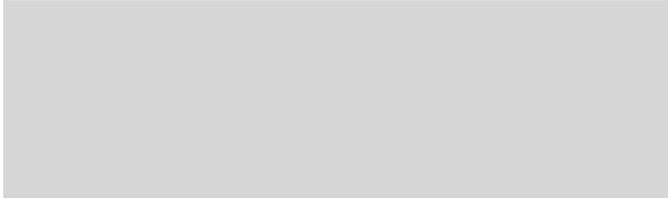




U.S. Citizenship  
and Immigration  
Services

(b)(6)



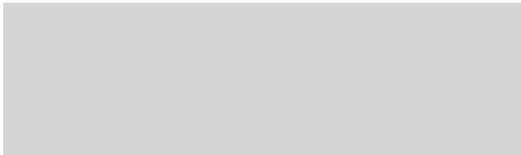
DATE: **AUG 28 2015**

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](http://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 Nonimmigrant Worker (Form I-129), seeking to extend the beneficiary's status as a 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 company established in [REDACTED] operates an import/export firm. It claims to be an affiliate of [REDACTED] the beneficiary's foreign employer in Mexico. The beneficiary was previously granted one year in L-1A status and the petitioner is now seeking approval for an additional three years so the beneficiary may continue to serve as its President.

The director denied the petition, concluding that the evidence of record did not establish that the petitioner would employ the beneficiary in a qualifying managerial or executive capacity.

On appeal, the petitioner asserts that the director erred by not considering prior approvals and the beneficiary's subordinate staff. The petitioner contends that the evidence of record establishes that the beneficiary will perform primarily managerial duties.

### 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, Petition for a Nonimmigrant Worker, 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.

## **II. Facts and Procedural History**

The sole issue to be addressed is whether the petitioner established that the beneficiary would be employed in a qualifying managerial capacity under the extended petition.

The petitioner filed the Form I-129 on October 3, 2013. The petitioner claims to operate an import/export firm with 5 employees, and claims to have had a gross annual income of \$114,919.93 in 2012. The petitioner stated on the Form I-129 that the beneficiary will continue to be employed in the position of President and will be responsible for directing and organizing the company. The petitioner further claimed that the beneficiary will have complete latitude in decision making, will receive no supervision, and will also direct the management of the organization.

In a letter dated October 24, 2013 submitted in support of the initial petition, the petitioner stated that as the President, the beneficiary will perform the following duties:

He will direct the management of the organization (specifically those in charge of managing the daily activities of the company) such as the general manager and the warehouse manager. He will be in charge of making all decisions and policies directly related to the company's finances. He will also be in charge of soliciting all type of transactions for the Corporation with the banks, opening and mobilizing bank accounts, issuing any type of checks or payments on behalf of the company, elaborating the reports with the balances of the company and meeting with the accountant to consult all these matters. He will direct the warehouse department and ensure that they handle the purchase, sale and moving equipment according to mercantile factors and client's requests. He will direct the general management department to ensure that everything meets the correct standards and the client's needs. He will also ensure that the general management department is making the correct choices while hiring and firing employees. He will keep analyzing the employee's performance according

to the general management's monitoring to ensure that each employee works up to a high standard. He will hold weekly meetings with both departments to ensure everything is running smoothly and will solve any serious problems that may arise. Finally, [the beneficiary] will develop and implement office operation and system instructions, policies and procedures.

The petitioner provided payroll information showing that five employees were working for the petitioner as of the date of filing. The payroll information did not show the hours worked by any of the employees. The petitioner's Form 941, Employer's Quarterly Tax Return, for 2013 also identifies five employees for the quarter immediately prior to the filing of the petition.

The director found the evidence submitted in support of the petition insufficient, and issued a request for additional evidence ("RFE") on May 5, 2014. The director requested, among other items, evidence to show that the petitioner can support an executive or managerial position.

In response, the petitioner submitted an organizational chart, payroll information, and business plan. According to the organizational chart, the beneficiary holds the position of president, and the general manager reports to the beneficiary. The chart further indicates that an accountant, sales manager, and warehouse manager report to the general manager. The accountant, sales manager, and warehouse manager all have subordinate positions listed below them on the chart; however, the warehouse manager is the only employee with a subordinate employee (forklift operator) listed by name. The position of accountant is listed on the organizational chart but is not included in the payroll for the period of filing.

The petitioner also included a copy of its business plan. The plan includes a personnel plan listing the employees on the organizational chart, their salaries, hiring date, and a brief description of their duties. In addition to providing a brief and general description of the beneficiary's duties, the petitioner addresses the duties of the beneficiary's only direct subordinate employee, the general manager, and states that the general manager is responsible for "general supervision of all phases of warehouse operation." The petitioner further states that the general manager is also responsible for the following: (1) recruiting, hiring, and training personnel; (2) facility/warehouse up-keep and capital improvements; and (3) annual budget planning and execution. The petitioner states that the general manager has an associate's degree. Regarding the warehouse manager, the petitioner stated that the warehouse manager's duties included supervision of warehouse operations and that he holds a bachelor's degree in management.

The director denied the petition, concluding that the petitioner did not establish that the beneficiary would be employed in a qualifying managerial or executive capacity. In denying the petition, the director noted that the beneficiary's duties are vague, the beneficiary does not supervise subordinate professional level employees, and that the size of the petitioning organization would not support a managerial position.

On appeal, the petitioner states that the record supports a finding that the beneficiary would be managing two subordinate supervisory employees and that he has significant authority over the business beyond that typically held by a first-line supervisor. The petitioner states that the beneficiary receives no supervision and

exercises complete decision-making authority over the organization. Finally, the petitioner stated that the director erred in denying the petition as the previously filed initial application was approved.

### III. Analysis

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will 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 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 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 fact that the beneficiary manages a business or a component of a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. See 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

The position description provided by the petitioner in the initial submission and in response to the RFE is insufficient to establish that the beneficiary will be primarily performing managerial duties. Duties such as: making all decisions and policies directly related to the company's finances, directing the management of the organization, soliciting all transaction types for the corporation, and developing and implementing office operation and system instructions do not describe with any specific detail what the beneficiary will be doing on a day-to-day basis. 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 has not provided any detail or explanation of the beneficiary's 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 (2d. Cir. 1990).

In addition, the petitioner states that the beneficiary will be responsible for directing the "warehouse department," as well as directing the "general management department" and making sure it is making the correct choices while hiring and firing employees. A review of the organizational chart and supporting documentation does not show that the petitioner has either a warehouse department or general management department. 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).

When examining the managerial or executive capacity of a beneficiary, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a beneficiary's duties and those of his subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts that contribute to understanding of a beneficiary's actual role in a business.

Here, in addition to the vague description of duties submitted by the petitioner that raise questions regarding the true nature of the beneficiary's position, the organizational structure likewise does not support the petitioner's contention that the beneficiary occupies an executive-level position. 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 he has an executive title or because he "directs" 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.*

At the time of filing, the petitioner employed the beneficiary and four other employees. The petitioner has not shown that the beneficiary is relieved from primarily performing the day-to-day duties associated with operating the import/export business. As noted, the record reflects that, at the time the petition was filed, the beneficiary was the employee performing the tasks necessary to provide the petitioner's import and export services. Accordingly, absent evidence that the beneficiary's duties focus on the broad goals and policies of the petitioner's organization, and not on the day-to-day operations of the petitioner's enterprise, the petitioner has not established that the beneficiary is employed in a qualifying executive capacity.

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. §§ 101(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).

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.

As a preliminary matter, we note that at the time of filing, the petitioner claimed that the beneficiary had four subordinate employees, three of which are listed on the petitioner's payroll documents. Based on the duties as described on appeal, the three positions on payroll, including the sales manager, warehouse manager, and forklift operator, are not considered to be professional-level positions. On appeal, the petitioner states that although the accountant is employed by [REDACTED] she is "on the company's payroll as an employee." The payroll documents submitted for the time period of filing do not show this position as employed by the petitioner. Moreover, the petitioner claims that it has hired, and is in the process of hiring, additional employees. However, employees hired after the date of the petition filing cannot be

used to establish eligibility. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Despite the discrepancies noted above with regard to the actual staffing of the petitioner's enterprise at the time of filing, we will nevertheless review the petitioner's claims regarding the managerial capacity of the beneficiary in relation to his claimed subordinate staff. The petitioner claims that the beneficiary will supervise a subordinate general manager, who will in turn supervise a warehouse manager. The position descriptions provided by the petitioner cast doubt on the validity of the organizational structure. The petitioner states that the general manager is responsible for "all phases of warehouse operations including production, quality control, maintenance, receiving, and shipping." The petitioner, however, only employs a forklift operator to perform the warehouse duties. The petitioner also claims that the warehouse manager supervises "warehouse operations." Two employees, therefore, are responsible for managing the same warehouse operations, but it does not appear that the petitioner has sufficient staff to actually perform the functions associated with these duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

Based on the foregoing discussion, the petitioner has not established that it will employ the beneficiary in a managerial or executive capacity under the extended petition. Accordingly, the appeal will be dismissed.

#### **IV. Beyond the Director's Decision**

Although not addressed by the director, a remaining issue to be examined is whether the petitioner has established that the beneficiary's services are for a temporary period. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In this matter, the record shows that the beneficiary is the sole owner of both the petitioner and the foreign organization. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of the position in the United States. Therefore, the petition may not be approved on this basis as well.

#### **V. Conclusion**

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 1025, 1037 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

We acknowledge the petitioner's claim on appeal that USCIS approved other petitions that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Eng'g Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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, the petitioner has not met that burden.

**ORDER:** The appeal is dismissed.