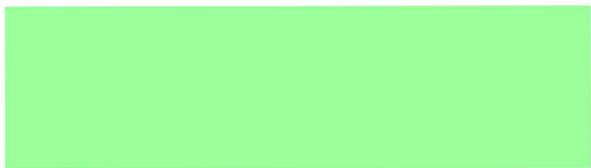


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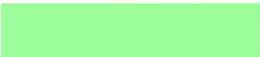
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

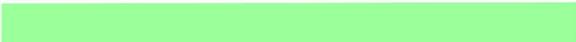


U.S. Citizenship
and Immigration
Services



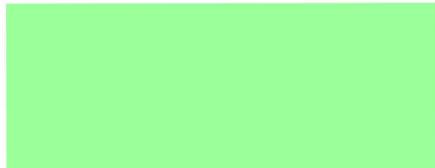
DATE: **OCT 28 2014** OFFICE: VERMONT SERVICE CENTER

FILE: 

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,

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

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Vermont Service Center Director 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 this nonimmigrant petition seeking to extend its authorization to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Florida limited liability company, states that it is an industrial and abrasive tool dealer. It claims to be a branch of [REDACTED] located in Venezuela. The beneficiary was previously granted L-1A status for a period of one year to open a new office in the United States.¹

The director determined that the petitioner had failed to establish that: it had acquired sufficient physical premises, had been doing business for the previous year, and that the beneficiary had been and would be employed in a 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, counsel submitted a brief along with supporting evidence, which addressed three of the four grounds for denial.

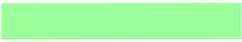
I. The Law

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

¹ [REDACTED]



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. Facts and Procedural History

The petitioner filed the Form I-129 Petition for a Nonimmigrant Worker on August 13, 2013. The petitioner provided supporting evidence, including a statement, dated August 6, 2013, which included job descriptions of the beneficiary's former employment abroad in her position as information system manager and her proposed employment with the U.S. entity as an operations manager. With regard to the former, the petitioner stated that the beneficiary carried out the following list of job duties during her employment abroad:

- Consults with management to analyze computer system needs for management information and functional operations, [sic] to determine scope and priorities of projects, and to discuss system capacity and equipment acquisitions.
- Recommends and develops plans for systems development and operations, hardware and software purchases, budget, and staffing.
- Manages the development, implementation, installation, and operation of information and functional systems for the organization.
- Develops, implements, and monitors management information systems policies and controls to ensure data accuracy, security, and legal and regulatory compliance.
- Negotiates and contracts with consultants, technical personnel, and vendors for services and products.
- Provides support to end users in the selection, procurement, usage, and maintenance of software programs and hardware.
- Manages computer operation scheduling, backup, storage, and retrieval functions.
- Reviews reports of computer and peripheral equipment production, malfunction, and maintenance to determine costs and impact, and address problems.
- Develops, maintains, and tests disaster recovery plans.

The petitioner provided additional evidence pertaining to the foreign entity, including the foreign entity's current organizational chart and payroll documents from January to July 2013.

The petitioner's letter of support also included a description of the beneficiary's proposed employment. The petitioner included a list of the beneficiary's proposed job responsibilities as well as hourly breakdowns of the

beneficiary's weekly and daily job duties. Both hourly breakdowns accounted for the beneficiary's activities during a 40-hour work week.²

The petitioner also provided an organizational chart depicting the beneficiary at the top-most position within the petitioner's organizational hierarchy, followed by one procurement manager and one administrative manager, and an assistant for each manager. Other supporting evidence included bank and business documents, tax returns, and corporate documents pertaining to the U.S. and foreign businesses.

On September 25, 2013, the director issued a request for evidence (RFE), in which he advised the petitioner that its initial evidence did not establish: (1) it is doing business; (2) it had secured sufficient physical premises to house the new office; and (3) that the beneficiary will be employed in the United States in a qualifying managerial or executive capacity.

The petitioner's response included job descriptions for the petitioner's employees, including an hourly breakdown of the beneficiary's weekly job duties. The petitioner also reiterated its prior claim pertaining to the hiring of additional personnel and provided additional business invoices, copy of a new lease entered into on October 31, 2013 showing additional space leased to house the petitioner's business, the petitioner's federal quarterly tax returns, and the petitioner's updated organizational chart showing a new employee – a billing supervisor – in addition to those depicted in the original chart.

Upon reviewing the evidence provided in response to the RFE, the director determined that the petitioner failed to establish that (1) the petitioning entity has sufficient physical premises to house its business; (2) the petitioner has been doing business for the past year; (3) that the beneficiary was employed abroad in a qualifying managerial or an executive capacity; and (4) the beneficiary would be employed in the United States in a qualifying managerial or an executive capacity. With regard to the issue of sufficient physical premises, the director noted that the petitioner's 300 square feet of office space is unlikely to have been sufficient to account for the goods the petitioner purchases and distributes. The director further noted that most of the invoices the petitioner submitted to show that it had been doing business in the United States pertained to a time period that followed the filing of the petition and thus did not establish that the petitioner had been doing business during the one year prior to filing the instant petition. With regard to the beneficiary's proposed employment, the director determined that the petitioner provided a vague job description and failed to demonstrate that the beneficiary would be primarily employed in a managerial or executive capacity. Finally, the director concluded that the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. In that regard, the director acknowledged that he had not previously addressed the issue of the beneficiary's employment abroad in the RFE. However, we note that based on the provisions of 8 C.F.R. § 103.2(b)(8)(ii), the director is not required to issue an RFE or a notice of intent to deny with regard to any issue pertaining to the petitioner's eligibility, even where the deficiency is a matter of missing initial evidence. The regulation expressly allows the director the authority to deny a petition without allowing the petitioner the opportunity to cure a noted evidentiary deficiency. *Id.*

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. Counsel submitted a brief along with supporting evidence,

² The beneficiary's complete list of job duties was included in the director's decision and therefore will not be restated in this discussion.

which addressed three of the four grounds for denial. Specifically, counsel's brief addressed the issues concerning the beneficiary's employment capacity in her former position with the foreign entity as well as her current and proposed position with the petitioning entity. The petitioner also provided additional evidence to show that it has been doing business in the United States for one year prior to the filing of the instant petition. After reviewing the petitioner's submissions, we find that the additional evidence was sufficient to overcome the director's adverse finding with regard to the issue of the petitioner doing business for one year prior to filing the petition. As such, this issue will not serve as a basis for our decision to dismiss the appeal.

Notwithstanding the above, counsel failed to address the director's adverse finding pertaining to the requirement that the petitioner must have sufficient physical premises to house its business operation. As a result of having failed to address a basis for denial, we find that the petitioner in effect conceded the director's adverse finding. Therefore, this appeal will be dismissed on the basis of the initial adverse finding pertaining to the petitioner's failure to establish that it secured sufficient physical premises to house its business operation. Furthermore, we find that counsel's assertions were insufficient to establish that the beneficiary was employed abroad or that she would be employed in the United States in a qualifying managerial or executive capacity. The two issues pertaining to the beneficiary's employment capacity in her foreign and proposed positions will be fully addressed in the discussion below.

III. The Issues on Appeal

As indicated above, the two remaining issues that will be addressed in this proceeding pertain to the beneficiary's employment abroad and her proposed employment with the petitioning entity. Specifically, we will review the record, including any supplemental evidence provided on appeal, in order to determine whether the petitioner established that the beneficiary was employed abroad and would be employed in the United States in a qualifying managerial or executive capacity.

A. Qualifying Employment in the United States

When examining the executive or managerial capacity of the beneficiary, we will look first to the petitioner's description of the beneficiary's job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The description of job duties must clearly describe the beneficiary's job duties and indicate whether such duties are in either an executive or a managerial capacity. *Id.* 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). Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (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 presence of other employees and the duties they perform, the nature of the petitioner's business, and any other factors that may contribute to a comprehensive understanding of a beneficiary's actual duties and role in a business.

In order to determine the petitioner's statutory eligibility, we consider the beneficiary's proposed employment under the statutory definitions of managerial and executive capacity. The definitions have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day operational functions.

Champion World, Inc. v. INS, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns or 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 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; 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. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Although the beneficiary is not required to supervise personnel, if the petitioner claims that the beneficiary's duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See Section 101(a)(44)(A)(ii) of the Act. Alternatively, if the beneficiary is to be employed in the role of a function manager, the petitioner must furnish a written job offer that clearly describes the duties to be performed, 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. 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 is not considered to be employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Here, the petitioner has not established that the beneficiary would be employed in a managerial capacity. In reviewing the job description that the petitioner submitted in response to the RFE, it appears that the beneficiary's job duties during the year prior to filing the instant petition are the same as those she would perform under an approved petition. However, in reviewing the record we cannot overlook the changes in the petitioner's staffing and question the likelihood that the beneficiary's job duties would remain unchanged regardless of whether the petitioner's staff consisted of two employees, as is likely to have been the case at the time the petition was filed, or five employees, as the petitioner's updated organizational indicates. Despite the original supporting statement and organizational chart, both of which show five employees, including the beneficiary, at the time of filing, a review of the petitioner's 2013 third quarterly tax return indicates that the petitioner had no more than three employees in August 2013 when the petition was filed. 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). Despite the obvious contradiction between the quarterly tax return and the petitioner's claims, the record contains no evidence reconciling or resolving this anomaly.

Furthermore, if, as indicated in the petitioner's 2013 third quarterly tax return, the petitioner had three rather than five employees at the time of filing, it is unclear specifically which positions were filled or what job duties the beneficiary's subordinates were performing. Such information is highly relevant, as it would assist us in determining how and whether the petitioner had the capability of relieving the beneficiary from having to allocate his time primarily to non-qualifying tasks with the staffing structure that was in place when the instant petition was filed.

In addition, a comparison of the two hourly breakdowns – one of which consists of the beneficiary's daily scheduled activities and their time allocations and the other of which provides an hourly breakdown of the beneficiary's weekly activities – which were provided in support of the petition discloses additional anomalies that preclude us from attaining clarification as to the tasks the beneficiary performed and would perform daily in the course of his employment for the petitioning entity. Namely, while both documents are based on a forty-hour work week, the more specific daily account indicates that out of the forty hours the beneficiary spends at work, approximately 19% of the time, or 7.5 hours, is spent on break and at lunch, thus indicating that the beneficiary actually spends 32.5, rather than 40, hours on work-related activities. The corresponding hourly breakdown, which purports to establish how the beneficiary allocated her time on a weekly basis, indicates that the beneficiary spends a full 40 hours carrying out work-related functions. Again, the record contains no documents capable of reconciling this discrepancy such that would indicate which job description is an accurate depiction of the beneficiary's job duties. Furthermore, despite the fact that the petitioner indicated that 14 hours, or approximately 43%, of the beneficiary's time would be spent meeting with members of the petitioner's staff, the petitioner provided no information disclosing the specific subject matter discussed during these meetings such that would explain and justify this type of time allocation within the scope of the petitioner's business operation.

Moreover, while the beneficiary's daily schedule specifically names the administrative manager with whom the beneficiary meets daily, the same schedule does not disclose the name of a procurement manager, with whom the beneficiary purportedly meets on Mondays and Tuesdays for a total of five hours, or specify which staff members are involved in the Thursday staff meeting with a duration of 1.5 hours. These missing facts, along with the above discussed 2013 quarterly tax return, call into question the petitioner's staffing composition at the time of filing and the extent to which the beneficiary's daily schedule represents an accurate portrayal of the activities that consumed and would consume her time on a daily basis. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

On appeal, counsel paraphrases the hourly breakdown that the petitioner providing originally in support of the petition and later in response to the RFE, asserting that the beneficiary is not merely a first-line supervisor and emphasizing that she is responsible for heading the "overall development of the company and is authorized to make decisions on behalf of the company." However, counsel's claims are not sufficient to overcome the considerable anomalies described above pertaining to the petitioner's staffing and the beneficiary's job description. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In light of the deficiencies described above, the petitioner has failed to provide sufficient evidence establishing that the beneficiary has been and would be employed in the United States in a primarily managerial or executive capacity. Therefore, on the basis of this second adverse finding the instant petition cannot be approved.

B. Qualifying Employment Abroad

The final issue to be addressed in this proceeding is the beneficiary's managerial or executive capacity during her employment abroad.

In the present matter, the petitioner provided a job description that is comprised of both qualifying and non-qualifying tasks. The job description is not, however, accompanied by time allocations indicating precisely how much time the beneficiary allocated to the non-qualifying tasks, including engaging in contract negotiation with vendors and personnel, providing support to end users, and developing, maintaining, and testing disaster recovery plans. Although the petitioner also provided the foreign entity's organizational chart and corresponding payroll documents from January to July 2013, these documents are not relevant to the matter at hand, as they do not pertain to the time period during which the beneficiary was employed abroad by the foreign entity. We note that the translation of the foreign entity's organizational chart does not include the specific position that the beneficiary occupied during her employment with the foreign entity. As such, we are unable to assess the beneficiary's placement within the foreign entity's organizational hierarchy or consider whether or not the beneficiary supervised managerial, supervisory, or professional employees.

On appeal, counsel provides the following description of the beneficiary's position abroad:

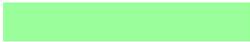
During the years preceding her transfer, the Beneficiary was responsible for developing, managing, and evaluating data processing and project [sic] feasibility requirements. She also reviewed and managed the overall backup and security systems to maintain their integrity.

Counsel's brief statements do not, however, provide insight into the beneficiary's daily activities or establish that the beneficiary's time during her employment abroad was allocated primarily to the performance of tasks within a qualifying managerial or executive capacity. As previously indicated, the petitioner has not provided evidence establishing of the foreign entity's staffing and organizational hierarchy at the time of the beneficiary's employment abroad, nor is there evidence on record to establish that the beneficiary was charged with overseeing the work of other managerial, supervisory, or professional employees. In light of these evidentiary deficiencies, we find that the petitioner has not established that the beneficiary was employed abroad in a primarily managerial or executive capacity and the appeal must be dismissed on the basis of this second adverse conclusion.

IV. Conclusion

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

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NON-PRECEDENT DECISION

ORDER: The appeal is dismissed.