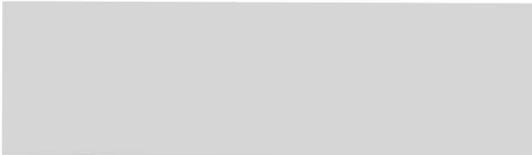




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **AUG 21 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 extend the beneficiary's status as an L-1A 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 New Jersey corporation, states that it operates an import-export business. It claims to be an affiliate of [REDACTED] located in United Arab Emirates. The beneficiary was previously granted L-1A status for a period of one year in order to open a new office in the United States. The petitioner seeks to employ the beneficiary as its president under the extended petition.

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.

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 beneficiary qualifies for the benefit sought based on her "managerial control and authority over all of the functions and operations of the company," and her senior level within the company's organizational hierarchy.

I. THE LAW

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 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.

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 April 28, 2014. The petitioner stated on the Form I-129 that it operates an import-export company with three employees. In a letter dated April 24, 2014, the petitioner described the beneficiary's position as follows:

As President of the newly established American company, the applicant's primary responsibilities have increased to include locating and creating new business, banking and investments opportunities and ensuring that [the petitioner] will achieve the targeted growth projections by planning, developing and establishing policies and objectives of our organization. She confers with company officials of our parent

organization to plan business objectives, to develop organizational policies, coordinate functions and operations and to establish responsibilities and procedures for attaining objectives; as well as handling internal & external business relationships by working intimately with shipping and airline vendors and the warehouse.

The petitioner submitted a copy of its IRS Form 1120, U.S. Corporation Income Tax Return, for 2013, which indicated that it had gross receipts of \$246,630, and paid \$18,500 in salaries and wages.

The director issued a request for additional evidence (RFE) on June 4, 2014, in which she instructed the petitioner to provide additional details regarding the beneficiary's duties, as well as evidence of the petitioner's staffing levels and organizational structure. Specifically, the director recommended that the petitioner provide an organizational chart, along with the names, job titles, summary of duties and salary for all employees the beneficiary manages. The director also requested the petitioner's state and federal quarterly wage reports and copies of its IRS Forms W-2 and W-3 for the past year.

In response to the RFE, the petitioner submitted a letter dated August 25, 2014 which repeated verbatim the beneficiary's U.S. position description as stated above. The chart depicts the beneficiary as president in the senior position and indicates that she is responsible for "locating and creating new business." The chart shows three positions reporting to the president, including a "Transport Execution Manager" (vacant), an accountant (vacant), and an operations manager. The operations manager position is staffed by a part-time worker who is responsible for "management [of] the people, clients & deliverables air, ocean or road operations team." The chart depicts a part-time warehouse assistant who is "responsible for supervising warehouse associates, functions, completing required paper work & report[s]." The chart also shows additional vacancies for a field supervisor, supervisor, staff accountant, accounts payable employee, accounts receivable employee and an office clerk. The chart indicates that the position of driver is staffed by "[REDACTED]" The petitioner stated that the driver "picks up vehicles and [sic]." The petitioner provided evidence that it paid the operations manager \$18,500 in 2013, but did not provide any evidence of wages to the individuals identified as "driver" and "warehouse assistant."

The director denied the petition on November 3, 2014, concluding that the petitioner did not establish that it would employ the beneficiary in a qualifying managerial or executive capacity under the extended petition. In denying the petition, the director found that the petitioner did not submit sufficient evidence regarding the duties performed by the beneficiary and did not establish that the company had grown to the point where it can support a qualifying managerial or executive position.

On appeal, the petitioner asserts that the director overlooked the fact that it achieved profits in excess of \$106,000 in 2013 in determining that the company had not grown sufficiently during the previous year. In response to the director's observation that the petitioner did not corroborate its employment of the driver and warehouse assistant named on the organizational chart, the petitioner asserts that drivers "are employed by our company on a 'contract' basis. Each time we require assistance with regard to a pickup, we contract the services of a Driver (who in addition to driving frequently serves as a Warehouse Assistant)."

The petitioner also contends that the beneficiary is qualified for the benefit sought based on her management or direction of an essential function. Specifically, the petitioner states:

[T]he "essential" functions of the subject company are performed by [REDACTED] the Operations Manager (who works 5 hours per day) . . . under the management/direction of the beneficiary. Therefore, the beneficiary manages the essential function(s) of the petitioning organization; and does not directly perform the functions. She has managerial control and authority over all the functions and operations of the company. In addition, she operates at a senior level within the organization's hierarchy and exercises discretion over the day-to-day operations of these functions.

The petitioner cites an unpublished AAO decision in support of its assertion that "overseeing a corporation and its employees is a functional managerial position even when the employees are not professionals and there are no mid-level supervisors."

In support of the appeal, the petitioner submits twelve "Dispatch Sheets," which show that the petitioner uses various transportation and trucking companies to transport vehicles that the petitioner has purchased for export.

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 under the extended petition.

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 petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* 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's brief description of the beneficiary's responsibilities included a combination of overly generalized duties that paraphrase the statutory definition of "executive capacity," as well as some non-qualifying duties. For example, the petitioner stated that the beneficiary will be "planning, developing and establishing policies and objectives for the organization," and will "plan business objectives," "develop organizational policies," and coordinate functions and operations. These broadly described duties indicate that the beneficiary has the appropriate level of discretionary authority over the business, but they offer little insight into what the beneficiary does on a

day-to-day basis as the sole full-time employee of the petitioner's import/export business. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Further, the petitioner states that the beneficiary is responsible for handling relationships with "shipping and airline vendors and the warehouse" as well as "locating and creating new business." Absent additional explanation, these duties suggest the beneficiary's direct involvement in the petitioner's shipping, logistics, sales and marketing functions, rather than her management of these activities. Although the director requested additional information regarding the beneficiary's duties in the RFE and noted the insufficiency of the submitted job description in her decision, the petitioner has not provided any further information regarding the beneficiary's duties on appeal. 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)).

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of establishing that her duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner did not document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both executive and administrative or operational tasks, but did not quantify the time the beneficiary spends on them. This lack of clarification is important because several of the beneficiary's daily tasks, as mentioned above, do not fall directly under traditional managerial or executive duties as defined in the statute. For this reason, we cannot determine whether the beneficiary is primarily performing the duties of a manager or executive. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Beyond the required description of the job duties, we review 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 comprehensive 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). The petitioner's primary claim on appeal is that the beneficiary manages an essential function because her part-time subordinate employee, the operations manager, performs "the essential functions" of the company under her management and direction. 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 provide a detailed description of 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.

The petitioner has not provided evidence that the beneficiary manages an essential function. The petitioner appears to assert that the beneficiary's authority to oversee the company and all of its activities and functions is tantamount to managing an essential function and does not attempt to define the beneficiary's specific duties, articulate the essential function she manages, or establish the amount of time the beneficiary allocates to managing an essential function. Rather the petitioner claims that "overseeing a corporation and its employees is a functional managerial position," and cites an unpublished AAO decision in support of its claim. The petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The petitioner has not established that the beneficiary qualifies as a personnel manager. 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). Although the petitioner submitted an organizational chart showing three supervisory or managerial positions subordinate to the beneficiary, almost all positions reflected in the chart remain vacant. The petitioner provided evidence that it employs the "operations manager" on a part-time basis, but did not establish that this employee is a professional, manager or supervisor. Although the petitioner identified a "warehouse assistant" who reports to the operations manager, it has not provided evidence that it employs this individual. 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. at 165.

Further, the record does not support the petitioner's claim that the part-time operations manager, actually relieves the beneficiary from performing non-qualifying duties associated with the day-to-day operations of the company. The petitioner has provided a very brief description of this employee's duties, noting that he is "responsible for the management [of] the people, clients & deliverables air, ocean or road operations team." This information is insufficient to support the petitioner's claims that this employee performs all non-executive functions required to operate the petitioner's business, particularly in light of evidence in the record indicating that the beneficiary is responsible for sales and marketing, as well as client, vendor and warehouse relationships. The

beneficiary is listed as the petitioner's contact for the trucking and transport companies that pick up and transport vehicles for the company, and appears to be involved in coordinating these activities.

For similar reasons, the record does not establish that the beneficiary will be employed in an executive capacity. 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, the petitioner has not established that the beneficiary is primarily focused on the goals and policies of the organization rather than on its day-to-day operations, as it simply does not have the staff in place to coordinate the company's purchasing, import and export operations and perform related operational and administrative tasks.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations require USCIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D).¹ The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, although the petitioner established that it was doing business and operated at a profit during the previous year, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

¹ Following the enactment of section 101(a)(44)(C) of the Act in 1990, the former Immigration and Naturalization Service (INS) recognized that that managerial capacity could not be determined based on staffing size alone and deleted reference to "size and staffing levels" at 8 C.F.R. § 214.2(l)(3)(v)(C)(3) (1990), setting out the evidentiary requirements for initial new office petitions. *See* 56 Fed. Reg. 61111, 61114 (Dec. 2, 1991). However, the INS chose to maintain the review of the new office's staffing, among other criteria, at the time that the new office seeks an extension of the visa petition. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D).

Furthermore, 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* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). 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. As discussed above, the petitioner's description of the beneficiary's duties, viewed within the totality of the evidence, does not establish that the beneficiary's current duties are primarily managerial or executive in nature.

Finally, we acknowledge the petitioner's proposed organizational chart, which includes vacancies for additional positions to be filled in the future. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

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

III. QUALIFYING ORGANIZATION ABROAD

Although not addressed by the director, the record as presently constituted does not contain evidence that the United States and foreign entities are still qualifying organizations as defined at 8 C.F.R. § 214.2(l)(1)(ii)(G). *See* 8 C.F.R. § 214.2(l)(14)(ii)(A). The petitioner did not submit evidence of the ownership of the U.S. or foreign entities in support of its assertion that they are both owned by the beneficiary, nor does the record include any evidence that the foreign entity continues to do business in the United Arab Emirates. Again, 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. at 165. For this additional reason, the petition cannot be approved.

IV. CONCLUSION

An application or petition that does not comply with the technical requirements of the law may be denied by our office even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

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.