



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **AUG 21 2015**

PETITION RECEIPT #: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[REDACTED]

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 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 Pennsylvania limited liability company, is engaged in the retail sale of clothing and accessories. It claims to be a branch office of [REDACTED] located in Saudi Arabia. The beneficiary was initially granted L-1A classification for a period of one year, from September 6, 2012 until September 5, 2013, in order to open a new office in the United States. The petitioner now seeks to employ the beneficiary in the position of Chief Operating Officer for a period of one year.¹

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 director overlooked persuasive evidence which establishes that the beneficiary will be employed in an executive capacity. Further, the petitioner contends that the director erroneously applied regulations applicable to a new office petition, rather than those applicable to an extension of a petition that involved a new office.

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.

¹ The petitioner previously filed a Form I-129 on November 25, 2013, after the new office petition expired [REDACTED]. The Director, Vermont Service Center, denied that petition on March 14, 2014, and this petition was filed approximately six months later, on September 16, 2014. The petitioner indicates on the current Form I-129 that it is requesting "a continuation of previously approved employment without change."

- (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)(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 addressed by the director is whether the petitioner established that the beneficiary will be employed in a qualifying executive capacity. The petitioner does not assert that the beneficiary will be employed in a managerial capacity.

A. Facts

The petitioner filed the Form I-129 on September 16, 2014. The petitioner was established in [REDACTED]. It operates a retail clothing and accessories store in [REDACTED], Pennsylvania, which opened for business in May 2014. The petitioner stated on the Form I-129 that it has three

employees and an estimated gross annual income of \$280,000. The petitioner seeks to employ the beneficiary in an executive capacity as its chief operating officer and submitted the following description of the beneficiary's duties as an attachment to the Form I-129:

- A. Directing the management of the organization:
 - a. overseeing the overall viability of the US venture, developing and overseeing long-term design, branding and renovation of store, building and branch; implement complex business strategies.
- B. Establishing goals and policies for the organization:
 - a. analysis and forecast of financial responsibilities and risks; internal and external financial reporting and budget reporting forecasting; assure monthly and yearly reporting; preparing budgets and reports to drive revenue; carrying out market research, outline and develop internal staffing requirements.
- C. Exercises wide latitude in discretionary decision making:
 - a. In this high level position, [the beneficiary] will work directly with suppliers and manufactures [sic] regarding the contracts for products of [the petitioner] in the United States. [The beneficiary] has full discretion to negotiate contracts and decide what products would be ordered, purchased and marketed – he essentially decides what would be entire inventory for corporation. Due to this critical position, [the beneficiary's] experience is crucial for the store into the U.S. market. Overseeing that inventory is received from overseas suppliers, overseeing that orders made to overseas suppliers are done so in a timely manner.
- D. Receives only general supervision or direction from higher level executives, the board of directors or stockholders:
 - a. Maintain and report operations to parent company; oversee yearly and long-term budgets. Along with fellow stockholders, makes decisions about corporate direction with US branch.

The petitioner submitted its updated 2014 business plan, and a 2014 balance sheet showing year-to-date sales of \$10,919 and year-to-date payments of \$5,050 for salaries and wages. The business plan identifies the beneficiary as the petitioner's president and states that he is "involved in the day to day activities of the company," along with the vice president.

The business plan at page nine explains that the company will run a "lean operation" and require its initial staff to "wear many hats." The included organizational chart identifies two tiers of staff. The higher tier includes the beneficiary's position of president, a vice president, and a partner/investor. The lower tier of employees includes a full-time sales clerk and a part-time sales clerk, both of which report to the vice president.

The director issued a request for evidence (RFE) on October 16, 2014. The director questioned whether the petitioner had been doing business for a full year at the time of filing and whether the petitioner intended to file as a new office.

In response, the petitioner explained that the beneficiary was previously granted one year in L-1A classification to open a new office in September 2012, and that its subsequent request to extend his status was filed in November 2013 and denied in March 2014. The petitioner emphasized that it purchased the property where it currently operates its store in 2012, and that the company has employed one person since establishment “to perform sales.” The petitioner explained that the construction and design of the store took longer than expected, but that the business has been active since it was established. The petitioner submitted copies of bank statements, agreements with architects and building contractors, utility bills, tax receipts and other evidence to establish the nature of its activities prior to the store opening in May 2014.

Finally, the petitioner submitted an earnings record for its sole payroll employee, which shows that she has worked 40 hours per week at \$9.00 per hour since May 2014.

The director denied the petition on December 9, 2014, concluding that the petitioner did not establish that the beneficiary will be employed in an executive capacity, or that the petitioner can support an executive position. The director observed that while the beneficiary would exercise authority over the operations of the business, he would also perform non-executive duties associated with the day-to-day functions of a retail store. The director also found insufficient evidence of the petitioner’s current staffing levels and therefore concluded that the record did not establish that a subordinate staff would relieve the beneficiary from performing non-qualifying tasks.

On appeal, the petitioner asserts that the record establishes that the beneficiary will be employed in an executive capacity. The petitioner contends that the director mischaracterized the nature of the beneficiary’s duties, noting that the submitted job description indicates that he will oversee activities such as inventory, ordering from suppliers, and the layout and renovation of the store. The petitioner further asserts that it was “absurd” for the director to find that “merely having full discretionary authority to make such decisions does not necessarily establish that the beneficiary would function at an executive level.” In this regard the petitioner avers that “the definition of an executive in the regulation specifically states this is a duty of an executive and an inherent duty performed solely by executives.”

Further, the petitioner states that it currently has an employee, [REDACTED] who performs the duties of manager and “the basic day-to-day operations of the company,” while the beneficiary would be responsible for making “the large decisions that affect the company as a whole, such as which inventory to negotiate for and what would be the best layout of the store.” The petitioner explains that its current employee sets staff schedules and prices. In addition, the petitioner claims that employees of the foreign entity will assist as needed.

In response to the director's observation that the record does not contain evidence to establish which employees listed in the business plan have already been hired, the petitioner states that it currently has two payroll employees, including Mr. [REDACTED], who "performs the duties of a manager and also those of the lower-level staff," and a full-time store clerk who is responsible for organizing inventory and providing cashier services.

B. Analysis

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

The petitioner described the beneficiary's duties in broad terms, noting that he will "oversee the overall viability" of the company, implement business strategies, establish goals and policies, report only to the claimed parent company, and exercise wide latitude in discretionary decision-making by making all inventory decisions and working directly with suppliers and manufacturers to negotiate contracts. While these statements are adequate in terms of establishing the beneficiary's level of discretionary authority and placement within the petitioner's organizational hierarchy, they are overly vague and only succeed in providing general information about the beneficiary's ongoing responsibilities as head of a growing company. These statements cannot, however, serve as an accurate representation or sampling of the beneficiary's daily tasks, which remain largely unspecified. 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.).

While we do not doubt that the petitioner requires someone to develop a long-term strategy for growth, oversee the company's budget and finances, negotiate with manufacturers and make decisions regarding inventory, it has not provided sufficient evidence to show that it currently requires an employee to primarily perform these duties, nor has it provided specific examples of how the beneficiary will carry out his responsibilities in light of the company's current scope of operations. Further, the petitioner indicates that the beneficiary will carry out non-executive duties, such as performing market research and financial analysis and reporting tasks, and concedes in its recent business plan that its initial staff, as of 2014, is required to "wear many hats." The fact that the beneficiary manages or directs a business as its president, chief operating officer and partial

owner 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”). Here, the petitioner has not demonstrated that the beneficiary’s actual day-to-day duties as of the date of filing the petition would be primarily executive as claimed. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108’.

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 a beneficiary’s actual duties and role in a business.

The petitioner has consistently claimed 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.*

The petitioner operates a retail store with three claimed employees. The petitioner has documented its employment of one individual who is likely the full-time clerk/cashier. The other two claimed employees appear to be the beneficiary and the vice president, a partial owner who, according to the petitioner, performs the duties of both a manager and a lower-level employee. The petitioner has not provided position descriptions for either the vice president or the cashier, other than noting that the vice president is responsible for scheduling employees and setting prices, while the cashier handles customer transactions and arranges inventory. 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)).

Without additional information regarding the actual tasks performed by the existing staff, we cannot determine to what extent the beneficiary would be relieved from involvement in day-to-day store operations, such as opening and closing the store, product displays, assisting customers with their selections and the fitting room, cash register transactions, purchasing, receipt of deliveries, pricing,

refurbishment of stock on the floor, marketing and advertising, and back office administrative, clerical and banking/bookkeeping functions. Although the petitioner indicates that the beneficiary will be employed at a higher level than the vice president/store manager, the petitioner's business plan shows them both on the same tier of the two-tier hierarchy and indicates that both the beneficiary and the vice president own the same proportion of the company and "will be involved in the day to day activities of the company." Overall, while the beneficiary will perform some qualifying tasks, the record does not support a finding that he will primarily perform the high-level duties contemplated by the statutory definition of executive capacity. It is the petitioner's burden to establish that the beneficiary's duties are primarily qualifying in nature by providing a detailed description of his actual, day-to-day tasks and evidence regarding the scope and nature of the duties performed by other employees in the organization. The petitioner cannot establish eligibility by submitting a broad position description that generally falls within the criteria set forth in the statute.

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size or the absence of employees who would perform the non-managerial or non-executive operations of the company. See, e.g. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Further, the petitioner in this case indicates that it is seeking adjudication of this petition as an extension of a "new office" petition. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows a "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. The petitioner did not have any income or pay any salaries and wages during the validity of the beneficiary's new office petition and the director already denied its initial request for an extension.

This petition was filed more than one year after the expiration of the new office petition and the petitioner still has not established that it has sufficient staff to relieve the beneficiary from performing non-executive duties associated with the day-to-day operations of its newly opened retail store. The petitioner has not established how it currently has a reasonable need for the beneficiary to perform primarily executive duties when the company is still in a preliminary stage of staffing and development more than two years after it was established. While the petitioner indicates that it intends to hire additional staff and perhaps expand its business to include additional retail stores 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 executive capacity. Accordingly, the appeal will be dismissed.

III. QUALIFYING RELATIONSHIP

Although not addressed in the director’s decision, the evidence of record does not establish that the petitioner has a qualifying relationship with the beneficiary’s foreign employer. To establish a “qualifying relationship” under the Act and the regulations, the petitioner must show that the beneficiary’s foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with “branch” offices), or related as a “parent and subsidiary” or as “affiliates.” See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

On the Form I-129, the petitioner stated that it is a subsidiary of [REDACTED], located in [REDACTED] Saudi Arabia. The petitioner submitted a copy of its Operating Agreement, dated November 4, 2011, which indicates the following ownership:

[REDACTED]	40%
[REDACTED]	40%
[REDACTED]	20%

The petitioner further provided a “Memorandum to Operating Agreement,” also dated November 4, 2011, which indicates that the petitioner transferred 51% of its shares to the foreign entity in exchange for a capital contribution of \$500,000. The memorandum indicates that the resulting ownership is as follows:

[REDACTED]	51%
[REDACTED]	9.8%
[REDACTED]	19.6%
[REDACTED]	19.6%

However, the petitioner’s business plan, which is dated 2014, indicates that the beneficiary owns 40% of the U.S. company, [REDACTED] owns 40% and [REDACTED] owns 20%. The petitioner’s IRS Form 1065, U.S. Return of Partnership Income, for 2013 contains the same information as the business plan and original memorandum of association.

The petitioner has submitted conflicting evidence in support of its claim that it is a subsidiary of the beneficiary’s foreign employer, which raises questions as to whether the petitioner ever transferred majority ownership to the foreign entity as claimed in the “Memorandum to Operating Agreement.” 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).

In addition to the noted inconsistency, the record lacks objective evidence of the petitioner’s ownership, such as membership certificates or its articles of association. As general evidence of a petitioner’s claimed qualifying relationship, a certificate of formation or organization of a limited liability company (LLC) alone is not sufficient to establish ownership or control of an LLC. LLCs

are generally obligated by the jurisdiction of formation to maintain records identifying members by name, address, and percentage of ownership and written statements of the contributions made by each member, the times at which additional contributions are to be made, events requiring the dissolution of the limited liability company, and the dates on which each member became a member. These membership records, along with the LLC's operating agreement, certificates of membership interest, and minutes of membership and management meetings, must be examined to determine the total number of members, the percentage of each member's ownership interest, the appointment of managers, and the degree of control ceded to the managers by the members. Additionally, a petitioning company must disclose all agreements relating to the voting of interests, the distribution of profit, the management and direction of the entity, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

The petitioner has not submitted sufficient corroborating evidence of its relationship with the foreign entity. For this additional reason, the petition cannot be approved.

IV. CONCLUSION

An application or petition that fails to 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 we review appeals on a *de novo* basis). When we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he or she shows that we abused our discretion with respect to all of our enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1037.

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