

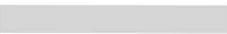


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **AUG 03 2015**

PETITION RECEIPT #: 

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:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this Form I-129, Petition for a Nonimmigrant Worker (Form I-129), seeking to classify the beneficiary 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 is a Maryland limited liability company engaged in the import, distribution and sale of fruit products. It states that it is an affiliate of the beneficiary's foreign employer, [REDACTED], located in Colombia. The petitioner seeks to employ the beneficiary as its Director of U.S. Operations and Sales for a period of three years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a qualifying managerial or executive capacity.¹

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to our office. On appeal, the petitioner asserts that the director placed undue emphasis on the size of the petitioning company in determining that the beneficiary would not be employed in a managerial or executive capacity and failed to consider the beneficiary's detailed duties and the totality of the evidence in the record. The petitioner submits a brief and supplemental 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(i)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

¹ The director originally denied the petition on June 12, 2014 based on a finding that the petitioner did not establish: (1) that it has a qualifying relationship with the beneficiary's foreign employer; and (2) that the beneficiary will be employed in the United States in a qualifying managerial or executive capacity. On August 20, 2014, the director issued an amended notice which cited the beneficiary's proposed employment capacity as the sole basis for denial. The petitioner has had an opportunity to supplement its appeal following issuance of the August 20, 2014 decision.

- (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.

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.

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, U.S. Citizenship and Immigration Services (USCIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. See section 101(a)(44)(C) of the Act.

II. THE ISSUE ON APPEAL

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

A. Facts

The petitioner filed the Form I-129 on March 21, 2014. The petitioner stated on the petition that it is engaged in fruit product distribution, has four employees, and has a gross annual income of \$44,286.

In a letter dated March 18, 2014, the petitioner stated that it imports and distributes fruit pulp and chorizo sausage to hundreds of Latin American restaurants in the ██████████ metropolitan area. The petitioner indicated its desire to expand its business to a more diverse client base in a larger geographical region, to create additional partnerships with fruit product exporters, and to develop a web presence. The petitioner indicates that it intends to rely on the beneficiary's expertise to implement these plans for expansion and growth. The petitioner described his proposed position as Director, U.S. Operations and Sales as follows:

This position will be executive in capacity because [the beneficiary] will be charged with making decisions of wide latitude on product development, sales, and marketing with little to no oversight. [The beneficiary's] duties will include the following (with expected percentage of time to be spent on each):

- Identify and assess business opportunities by identifying prospects and evaluating their position in the industry; (10%)
- Identify and implement product improvements or new products by remaining current on industry trends, market activities, and competitors; (10%)

- Identify and bolster technology deficiencies and how our company can utilize innovative technology to expand growth; (10%)
- Develop and implement strategy to diversify our portfolio; (10%)
- Produce long term plan for development of our U.S. distribution; (10%)
- Develop and strengthen relationship with sellers, distributors, consumers; (10%)
- Acting as a contact between a company and its existing and potential markets; (10%)
- Negotiating on price, costs, delivery and specifications with buyers and manufacturers; (10%)
- Continue development and execution of international and domestic growth strategy; (10%)
- Work with and provide professional advice to shareholders to support them in their governance role; (5%)
- Create strategic advantages and identify opportunities for future development[.] (5%)

The petitioner further stated that the beneficiary “will direct the management of our company’s products, distribution, and current customers” and “design and implement strategy to minimize our costs, maximize our profits, and engage the most customers on both a retail and wholesale level.” The petitioner stated that the company’s “sales and client acquisition vision will be directed and implemented by [the beneficiary] personally.”

The petitioner provided a list of its current employees, which include the CEO, a delivery driver, and three part-time food demonstrators. The petitioner’s organizational chart indicated that the beneficiary will report to the CEO and supervise the driver and food demonstrators. The petitioner stated that the CEO acts as the company’s legal representative and is responsible to “plan, propose, direct, coordinate marketing, sales and product development.”

The petitioner also provided a Letter of Engagement dated February 14, 2014 from ██████████ LLC, a company retained by the petitioner in February 2014 to provide re-branding and logo design, transactional website design services, and strategic marketing consulting for a total fee of \$19,550. In this letter, ██████████ provided an overview of its services, emphasizing that it specializes in market research and software development for marketing.

On April 11, 2014, the director issued a request for additional evidence (RFE). The director advised the petitioner that its initial evidence did not establish that the beneficiary would be employed in a qualifying managerial or executive capacity. The director requested additional information regarding the beneficiary’s proposed duties, such as a letter from the petitioner describing his expected executive duties and the percentage of time he would allocate to each duty.

In response, the petitioner submitted a letter dated May 22, 2014, in which its CEO explained that the beneficiary will be employed in a primarily executive position, in charge of “directing the marketing and sales of the business to maximize client retention and acquisition,” as well as “establishing the

marketing goals, strategy, and direction of our company as they relate to client and market expansion.” The petitioner’s CEO explained that the beneficiary will work with [REDACTED] to shape and define the marketing strategy for implementation by the petitioner’s employees. In addition, he stated that the beneficiary will exercise wide latitude in decision making, specifically with respect to defining the marketing strategy for prospective clients, communicating with existing clients, and recruiting to increase the sales force.

The petitioner’s CEO further stated that the beneficiary will be responsible for managing the marketing and sales function. He emphasized that the beneficiary “will not be directly supervising every employee, but rather will be defining and overseeing the company’s marketing strategy.” He indicated that by 2017, the petitioner expects to have a sales director and two sales associates who will report to the beneficiary.

The petitioner’s response to the RFE also included a seven-page position profile for the Director of U.S. Operations and Sales position, as well as “Three and Five Year Plans” for the position. The plans indicate that in 2014, the beneficiary will supervise the demonstrators and delivery driver, while maintaining external relationships with sales associates, marketing consulting firms, product suppliers, a storage company, a transport company and an external accountant. In 2017, the beneficiary would be responsible for supervising a marketing analyst, sales director, logistics director, sales associates, and a delivery staff and demo staff, with additional marketing analysts and quality staff added by 2019.

The petitioner also submitted a letter from counsel, who emphasized the beneficiary’s role as a function manager and stated that the beneficiary “will not be performing the non-qualifying and routine sales and marketing functions,” which would be performed by the CEO, the delivery person and the food demonstrators. Counsel emphasized that in light of the petitioner’s projected three and five-year plans and prospective growth, “it is justifiable that the Beneficiary will be primarily managing the essential marketing and sales function of the company.” Finally, the petitioner submitted a monthly sales analysis provided by [REDACTED] LLC which indicates that the petitioner has experienced an increase in sales during the first five months of 2014 compared to the same period in the previous year, which [REDACTED] attributes to the beneficiary’s contribution as a stakeholder in the company.

The director denied the petition, concluding that the petitioner did not establish that the beneficiary will be employed in a qualifying managerial or executive capacity. The director found that the petitioner described the beneficiary’s proposed duties in overly broad and non-specific terms and that, given the size and nature of the business, it is more likely than not that the beneficiary and his subordinates would all perform the tasks necessary to the operation of the business. In this regard, the director observed that the petitioner had not established that it has employees to perform the day-to-day tasks of the company, other than tasks associated with demonstration of the products it sells and delivery.

On appeal, the petitioner asserts that the director failed to review the totality of the evidence submitted, the nature of the business, and the function the beneficiary would manage, and instead based her determination on the size of the company and the number of employees the beneficiary would initially supervise. The petitioner also objects to the director's finding that its initial description of the beneficiary's duties was vague or did not show such duties fall within an executive capacity, and asserts that "the fact that the company is currently small in size does not detract from the hierarchy of its structure."

The petitioner insists that the beneficiary will manage and direct the sales and marketing function, and will not perform the non-qualifying routine sales and marketing duties. The petitioner asserts that the CEO, delivery person and two food demonstrators will be responsible for executing the strategy and techniques that are crafted by the beneficiary. In addition, the petitioner contends that the director ignored the petitioner's statements that it is in a nascent stage of growth, and emphasizes that it provided evidence that it will employ a sales director, sales associates, a logistics director and a chief administrative officer, among others, by 2017. It emphasizes that its recent growth supports its prospective growth and business plans, and establishes its reasonable need for the beneficiary to primarily manage the company's sales and marketing function in an executive and managerial capacity.

On December 7, 2014, the petitioner submitted supplemental evidence in support of the appeal, including a lease agreement for a new warehouse, confirmation that it has registered a trade name [REDACTED], and updated logo and branding documentation showing that the petitioner is now using this trade name. The petitioner asserts that this evidence shows that the company is following through with its previously-submitted marketing plans and projections, and demonstrates that the petitioner was, at the time of filing, a company on the cusp of expansion with a need for a managerial or executive employee.

B. Analysis

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary would be employed in a qualifying managerial or executive capacity.

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 definitions of executive and managerial capacity 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 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).

Here, the petitioner initially provided a list of eleven duties along with the percentage of time the beneficiary would allocate to each area of responsibility. Based on this description, it is reasonable to conclude that the beneficiary would spend at least half of his time involved in non-qualifying

market research, sales, and purchasing/procurement activities. Specifically, the petitioner stated that the beneficiary would be: “identifying prospects and evaluating their position in the industry”; “remaining current on industry trends, market activities and competitors”; “negotiating on price, costs, delivery and specifications with buyers and manufacturers”; “acting as a contact between a company and its existing and potential markets”; as well as “develop[ing] and strengthen[ing] relationships with sellers, distributors, consumers.” The petitioner did not explain how these duties, while necessary to the petitioner’s day-to-day operations and related to its stated expansion activities, fall within the statutory definitions of either managerial or executive capacity. The petitioner’s statements reflect that the beneficiary would perform these duties himself, rather than assigning them to the company’s employees and/or contractors.

The petitioner indicated that approximately 35 percent of the beneficiary’s time would be allocated to strategy and long-term development, which included his responsibilities to “develop and implement strategy” to diversify the petitioner’s portfolio, “produce long-term plan” for development of U.S. distribution, “continue development and execution of international and domestic growth strategy,” and “create strategic advantages and identify opportunities for future development.” While such tasks may generally fall within the statutory definition of executive capacity, the petitioner did not indicate that these would be his primary duties nor did it explain how non-qualifying duties associated with implementing these strategies would be performed by the petitioner’s delivery driver and part-time food demonstrators.

The beneficiary’s two remaining duties, which included identifying and bolstering technology deficiencies and providing professional advice to shareholders, were poorly defined and cannot be characterized as managerial or executive in nature. Therefore, overall, the petitioner’s initial description of the beneficiary’s duties suggested that the beneficiary would more likely than not spend half of his time performing duties that are not managerial or executive. While the petitioner indicates a reasonable need for the beneficiary to perform some high level functions associated with its sales and marketing strategies as it seeks to expand its client base, the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990). To the extent that the petitioner defined the beneficiary’s duties at the time of filing, it indicated that the beneficiary would be allocating more time to operational functions than he would to qualifying executive or managerial duties.

The petitioner submitted a lengthy revised position description in response to the RFE, which was broken down into seven “long-term duties and responsibilities” and five “daily duties” with 25 associated tasks. While the petitioner expanded upon the beneficiary’s responsibility for developing strategies and long-term goals for sales and marketing, it also changed the non-managerial duties that were included in the initial position description by indicating that the beneficiary would “oversee” the negotiation, market research, procurement and other activities that it previously stated he would perform directly. The petitioner did not identify who would perform these activities, given that the petitioner’s staff consisted, at most, of a driver and part-time food demo staff at the time of the RFE response.

When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978.) Further, because the expanded job description did not include the requested percentages of time to be allocated to specific duties, the initial description provides a better indicator of how the beneficiary would spend his time. As discussed, that description indicates that the beneficiary will allocate half of his time to duties that are neither managerial nor executive in nature.

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 understanding of a beneficiary's actual proposed duties and role in a business. Here, the totality of the evidence does not support the petitioner's claims that the beneficiary will be employed in a qualifying executive capacity, or as 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.*

Here, while the petitioner has consistently stated that the beneficiary will be responsible for the goals and policies of the organization, particularly with respect to sales and marketing, it also stated that he would allocate 35 percent of his time to such duties, while spending as much as 50 percent of his time on market research, purchasing and procurement, customer relationships, and logistics-oriented tasks. Therefore, the petitioner has not shown how the beneficiary's duties would be primarily executive in nature, given the beneficiary's involvement in the day-to-day operations of the enterprise.

For the same reason, the petitioner has not established that the beneficiary will be employed as a function 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 detailed description of the beneficiary’s duties that explains how he manages the function, identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary’s daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner’s description of the beneficiary’s daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who “primarily” performs the tasks necessary to produce a product or to provide services is not considered to be “primarily” employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); see also *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm’r 1988)).

Here, while the beneficiary may be in charge of the company’s sales and marketing strategies, it has not established that his time will be primarily allocated to managing the sales and marketing function, or that someone other than the beneficiary would be tasked with performing the non-qualifying duties associated with this function. The petitioner has submitted evidence that certain limited duties, such as logo and website design, will be performed by a marketing consultant; however, it also attributes basic market research, sales and other related tasks to the beneficiary. Moreover, the petitioner’s claim that its delivery driver, CEO and part-time food demonstrators will execute the beneficiary’s sales and marketing plans is not supported by any evidence, such as position descriptions for these employees. In fact, the only position description provided for the CEO indicates that his responsibility is to “plan, propose, direct, coordinate marketing, sales and marketing development,” which is essentially the same as the beneficiary’s proposed role. The petitioner also refers to external “sales associates” who will serve as the beneficiary’s external contacts, but the record contains no evidence of the petitioner’s use of external, contracted or commissioned sales staff. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm’r 1972)). In this matter, the petitioner has not provided evidence that the beneficiary will primarily manage an essential function.

Section 101(a)(44)(C) of the Act requires USCIS to “take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function.” However, regardless of the size of the business, the petitioner must establish that the beneficiary’s position consists of “primarily” managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks.

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). Here, our finding is based on the conclusion that the beneficiary will not be primarily performing managerial or executive duties; our decision does not rest on the size of the petitioning entity.

The petitioner indicates that the beneficiary will be responsible for expansion activities, including the hiring of sales, logistics and quality assurance staff by 2017. However, the statute and regulations do not provide the petitioner with a three-year window to grow to the point where it can support a qualifying managerial or executive position. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248; *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm’r 1971).

For the foregoing reasons, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity. Accordingly, the appeal will be dismissed.

III. CONCLUSION

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.