

(b)(6)



U.S. Citizenship  
and Immigration  
Services

DATE: **OCT 03 2014**

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg

Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the nonimmigrant visa petition and 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 extend the beneficiary's status as an 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 Georgia limited liability company, operates a beverage manufacturing and distribution company. It claims to be an affiliate of [REDACTED] located in Sri Lanka. The beneficiary was previously granted one year in L-1A status to serve as chief executive officer (CEO) of the petitioner's new office and the petitioner now seeks to extend his status for two years.

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.

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 director placed undue emphasis on the petitioner's staffing levels and its 2012 revenues in determining whether the beneficiary would be employed in a qualifying managerial or executive capacity under the extended petition. The petitioner submits a brief from counsel 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.
- (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
- (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. 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 September 26, 2013. The petitioner stated on the Form I-129 that it operates a food and beverage business with five employees. In a letter dated September 19, 2013, the petitioner described the beneficiary's duties as follows:

He will oversee the management of all business and financial operations, will hire all managerial personnel and oversee their work, and will be responsible for the daily management of the company. [The beneficiary's] main areas are Marketing, Distribution and Brand building. He's also involve[d] in product innovation and contract manufacturing and finding right manufactures [sic]. Negotiate with local manufacture[r]s and partners to manufacture and distribute [redacted] energy drink, [redacted]

As the current Manager/CEO, [the beneficiary] currently oversees all aspects of the business, including working with employees under him to support in marketing and advertng [sic], mainly on ads with Ad agencies and approving Brand communication materials, Ads and sponsorship. He also confers with the overseas company to plan business objectives, develop organizational policies and establish responsibilities for attaining the company's goals.

The petitioner indicated that the beneficiary's role is in an executive capacity and that he is responsible for the overall sales and marketing, establishing the business, and generating revenue. The petitioner emphasized that the beneficiary is as at the top of the company's hierarchy and does not report to any other individual.

The petitioner submitted a copy of its business plan updated in 2013. The business plan indicates that the petitioner expanded from its initial plan to distribute [redacted] branded energy drinks manufactured in the United States to introduce [redacted] which are contract manufactured by companies located in Vietnam and China. The petitioner stated that it started selling the [redacted] in July 2013 and would offer [redacted] beginning in October 2013. The petitioner provided supporting evidence confirming that it is doing business as stated in the business plan.

The petitioner submitted an organizational chart reflecting that the beneficiary supervises an office sales manager and a manager, administration. The chart reflects that the office sales manager supervises a sales representative and a driver/helper, while the manager, administration supervises a data clerk and a receptionist/telephone operator. The petitioner also provided copies of recent paystubs for the employees on the chart, excluding the beneficiary and the manager, administration.

The director subsequently issued a request for evidence (RFE). The director advised that the petitioner's initial description of the beneficiary's duties was insufficient to establish that the beneficiary would primarily perform managerial or executive tasks and requested a more detailed position description. The director also advised the petitioner that it must submit a statement describing the staffing of the company, including the number of positions and the types of positions they hold, accompanied by evidence of wages paid to employees. The director stated that the petitioner could fulfill this requirement by providing a detailed organizational chart along with state and federal quarterly wage reports.

In a letter dated December 17, 2013, the petitioner provided an expanded description of the beneficiary's proposed duties, which is summarized below:

**Management of all business and financial operations:**

- Exercises wide latitude in discretionary decision making.
- Ensures that the business operates at targeted gross margin.
- Approves all pricing formula and intended margin limits.
- Heads up and manages all the marketing sales and distribution activities and strategies.
- Makes the final decision in selecting the right manufacturers for all the products sold by [the petitioner] under the brand name [redacted]
- Final approval of sales orders including special discounts and pricing issues.
- Approves sales proposals prepared by the Sales Manager.
- Communicates with the decision makers of various retail outlets in order to make [redacted] products available at these retail outlets and enters into contracts with them on behalf of the petitioner.

**Recruitment and Direct Management:**

- Makes all the final decisions regarding the recruitment of employees.

- Approves monthly target plan, weekly reports, and special sales orders prepared by sales manager.

**Marketing and Advertising and support of staff:**

- Makes all the final decisions regarding marketing and advertising strategies to be employed.
- Makes decisions on expanding, extending new products and development of new products.

**Finding the right manufacturers:**

- Formulates the business strategies and implements strategies in the selection of the right manufacturers for the products.

**Decision making and Execution:**

- Makes all the executive decisions and receives only general supervision from the Board of Directors.
- Communicates with the foreign company personnel regarding U.S. operations and seeks their input before taking decision on expanding, extending new products and development of new products and finances.
- Raises finances as required for the petitioner's operation.

(Bullets added).

The petitioner indicated that it is selling its products in Georgia, Alabama, Florida and South Carolina, in a total of 400 to 500 gas stations and groceries, and provided examples of its current and planned marketing and advertising activities.

With respect to the petitioner's staffing, the petitioner indicated that the beneficiary has hired an office sales manager, a sales representative, a data clerk, a receptionist/PT operator, and a driver/helper. The petitioner stated that the sales manager is responsible for sales and marketing including preparing the monthly target vs. achievement report, inventory control, field visits with sales staff, negotiating with key account managers in supermarkets, monitoring recurring orders, and reporting to the beneficiary on new market developments. The sales representative is in charge of canvassing orders, visiting existing customers, penetrating new markets in Georgia, and working on debt collection targets set by the sales manager.

The petitioner further indicated that the data clerk is responsible for maintaining sales data, ledger entries and inventory control, and taking phone orders from convenience store customers, and the receptionist is in charge of online orders, greeting customers who visit the warehouse for direct purchase, and following up with the sales manager on orders. Finally, the petitioner indicated that the driver/helper is responsible for delivering orders to convenience stores and supermarkets and working in the warehouse. The petitioner indicated that two of its employees have associates degrees and two have high school diplomas. The petitioner stated that its driver/assistant is a high school freshman with two years of work experience. The petitioner indicated that all

of its workers earn \$7.25 to \$7.50 per hour and submitted employment letters indicating that each agreed to work 128 to 160 hours per month.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a managerial or executive capacity under the extended petition. In denying the petition, the director observed that the petitioner's description of the beneficiary's duties was vague and failed to identify the actual tasks he performs. In addition, the director noted that the petitioner had not established that it has subordinates to perform day-to-day accounting, bookkeeping or other finance related functions or that it employs a sufficient number of sales representatives. The director further noted that the petitioner's financial statement for the period ending September 30, 2013 showed only \$154,150 in sales for the year and determined that the company cannot support a managerial or executive position and does not have the staff to relieve the beneficiary from performing non-managerial tasks.

On appeal, counsel for the petitioner asserts that the statute does not limit L-1A classification to beneficiaries who supervise a large number of employees or a large organization. Counsel contends that the beneficiary is responsible for establishing the company's policies, goals and objectives, negotiating contracts with vendors and hiring and firing employees, rather than being involved in the day-to-day management of the company. Counsel notes that the beneficiary's spouse is performing day-to-day accounting and bookkeeping activities, and that the petitioner uses the services of a qualified accountant for tax filing and other tax matters. Counsel maintains that the beneficiary's primary duties are to plan, negotiate and provide marketing leadership to the petitioning company. Finally, counsel emphasizes that the petitioner achieved year-end sales of \$186,215 in 2013, a figure which shows a healthy growth in the company's first full year of operations.

#### B. Analysis

Upon review, and for the reasons discussed herein, the petitioner has not established that it will employ the beneficiary in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, United States Citizenship and Immigration Services (USCIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(1)(3)(ii). 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 either an executive or a managerial capacity. *Id.*

The petitioner's initial description of the beneficiary's duties consisted of a list of broadly stated responsibilities that failed to provide any meaningful insight into what the beneficiary actually does on a day-to-day basis. For example, the petitioner stated that the beneficiary will "oversee the operations and management of the U.S. company," "oversee the management of all business and financial operations," hire managerial personnel and oversees their work, "oversee all aspects of the business," and be "responsible for the daily management of the company." While this repetitive description emphasized the beneficiary's level of authority, it did not assist in clarifying the specific tasks he performs. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir.1990).

In addition to these broadly-stated management responsibilities, the petitioner stated that the beneficiary's "main areas are Marketing, Distribution and Brand building," as well as product innovation, contract manufacturing and finding the right manufacturers. In this regard, the petitioner stated that the beneficiary works with subordinates who provide support in marketing and advertising matters, specifically with respect to brand communication materials, ads and sponsorship. However, the petitioner's description of the beneficiary's job duties did not reflect delegation of these activities to any subordinates and it was unclear to what extent the beneficiary manages these "main areas" rather than performing non-managerial duties associated with marketing and advertising matters. Overall, the initial description of the beneficiary's duties was insufficient to establish that he primarily performs managerial or executive duties.

The petitioner, after being given an opportunity to supplement the record with additional details regarding the beneficiary's duties and the percentage of time he will allocate to specific tasks, responded to the RFE with a lengthier position description. However, the petitioner reiterated many of the same duties submitted at the time of filing, once again emphasizing the beneficiary's overall management and decision-making responsibilities, authority to recruit employees, responsibility for marketing, sales and distribution, contract negotiation with manufacturers and vendors, and development of new products. The petitioner supplemented the description by providing examples of advertising and marketing efforts, future products, and recent contracts signed with retailers. However, the petitioner did not further define the beneficiary's specific day-to-day tasks or the amount of time he allocates to specific tasks.

Overall, while several of the stated responsibilities would generally fall under the definitions of managerial or executive capacity, due to the lack of specificity, the petitioner has not met its burden to provide a detailed description of duties. 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 job duties. The petitioner has failed to provide sufficient 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. at 1108.

Furthermore, 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 statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See sections 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." See section 101(a)(44)(A)(iv) of the Act; 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).

The petitioner indicates that the beneficiary supervises a sales manager and an administration manager. As noted, the petitioner has not provided evidence of payments made to the administration manager. While the petitioner indicates on the organizational chart that the sales manager oversees the sales representative and delivery person, the sales manager's duties as described in the record are not supervisory in nature and the submitted subordinate job descriptions suggest that the two sales employees have different areas of responsibility and deal with different types of customers. The petitioner has not established that the sales manager is a managerial or supervisory employee, and the petitioner does not claim that this employee is a professional. Overall, the record does not establish that the beneficiary primarily supervises a subordinate staff comprised of professional, supervisory or managerial employees.

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). 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. Here, the petitioner has not submitted evidence establishing these essential elements. The petitioner has not specifically articulated a claim that the beneficiary manages an essential function, but has stated that his "main areas are Marketing, Distribution and Brand building." As discussed above, the petitioner has not provided a detailed description of the beneficiary's duties sufficient to establish that he performs primarily managerial duties associated with these functions or that the petitioner's employees or other staff sufficiently relieve the beneficiary from involvement in the day-to-day operations of the company.

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.* Here, although the beneficiary's job title is chief executive officer, the record does not establish that his current duties are primarily focused on the company's broad goals and policies or that executive-level duties would require a significant portion of his time.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). In the present matter, 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.

The petitioner explains that it is presently engaged in selling three lines of products, including an energy drink, an aloe vera drink, and cell phone accessories, all of which are contract manufactured by different companies under the [REDACTED] name. An advertisement submitted on appeal indicates that the company also sells novelties and electronic hookahs, and the petitioner's letterhead states "We also print stickers! Visit [www.\[REDACTED\]](http://www.[REDACTED])" The petitioner has not mentioned these additional lines of business or indicated who performs duties related to them. Further, the petitioner claims to sell its beverages in 400 to 500 stores in four states and to several retail chains in Georgia. The petitioner has not established how its staff of five hourly employees performs all of the sales, marketing, distribution, logistics, inventory, warehousing, advertising, purchasing and other tasks associated with the day-to-day operations of a wholesale distribution company that develops and contract manufactures its own products, and has at least four lines of business. The petitioner indicates that the sales manager, sales representative, data clerk and receptionist are all involved in different aspects of routine sales, but the beneficiary appears to be the sole employee responsible for securing sales contracts with larger retailers as well performing marketing and advertising functions. The beneficiary also appears to be the sole employee who deals with the contract manufacturers and all invoices for the purchase of the petitioner's inventory identify him as the contact for purchasing. The only employee who is claimed to be involved in warehouse and delivery duties is described as a high school freshman; however it is unclear how a freshman in high school can be employed as a full-time delivery driver. The petitioner claims that the beneficiary's spouse is employed as the company's administration manager and performs all of the bookkeeping duties, but it has not provided evidence of wages or other payments made to her. 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)).

Overall, there are a number of key day-to-day responsibilities reasonably required to operate the business that have not been assigned to any of the beneficiary's subordinates and the record does not establish that he is relieved from significant involvement in the company's day-to-day operations. Reading section 101(a)(44) of the Act in its entirety, the "reasonable needs" of the petitioner may justify a beneficiary who allocates 51

percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir. 2008).

Based on the foregoing discussion, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity. Accordingly, 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.