis"; "made decisions to hire and fire key employees"; "stipulated annual marketing plan and budgets"; and "filed annual international business development reports with [redacted] headquarters".

Where the Form I-129 asks the petitioner to provide a description of the beneficiary's proposed duties in the United States, the petitioner stated:

[The beneficiary], as General Manager, is the chief executive officer of the corporation and has active management of the business of the corporation. He is executing on behalf of the corporation all instruments requiring such execution except to the extent this signing and execution thereof shall be expressly designated by the board of directors to some other officer or agent of the corporation.

In support of the instant petition, the petitioner submitted contracts, rental reservations, invoices, a commercial lease agreement, a catering agreement signed by the beneficiary on behalf of the company, and email correspondence between the petitioner's clients and the beneficiary.

The director issued a request for evidence ("RFE") informing the petitioner that the initial evidence was insufficient to establish the beneficiary's managerial and/or executive position in the United States. The director requested that the petitioner submit: (1) an organization chart including the beneficiary and the names, job title, summary of duties, education level, and salary of all employees subordinate to the beneficiary; (2) copies of its state quarterly wage reports for the third and fourth quarters of 2013; (3) copies of its payroll summary and tax forms showing the wages paid to all employees under the beneficiary's direction; and (4) copies of employment agreements entered into by any newly hired employees who will be managed by the beneficiary.

The director also requested a letter describing the beneficiary's expected managerial or executive duties and the percentage of time to be spent on each specific duty. The director stated that the letter should address how the beneficiary's duties fall within the statutory definitions of either managerial or executive capacity. In response to the RFE, the petitioner provided a document entitled "Explanation on Corporate Chart." The document states that the U.S. company provides the following services:

1. Creating, developing, organizing and holding all kinds of exhibitions & conferences.
2. Exhibiting space leasing: on-site operation and management; lighting, water and electricity supply and compressed air; air conditioning; cleaning and waste disposal; security services.
3. Seminar and VIP rooms leasing: providing rooms and services for conferences, seminars, press conference and VIP reception.
4. Construction of standard booths: standard-booth construction, carpeting, lighting facilities installation, design and construction of special booths.
5. Information technology services: phone, fax and internet installation.
6. Forwarding services and customs clearance: providing domestic and international exhibits forwarding, customs clearance.
7. Advertising services: advertisement design, production and release in a long-term or a slow period.
8. Leasing of articles: leasing of furniture, audio-visual equipment, floral, etc.
9. Business center: providing DDD and IDD calls, fax, typing, copying, computer word processing and internet services.
10. Shops: selling articles for booth decoration, hardware, etc.

11. Other services: organizing press conferences and opening ceremonies, hiring interpreters and security persons, reserving hotels and services for seminars and banquets.

The petitioner also explained that, based on the nature of the industry and services provided, it is legally obligated to cooperate with local labor unions who dispatch laborers to the exhibition sites located in different cities.

The petitioner also provided: invoices billed to [REDACTED] for work at the [REDACTED] in Chicago, Illinois held from March 2, 2013 through March 5, 2013; a contract between [REDACTED] for laborers to set-up and dismantle booths at the [REDACTED] held [REDACTED] invoices to [REDACTED] for labor at the [REDACTED] held [REDACTED]; labor dispatch information dated May 2, 2013 for seven labor union employees to the [REDACTED] documentation for pension payments made for twenty-one labor union employees in May 2013 and October, 2013; and documents for a breakfast meeting dated 2013.

The petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, IRS Form 940, Employer's Annual Federal Unemployment (FUTA) Tax Return, and IRS Form W-3, Transmittal of Wage and Tax Statements, indicate that during 2013 it payments to employees totaling \$23,190.62. The petitioner's IRS Form 941, Employer's Quarterly Federal Tax Returns indicate that it paid 21 employees a total of \$13,953.94 during the second quarter; it paid 23 employees a total of \$9,236.98 during the fourth quarter; and it paid no wages or other compensation to employees during the third quarter of 2013. The petitioner's 2013 state quarterly wage reports indicate that the petitioner paid wages in May and December, and the record does not reflect wages paid at any other time throughout the year.

The director ultimately denied the petition finding that the evidence was insufficient to establish that the beneficiary would be employed in a qualifying managerial or executive capacity under the extended petition. The director noted that the petitioner provided a list of services the company provides, but did not identify the beneficiary's specific duties or provide the percentage of time the beneficiary spends performing managerial or executive duties. The director also noted that the petitioner failed to provide the requested organization chart, job titles and a summary of duties for its employees. The director concluded that the duties which were described by the petitioner are not typically performed by someone in a managerial or executive position.

On appeal, counsel for the petitioner asserts that the director mischaracterized the nature of the beneficiary's responsibilities and disregarded his placement within the corporate group's organizational hierarchy. Counsel specifically emphasizes that the petitioner is the general manager of the official trade representative of the Government of China, and that the beneficiary "fills an important role in an extremely important entity."

The petitioner provides an organization chart, a detailed description of the beneficiary's job duties, and additional evidence to show the beneficiary's role within the company as the sole point of contact.

## B. 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 a managerial or executive capacity.

As a preliminary matter, for the first time on appeal, the petitioner submits additional evidence including an organization chart and a description of the beneficiary's job duties. This information was previously requested by the director in the RFE, but was not provided in the petitioner's response. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, we need not and will not consider the sufficiency of the evidence submitted on appeal.

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 regulations governing the extension of a "new office" require that the petitioner submit a statement of the beneficiary's duties for the previous year and beneficiary's proposed duties under the extended petition. *See* 8 C.F.R. § 214.2(l)(14)(ii)(C). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in an executive or managerial capacity. *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 definition. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

In the instant matter, the petitioner's brief description of the beneficiary's duties is overly broad and fails to indicate whether the beneficiary's duties are managerial or executive. For example, the petitioner states that the beneficiary: "has extensive marketing duties and authorities for business development"; "has active management of the business"; "handles [the petitioner]'s business efforts on a daily basis"; "stipulated marketing plan [*sic*] and budgets"; and executes documents on behalf of the company. These broadly described responsibilities potentially encompass a myriad of both qualifying and non-qualifying duties. Without a sufficiently detailed statement of the beneficiary's job duties, the petitioner has failed to establish that the beneficiary's duties are more than the non-qualifying marketing, financial, administrative and operational duties inherent to selling and providing the company's services. The regulations require the petitioner to describe the beneficiary's duties with the level of detail necessary to determine whether each duty meets the statutory definitions of managerial or executive capacity. 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, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner has failed to distinguish the beneficiary's managerial and/or executive duties from his non-qualifying duties. The petitioner has also failed to provide a percentage of time that the beneficiary spends performing each duty. Therefore, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

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 only provision that allows for the extension of a "new office" visa petition requires the petitioner to demonstrate that it is staffed and has grown to the point where it can support a qualifying managerial or executive position. The petitioner is required to submit 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. 8 C.F.R. § 214.2(l)(1)(14)(ii)(D).

In the RFE, the director informed the petitioner that the initial job description was insufficient to establish the beneficiary's employment in the United States as a manager or executive. The director instructed the petitioner to submit a letter describing the beneficiary's managerial or executive duties and the percentage of time spent on each duty. The director also instructed the petitioner to submit an organizational chart showing the U.S. entity's organizational structure and listing the name, job title, summary of duties, education level, and salary of all the employees in the beneficiary's immediate division, department, or team. The petitioner responded to the RFE, but failed to provide the letter describing the beneficiary's duties, an organization chart, and information about employees working directly with the beneficiary. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner indicated on the Form I-129 that it employed 10 individuals. However, payroll documents, tax returns, and documents from the labor union indicate that the petitioner paid 21 labor union employees in May and 23 union employees in December. The corporate tax return does not show additional wages paid outside of these two months. 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. 582, 591-92 (BIA 1988). The petitioner has not provided sufficient evidence to establish the number of employees working for the U.S. business. Based on the evidence submitted, the petitioner has not established that it regularly employs anyone other than the beneficiary to handle its day-to-day administrative and operational matters.

The invoices suggest that the beneficiary works with the labor union and sub-contractors who provide some of the company's services. However, the record indicates that the union employees and sub-contractors are hired to work on a particular project and are not involved in the day-to-day operations of the business. In response to the RFE, the petitioner stated that the U.S. entity provides services including: organizing exhibitions and conferences; leasing exhibition space, seminar rooms, VIP rooms, furniture, and audio-visual equipment; advertising; booth construction; reserving hotels; hiring interpreters and security personnel; forwarding and customs services; and installing or providing phone, fax, and internet services. The petitioner has not provided evidence of any employees other than the beneficiary available to perform all other administrative and operational tasks associated with providing the company's many services.

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). Although the beneficiary is not required to supervise personnel, if it is claimed that the beneficiary's duties involve the supervision of employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. Without an organization chart, position descriptions for its U.S. employees, or evidence of its staffing levels, the petitioner has not established that the beneficiary has subordinate employees sufficient to qualify the beneficiary as a "personnel manager."

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 clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). 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, or other non-qualifying duties, is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r. 1988). The petitioner has not articulated a claim that the beneficiary is a function manager.

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.* Again, the evidence does not demonstrate that the petitioner has sufficient subordinate staff to relieve the beneficiary from involvement in the day-to-day operations of the enterprise.

In the present matter, the regulations provide specific 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.

On appeal, the petitioner states that it provided ample evidence that the beneficiary is its general manager as his name and job title appears on all company documents. The petitioner emphasizes that the beneficiary plays a key role in the overall organization as the parent company is a branch of a Chinese governmental entity that oversees and promotes all international trade with China. The petitioner maintains that the beneficiary is "the one person that handles the necessary arrangements with the subcontracting companies to assemble the exhibits" and that the petitioner is not "some mom and pop company" but rather the official trade representative of the government of China.

We do not question that the beneficiary occupies the senior position in the petitioner's organization and has discretionary authority to manage its operations. However, the fact that the beneficiary 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 petitioner must still establish that his actual duties are primarily managerial or executive in nature, and, for the reasons discussed above, the petitioner has not met that burden.

Based on the evidence furnished, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

### 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.