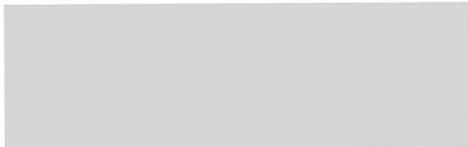




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE:

**JUL 06 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, California Service Center, denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed a 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 is a New Zealand company engaged in film and theater projects for the independent film-making industry. The petitioner seeks to employ the beneficiary as the owner and director of its U.S. affiliate, [REDACTED], which was established in California in [REDACTED]. The beneficiary was previously granted L-1A classification from September 12, 2013 until May 30, 2014 in order to open the new office in the United States. The U.S. company now seeks to employ her for a period of three years.

The director denied the petition, concluding that the evidence of record did not establish that the beneficiary would 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 us for review. On appeal, the petitioner submits a brief and additional evidence.

## 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 the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a parent, subsidiary, or affiliate of the foreign employer.

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.

Finally, 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. 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 the United States in a managerial or executive capacity under the extended petition.

### A. Facts

The petitioner filed the Form I-129 on August 26, 2014. The petitioner states that in [REDACTED], it established its affiliate in the United States to function as a full-service film and theater production company and a networking/promotional company for New Zealand artists in the United States. The record reflects that the beneficiary is the sole owner of both the New Zealand and U.S. entities. The petitioner claims that the U.S. affiliate has two employees.

The petitioner submitted an undated letter in support of the petition, which was signed by the beneficiary. She described her duties as owner and director of the U.S. entity as follows:

In this capacity, I will be assigned executive-level authority for the forecasted growth and development of our affiliate. I will continue to determine the overall goals and philosophy for our enterprise, in coordination and in conjunction with the overall plan for growth implemented by me in presiding over my New Zealand-based affiliate company. I will supervise the development of the United States enterprise, will also attend meetings with current and prospective clients as well as important industry events, and will direct, supervise and participate in negotiation with potential commercial clients regarding business development. I will also review reports regarding the overall operations of new client agreements undertaken by (the U.S. affiliate) following successful agreement reached with clientele, and supervise and preside over the progress of our production work following agreement with investors and appropriate production crews.

The beneficiary stated that she would continue to preside over the New Zealand company with the majority of her time spent in the United States. She discussed the U.S. affiliate's business including several projects ready for production or planned for the near future. She also indicated that she would be acting in and producing the U.S. affiliate's own projects.

The petitioner submitted its affiliate's business plan, copies of representative projects and contracts to demonstrate its legitimate business and the viability of its efforts. This evidence included a letter from [REDACTED] of [REDACTED], who stated that the beneficiary had been contracted as the producer on several of his company's film projects, and that she would be paid a producers fee for this work. The petitioner also provided a letter from [REDACTED] of the [REDACTED] Mr. [REDACTED] stated that he has written a film script and intends for the beneficiary to have a major acting role in the film as well as the opportunity to produce the film. The petitioner stated that the affiliate had business expected to generate \$350,000 in revenue and had several projects in development that it anticipated would provide employment opportunities for cast and crew.

The beneficiary stated in her letter that she anticipated that the company would sustain a full-time staff including a fund manager, a producer, a publicist and support staff by the end of its third year of operations. In addition, the petitioner provided a hierarchy of employees depicting the beneficiary as "owner/manager" with employees to be hired including a project manager, a liaison to another company and the production cast and crew, as needed. A separate document indicated that the beneficiary will be creative director/producer and will contract staff on a project basis. The petitioner provided a list of its employees in New Zealand, including a creative producer, a production manager, an assistant producer, a production assistant and additional staff contracted on a project basis, but it did not provide an explanation of how these staff would support the beneficiary in the United States.

The director issued a request for evidence (RFE) dated August 28, 2014, instructing the petitioner to provide additional evidence explaining the beneficiary's duties on a day-to-day basis and the U.S.

operation's staffing to include the number of employees, their job titles, position descriptions, and evidence of wages paid for their services.

In response to the request, the petitioner provided a letter dated November 2014 stating that the beneficiary "will be assigned full executive-level authority for the continued establishment and development of the Petitioner's U.S. subsidiary company." The petitioner asserted that the affiliate's lack of a "normal" office set up with a permanent staff does not negate the beneficiary's role as an executive. The petitioner asserted that the beneficiary's duties are at a "high-level in terms of activity" and that she is a decision maker engaged in executive-level negotiations, meetings and attendance at events to promote her company and develop business.

The petitioner provided the following description of the beneficiary's "general duties" in the United States:

- Taking meetings with potential clients, collaborators and networking.
- Planning projects-organizing cast/crew/equipment and other productions [sic] related tasks
- Reading scripts
- Attending events such as movie premieres, seminars and conferences
- Getting feedback and advice to filmmakers on scripts and production
- Consulting with other filmmakers
- Liaising with [the petitioner's] office in New Zealand and connecting them with filmmakers in the USA for potential and NZ/USA film partnerships
- Maintaining relationships with key stakeholders, such as the NZ Consulate, New Zealand Film Commission and other businesses
- Maintaining the running of the business – accounts, taxes, contracts and asset building
- Hiring of equipment owned by Random Films to other filmmakers
- Travel out of the city for training, development and meetings, such as for film festivals and conferences
- Other tasks vary as the[y] arise and this list is not finite

In denying the petition, the director determined that the beneficiary's duties were not consistent with those typically performed by one in a managerial or executive position and that the petitioner provided insufficient evidence to demonstrate that the beneficiary would be relieved from primarily performing non-qualifying tasks. The director also found insufficient evidence to establish that the beneficiary would be employed in a qualifying capacity as a function manager.

On appeal, the petitioner asserts that the director erred as a matter of law and improperly relied upon the company size and the lack of permanent full-time employees to find that the beneficiary would not be employed in a qualifying capacity. The petitioner explains that the film-making business is a very specialized and niche business with different needs than other types of companies. The petitioner asserts that the business model requires retention of personnel on a per-film basis and that

the "beneficiary spends her time looking for new projects, negotiating contracts, and attending business meetings." The petitioner asserts that an executive/manager in the beneficiary's field is typically engaged in this manner and the size of the company should be irrelevant.

The petitioner also provides additional information relating to the beneficiary's duties in the United States as follows:

Day-to-day running (approx. 70% of tasks) includes:

- Delegating tasks to colleagues on projects such as organizing contracts and financing productions
- Taking meetings with writers, producers, directors etc. to negotiate and acquire projects and deciding which projects to take on
- Liaising with NZ office to oversee contracts between NZ and USA for production and financing
- Working with our publicist for projects in various states, from press releases announcing films to movie premiere and distribution deals
- Negotiating sales for projects' distribution
- Hiring crew and cast for projects, hiring of internal staff if necessary on contract basis

Other duties include (approx. 30%):

- Attending movie premieres, events and networking to raise awareness of company and projects
- Liaising with accountants and financial managers for business accounts
- Any other duties as required to manage the company

Many duties are contracted out: cast and crew for film production, publicity for projects through our PR firm, [REDACTED], accountants and other jobs where contracting is needed. Day to day management is managed by (the beneficiary), with help where needed. Whilst there are no permanent staff at the moment, the company wishes to employ full time assistants, in house accountants and fund managers and other production staff such as editors and production managers in the near future.

The petitioner submits information from the Internet Movie Database (IMDB.com) regarding the film [REDACTED], which was to be released in U.S. theatres in February 2015. According to IMDB, the production company for the film is [REDACTED]. The beneficiary is listed as one of three executive producers of the film. The petitioner also provided a "Final Cast List Information Sheet" and related documents for the upcoming film [REDACTED], produced by [REDACTED] which is also the company being billed for the cast and crew's wages. The petitioner states that the beneficiary is developing this film in an executive producer capacity.

## 2. Analysis

Upon review, we find that the petitioner has not established that the beneficiary will be employed in the United States 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(1)(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 or her time on day-to-day functions. *Champion World, Inc. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Here, while we acknowledge that the beneficiary has the requisite level of authority as the petitioner's owner, creative director and sole employee, the evidence does not establish that her actual duties are primarily managerial or executive in nature. 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 response to the director's request for a detailed description of the beneficiary's specific duties, the petitioner listed eleven general duties required for the day-to-day running of the U.S. affiliate. More than half of the listed duties included non-qualifying tasks such as reading scripts, planning projects, attending training and development, attending events, providing consulting services, renting equipment to other filmmakers, and performing "production-related tasks." An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

On appeal, the petitioner provides a new list dividing the beneficiary's duties and responsibilities into two categories: (1) day to day running of the business (70%); and (2) other duties (30%). Nevertheless, this new lists provides no greater clarification since the day to day tasks and "other duties" also include potentially non-qualifying tasks such as liaising with foreign affiliates, working with the publicist, negotiating sales, and any other duties required to manage the company. Further, the petitioner has not included several of the non-qualifying duties mentioned above, but has also not claimed that it has hired any employees or contractors to perform the non-managerial duties attributed to the beneficiary prior to the denial of the petition. Moreover, neither job description mentions the beneficiary's intention to take on acting roles as they become available to her. Absent a clear and credible breakdown of the time spent by the beneficiary performing her duties, we cannot determine what proportion of those duties would be managerial or executive. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). 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.

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 has not provided sufficient evidence to establish that the beneficiary will be employed in a qualifying executive capacity. The petitioner submitted vague and general duty descriptions for the beneficiary that do not adequately specify her day-to-day executive actions and tasks. As the petitioner's sole employee, she would reasonably be required to perform all or most of the non-executive tasks associated with operating the petitioner's business. In addition, the petitioner also expressly stated that the beneficiary would engage in non-qualifying activities such as acting and producing if the opportunity arose for her, though these activities were not included in the petitioner's list of her day-to-day duties. Therefore, to the extent that the petitioner provides specifics regarding the duties and responsibilities, these reflect that the beneficiary will be engaged in non-qualifying duties. The petitioner cannot establish the beneficiary as a qualifying executive merely because she has an executive title, because she directs the enterprise as the owner or sole managerial employee, or by reiterating the regulatory definition of an executive. Again, the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In this matter, the petitioner claimed that the U.S. affiliate had two employees when this petition was filed but the record provides insufficient evidence to support the claim. 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). Despite the director's request for additional evidence regarding the U.S. affiliate's employees, such as names and payroll information the petitioner did not identify or document any employees in the United States other than the beneficiary. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Instead, the petitioner reiterated the beneficiary's responsibilities and the unique nature of the company. We agree with the director's determination that the petitioner has not established that its employees in New Zealand are available to the beneficiary to relieve her from performing non-qualifying duties while developing a business in the United States. Rather, we find that the evidence of record demonstrates that the beneficiary was the only employee and that she

may have relied upon basic support services from a virtual office, but she had no dedicated employees to relieve her from primarily performing non-qualifying duties.

The petitioner claims that the beneficiary would hire cast, crew and other personnel on a per-project basis, but it has not provided evidence to support this claim. The two U.S.-based film projects on which the petitioner is relying for income in the immediate future, [REDACTED], were produced by other film production companies. While the petitioner provided evidence of the beneficiary's executive producer credits, it did not provide evidence of her involvement in hiring the cast, crew and other workers associated with these projects, or evidence that this contracted staff was retained by the petitioner's U.S. affiliate. In fact, the evidence submitted indicates that such responsibility more likely than not falls to each respective film's production company.

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, we must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. 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, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *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).

We acknowledge the unique nature of the petitioner's business; however, the petitioner has not consistently claimed that it is typical in its industry to operate with a sole employee, nor has it explained how it has a reasonable need for the beneficiary, as its sole employee, to perform primarily managerial or executive duties. In fact, while the petitioner states that the beneficiary performs duties that are typical of executives in the film-making industry, it also consistently states that it intends to hire full-time subordinate managers, production staff, assistants and other staff as soon as it is feasible to do so. Reading section 101(a)(44) of the Act in its entirety, the "reasonable needs" of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir., 2008).

We also acknowledge the petitioner's pending projects, anticipated production plans, and even the expected future hiring of permanent staffing for the U.S. affiliate but the petitioner did not demonstrate eligibility at the time this petition was filed. 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).

Overall, the evidence is insufficient to establish that the beneficiary will be employed in a qualifying managerial or executive capacity. The beneficiary will serve as owner and creative director of the U.S. affiliate with no other U.S. employees. Under these circumstances, the claim that the beneficiary's duties will be primarily at the executive level is not credible. The documentation submitted describing the business and the beneficiary's day-to-day responsibilities does not demonstrate that the preponderance of her daily activities will be to direct the management of the organization or to manage a subordinate staff of professional, managerial, or supervisory personnel or an essential function within the organization. Therefore, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity, and the appeal will be dismissed.

### III. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.