



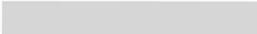
U.S. Citizenship
and Immigration
Services

(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:

NO REPRESENTATIVE OF RECORD

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,

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. 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 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 corporation established in June [REDACTED] states that it engages in real estate brokerage, consulting, marketing, and advertising. The petitioner claims to be an affiliate of [REDACTED] located in the Czech Republic. The petitioner seeks to employ the beneficiary as the Senior Vice President of Sales for a period of three years.

The director denied the petition, concluding that the evidence of record did not establish that the beneficiary will be employed primarily in a qualifying managerial or executive capacity in the United States.

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 will be employed in a primarily managerial and executive capacity in the United States. The petitioner submits a brief 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.

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 in the United States.

1. Facts

The petitioner filed the Form I-129 on June 3, 2014 and indicated that it had four current employees in the United States and a gross annual income of \$514,560. On the Form I-129, where asked to describe the beneficiary's proposed duties in the United States, the petitioner stated as follows:

{The beneficiary's} role as Senior Vice President of sales is to supervise and control all operations of our company on top managerial level. He is responsible for supervising the sales and other top managers. He helps evolve new strategies and programs to expand our services in the United States. He works closely with Foreign Trade Vice President, Financial Vice President, etc. and he is in close cooperation with all departments in [the foreign entity]. The purpose of this important mission is to bring more business and build the stable position of the company on US market.

His duties in the [U.S.] includes[:]

Supervising the team of top sales representative and USA based top managers. To completely handle the responsibilities of all sales operations in the [U.S.] which include the following[:]

- a. supervising a team of top sales personnel who run the day-to-day operations at [the petitioner]
- b. provide the strategic decision based on his education and experience
- c. manage personnel and human development policies in cooperation with president of corporation and managers
- d. set guidelines for sales representative and management of the company
- e. personally supervise the key operations of the company
- f. establish stable position of the company on US market

The petitioner submitted a letter of support, dated April 2, 2014, describing the beneficiary's proposed duties in the U.S. exactly as described on the Form I-129 and describing his qualifications for the position as follows:

[The beneficiary] has unique progressive invaluable experience of all services provided by the company for over 4 years as Senior Vice President of Sales in executive capacity.

[The beneficiary] has also education in real estate . . . and economy, management and marketing. . . .

The body of knowledge, contacts and education developed by [the beneficiary] through his key position with [the foreign entity] made him invaluable to the company and also will make his transfer to the corporate headquarters in the [U.S.] highly desirable.

His Managerial and Executive level experience with [the foreign entity] and his knowledge of the [petitioner's] real estate and foreign trade know how are clearly documented, and the

application of his expertise to the development of trade markets will assure the continued success of [the petitioner].

The petitioner submitted its organizational chart, showing that the President is at the top tier of the hierarchy, directly supervising a Vice President Finance, Vice President Foreign Trade and Real [Estate], Vice President Sales, and Vice President Marketing. The Vice President Finance supervises an Accounting Manager and an Investment Manager; the Vice President Foreign Trade and Real supervises a Foreign Trade Manager, a Real Estate Manager, and a Law Department Manager; the Vice President Marketing supervises a Marketing Manager and an Advertising Agency Director; and the Vice President Sales, the beneficiary's proposed position, supervises a Sales Manager and a Service Manager. The organizational chart does not include the names of any employees in any of the listed positions, nor does it indicate if someone has even been hired for the listed positions. The organizational chart includes a summary of its intentions to hire staff in the future.

The petitioner also submitted its Internal Revenue Service (IRS) Form 941, Employer's Quarterly Federal Tax Return, for the third and fourth quarters of 2013. In the third quarter, the petitioner paid \$10,787.76 in wages, tips, and other compensation to four employees: [REDACTED] and [REDACTED]. In the fourth quarter, the petitioner paid \$10,300.57 in wages, tips, and other compensation to three employees: [REDACTED] and [REDACTED].

The petitioner did not submit any additional information about the beneficiary's proposed position in the United States or the positions of his subordinates.

The director issued a request for evidence ("RFE") on July 31, 2014, advising the petitioner that the description of duties provided for the beneficiary's position at the U.S. company is not sufficient to show that he will be primarily employed in a managerial or executive capacity in the United States. The director instructed the petitioner to submit evidence demonstrating that the proposed position in the United States will be managerial or executive.

In response to the RFE, the petitioner submitted a letter, dated October 12, 2014, specifically addressing the beneficiary's proposed position in the United States as follows:

[The beneficiary's] role as Vice President of Safes [sic] with the US Entity shall be to supervise and control all sales, service and new business activities of our company on the top managerial level. He shall be responsible for supervising all the sales managers and services managers and the New Business Director. At least 5 second level top managers supervising their further structured teams shall report to [the beneficiary]. It means that [the beneficiary] shall manage Trade division of the US Entity, consisting of three departments of the US Entity, including Sales Department, Service Department and New Business Department.

To his main responsibilities shall belong evolving new structures and strategies in order to expand our services in the United States in close cooperation with the President of the US Entity and he is in close cooperation with all the respective departments in [the foreign entity]. . . .

To the main responsibilities of [the beneficiary] when managing the Trade Division of the US Entity, consisting of Sales Department, Service Department and New Business Department shall belong:

- a) *hiring and managing a team of top management personnel, who run their teams and who supervise the day-to-day operations at the US Entity, with respect to Sales Department, Service Department and New Business Department. This competence includes all personal competences (hiring, firing, promoting etc.) – 40% of time;*
- b) *exercising discretion over day-to-day operations and activities of the Trade Division of the US Entity, consisting of Sales Department, Service Department and New Business Department – 20% of time;*
- c) *providing the strategic decisions with respect to the sales and new business development activities, based on his education and experience – 20% of time; and*
- d) *closely cooperate with the President of the US Entity with respect to preparing and implementing [sic] the strategies of the US Entity aimed at [sic] its further growth – 10% of time.*

The US Entity shall be divided into five separately managed Divisions, which all be reporting to the President of the US Entity. The Trade Division to be managed by [the beneficiary]. . . . The Trade Division shall consist of three departments – Sales Department, Service Department and New Business Department. [The beneficiary] as head of the Trade Division shall be reporting to the President of the US Entity.

Most of the management activities of [the beneficiary] shall be accomplished by cooperation with the managers subordinated to [the beneficiary]. The beneficiary shall directly supervise these managers. To the main instruments used to manage the subordinated managers shall be the individual and collective meetings conducted on weekly basis, motivation system . . . preparing and implementing sales and other strategies, including setting deadlines, goals, approving the targets and motivation systems for teams supervised by subordinated managers, setting and coordinating communication channels, supporting sales plans, directing execution of sales policies and practices, etc.

We note that the above percentages amount only to 90% of the beneficiary's time.

The petitioner submitted a new organizational chart indicating that it is to be implemented in 2015. The organizational chart shows five divisions, each with a dedicated Vice President within the division, all reporting to the President: Trade Division (Vice President Sales), Production Division (Vice President Production), Financial Division (Vice President Finance), Foreign Trade Division (Vice President Foreign Trade) and Marketing Division (Vice President Marketing). The Vice President Sales position within the Trade Division, the position proposed for the beneficiary, supervises two Sales Managers, two Service Managers, and one New Business Director. This new organizational chart also does not include the names of

any employees in any of the listed positions, nor does it indicate if someone has even been hired for the listed positions.

The director denied the petition on December 3, 2014, concluding that the evidence of record did not establish that the beneficiary will be employed in a primarily managerial or executive capacity in the United States. In denying the petition, the director found that the proposed position appears to be entirely based on theoretical projections of business growth and expansion and the petitioner did not provide documentation regarding the current operation and structure of the U.S. entity. The director found that the record does not indicate that the U.S. entity will support the proposed L-1A managerial position due to the petitioner's lack of personnel and the absence of employees who could perform the non-managerial or non-executive operations of the company. The director noted that, despite her request, the petitioner did not submit documentation identifying and describing the positions at the U.S. entity that are currently staffed.

On appeal, the petitioner disputes the director's adverse findings and contends that the beneficiary will be employed in a qualifying managerial or executive capacity in the United States. The petitioner contends that the beneficiary's proposed position fulfills all of the requirements for managerial and executive capacity. The petitioner reiterates the previously submitted description of the beneficiary's proposed position and duties.

On appeal, the petitioner also submits a document printed from the State of Florida's website indicating that it is a current and active Real Estate Corporation employing the following licensed individuals:

- [REDACTED] Real Estate Sales Associate
- [REDACTED] Real Estate Sales Associate
- [REDACTED] Real Estate Broker
- [REDACTED] Real Estate Sales Associate
- [REDACTED] Real Estate Broker Sales Associate

2. Analysis

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, or as a function manager, 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 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 in either an executive or a managerial capacity. *Id.* 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 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 definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the 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").

In the instant matter, the petitioner first characterized the beneficiary's role as Senior Vice President of Sales and described his proposed duties in very broad terms, in part: supervise and control all operations of the company; supervise sales; supervise other top managers; help "evolve" new strategies and programs to expand services in the U.S.; supervise the team of top sales representative and U.S.-based top managers; supervise a team of top sales personnel who run the day-to-day operations; provide the strategic decisions; manage personnel and human development policies; set guidelines for sales representative and management; personally supervise the key operations of the company; and establish the stable position of the company on the U.S. market. This initial description of the beneficiary's proposed position is insufficient to show that the beneficiary will primarily perform qualifying duties at the U.S. company. The petitioner did not demonstrate what proportion of the beneficiary's duties would consist of executive or managerial duties and what proportion would consist of non-executive or non-managerial 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 daily job duties. The petitioner's description of the proposed duties does not provide any detail or explanation of the beneficiary's claimed managerial or executive 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*. 905 F.2d 41 (2nd Cir. 1990).

In response to the RFE, the petitioner amended the description of the beneficiary's position to include the management of the entire Trade Division of its U.S. company incorporating the Sales Department, Service Department, and New Business Department. The petitioner provided an equally vague description of the beneficiary's proposed position and allocated percentages of time he will devote to each specific duty. Specifically, the duties relate to the Trade Division and the percentages of time allocated were 40% to hiring and managing a team of top management personnel, who run their teams and who supervise the day-to-day operations of the company; 20% to exercising discretion over day-to-day operations and activities; 20% to providing the strategic decisions with respect to the sales and new business development activities; and 10% to closely cooperating with the President of the U.S. company with respect to preparing and implementing strategies aimed at further growth. In allocating the percentages of time to the briefly listed duties, the petitioner did not include any additional details or specific tasks related to each duty, nor did the petitioner indicate how such duties qualify as managerial or executive in nature. 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. *Id.* at 1108.

In the instant matter, the petitioner has not provided sufficient information detailing the beneficiary's proposed duties at the U.S. company to demonstrate that these duties will qualify him as a manager or executive, or as a function manager. 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 daily job duties. The petitioner's description of the proposed duties does not provide any detail or explanation of the

beneficiary's claimed managerial or executive activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Id.*

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." 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 it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

In evaluating whether the beneficiary manages professional employees, we must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Here, the organizational chart indicates that the beneficiary will directly supervise two Sales Managers, two Service Managers, and one New Business Director. However, the petitioner has not provided any evidence to establish that the beneficiary's subordinate staff has been hired or that it currently employs any staff to perform the routine day-to-day activities of its business. Although afforded a second opportunity to submit documentation identifying and describing the positions at the U.S. entity that are currently staffed, the petitioner did not do so. The petitioner's Forms 941 for the third and fourth quarters of 2013 indicate that it had three employees in December 2013, but the petitioner did not identify the positions of these employees or their duties at its U.S. company. On appeal, the petitioner asserts that it employs Real Estate Brokers and Sales Associates, but again, does not provide any information relevant to the beneficiary's direct subordinates and any other employees that will relieve the beneficiary from performing non-qualifying operational and administrative duties. Therefore, the petitioner has not established that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees. 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).

The petitioner has not established, in the alternative, that the beneficiary is employed primarily 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 position description that describes the duties to be performed in managing the essential function, i.e. 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. Here, the petitioner did not indicate that the beneficiary is a function manager. The petitioner did not describe an essential function to be managed by the beneficiary or provide a breakdown of the beneficiary's job duties to support such a claim.

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. For the reasons discussed above, we find that the beneficiary will not be employed as a function manager.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within an 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.* While the definition of "executive capacity" does not require the petitioner to establish that the beneficiary supervises a subordinate staff comprised of managers, supervisors and professionals, it is the petitioner's burden to establish that someone other than the beneficiary carries out the day-to-day, non-executive functions of the organization.

Here, the petitioner vaguely asserts, on appeal, that the beneficiary will be an executive; however, the petitioner has not shown that the beneficiary will be employed in a primarily executive capacity. The petitioner did not demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. The job duties provided for the beneficiary and his subordinates do not demonstrate that the beneficiary will focus 51% of his time on executive duties rather than the day-to-day operations of the business.

Based on the deficiencies discussed above, the petitioner has not established that the beneficiary will be employed in a primarily managerial or primarily executive capacity in the United States. 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 petitioner has not met that burden.

ORDER: The appeal is dismissed.