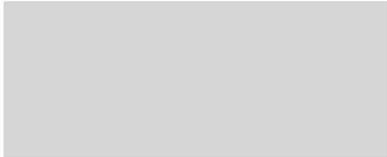




U.S. Citizenship
and Immigration
Services

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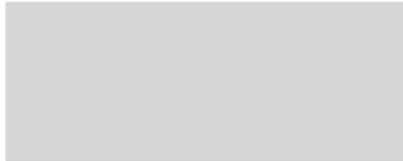
DATE: JUN 19 2015

PETITION RECEIPT #: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed a a Petition for a Nonimmigrant Worker (Form I-129) to extend the beneficiary's status 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 limited liability company, states that it is an affiliate of the beneficiary's former employer in Brazil. The beneficiary was previously granted one year in L-1A status in order to open a new office in the United States and the petitioner now seeks to extend his status so that he can continue his employment as its Industrial Director.

The director denied the petition, concluding that the petitioner failed to establish: (1) that the beneficiary would be employed in the United States in a managerial or executive capacity under the extended petition; or (2) that the U.S. entity has been doing business for the previous year.

On appeal, the petitioner disputes the director's finding with regard to the beneficiary's employment capacity in his proposed position with the U.S. entity. In a separate statement, the petitioner requested an additional sixty days in which to provide a supporting appeal brief. More than sixty days have passed and the record has not been supplemented with additional evidence or information. Therefore the record will be considered complete as presently constituted.

I. The Law

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be

acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

II. Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on June 17, 2014. The petitioner provided a supporting statement, dated June 15, 2014, addressing various eligibility factors, including the nature of the business to be conducted in the United States, the petitioner's qualifying relationship with the beneficiary's former employer abroad, and the beneficiary's former and proposed positions with the foreign and U.S. entities, respectively. The petitioner also provided numerous other supporting documents, including the petitioner's organizational chart, and various corporate and financial documents pertaining to both entities.

On June 27, 2014, the director issued a request for evidence (RFE), informing the petitioner that the evidence initially submitted was not sufficient to warrant approval of the petition. The director informed the petitioner of the statutory and regulatory requirements that apply to the matter at hand, including evidence to show that the petitioner has been and would be doing business, a statement describing the job duties the beneficiary would perform in the United States under an approved petition, and evidence of the petitioner's staffing, including the number of employees, types of positions, evidence of wages paid.

The petitioner responded to the director's request, providing job descriptions, an organizational chart, quarterly tax returns, and other supporting documents.

After reviewing the submissions the petitioner provided in response to the RFE, the director concluded that the petitioner failed to establish that the beneficiary has been doing business and that the beneficiary's proposed employment in the United States would be in a qualifying managerial or executive capacity.

On September 19, 2014, the petitioner filed an appeal seeking to overturn the director's decision. Based on our own comprehensive review of the record and for the reasons provided in the discussion below, we find that the petitioner failed to overcome the grounds for denying the petition. While we consider all evidence on record, we will specifically reference only those submissions that are relevant to the grounds for denial.

III. The Issues on Appeal

A. Employment in a Managerial or Executive Capacity

As indicated above, the primary issue to be addressed in this decision is the beneficiary's proposed position with the petitioning entity and whether the petitioner provided sufficient evidence to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity.

We generally commence our analysis of the beneficiary's proposed employment by looking first to the petitioner's description of the beneficiary's job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The description of job duties must clearly describe the beneficiary's job duties and indicate whether such duties are in either an executive or a managerial capacity. *Id.* Published case law has determined that the duties themselves will reveal the true nature of the beneficiary's 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). We then consider the beneficiary's job description in the context of the organizational structure of the prospective U.S. employer, the job duties and job requirements of the positions subordinate to the beneficiary, and any other relevant factors that may contribute to a comprehensive understanding of the beneficiary's daily tasks and his role within the petitioning organization.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 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 the petitioner claims that the beneficiary's job duties include personnel supervision, the petitioner must establish that the subordinates are supervisory, professional, or managerial employees. See Section 101(a)(44)(A)(ii) of the Act. Alternatively, if the beneficiary is to be employed in the role of a function manager, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 214.2(l)(3)(ii). 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. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Here, the petitioner has not submitted a job description that establishes that the beneficiary would be employed in a managerial capacity. For instance, the petitioner claimed that 5% of the beneficiary's time

would be spent establishing and managing the system of product development for the sales team. However, the petitioner did not identify or describe a product development system; nor did the petitioner explain what specific tasks would constitute the management of this system. Further, in reviewing this job duty within the context of the staffing hierarchy that was depicted in the corresponding organizational chart, which the petitioner provided in its RFE response, it appears that the petitioner's entire sales team was comprised of a single individual – Timothy Squires. While the chart indicates that additional sales positions, including a sales specialist and a sales assistant, would eventually be filled, the evidence indicates that both of these positions were vacant at the time the instant 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). Further, despite listing two sales people in the petitioner's original organizational chart, this information is at odds with the more recently submitted chart, which shows that the petitioner employed a total of four employees, including only one sales person. 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). Here, the record lacks any objective evidence establishing that the petitioner actually employed more than one sales person at the time of filing, thus giving cause to question the existence of a sales team and any job duties that the beneficiary would have to perform with a sales team in place.

The petitioner also claimed that the beneficiary would spend 10% of his time to establishing market development strategies and deciding on ways to implement such strategy and another 10% managing marketing activities in an effort to generate new business. Here again, we look to the petitioner's organizational chart, which includes no marketing personnel, thus leading us to question who, if not the beneficiary, would assume the operational tasks associated with marketing the petitioner's products, including attending local industry and group events, which would consume another 5% of the beneficiary's time.

Given the petitioner's limited staffing composition, as depicted in the petitioner's most recently submitted organizational chart, we further question the nature of the specific tasks involved in promoting employee meetings and managing the activities of the production logistics sectors. While the petitioner's organizational chart indicates that the petitioner intends to hire a production and logistics staff, which would eventually add a production supervisor, three production operators, a logistic specialist, and a logistic assistant to the petitioner's personnel structure, the record indicates that these positions were vacant at the time the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or 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); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

In addition, the record lacks evidence to show that the beneficiary manages subordinates who are supervisory, professional, or managerial employees. Despite the management tiers that are built into the organizational chart that was part of the RFE response, the record shows that most of the listed positions were vacant, thus leaving no employees for the sales specialist and supply specialist/receptionist to oversee. Further, we note that the information provided in the petitioner's original organizational chart is inconsistent with information that the petitioner provided in the organizational chart that was submitted in response to the RFE. Namely,

while the original chart lists a total of five employees – the beneficiary, two sales people, one receptionist/supply person, and a janitor – the organizational chart that was provided in response to the RFE lists only one sales person, thus showing one less employee than the staffing reflected in the original chart. In fact, Part 5, No. 13 of the petition itself indicates that the petitioner claimed only four employees at the time of filing, thus indicating that not only was the original organizational chart inconsistent with the chart submitted in the RFE response, but it was also inconsistent with the petitioner's own claim as originally made in the Form I-129. As previously stated, the petitioner is expected to provide independent objective evidence to resolve any inconsistencies in the record. See *Matter of Ho*, 19 I&N Dec. at 591-92. Here, the record lacks evidence to establish the actual number of employees the petitioner had at the time of filing. While the petitioner's 2014 quarterly tax return for the second quarter indicates that the petitioner paid wages to five employees during that quarter, this information does not establish that the petitioner maintained a staff of five employees during all three months that comprise the second quarter. The petitioner did not provide evidence to show that it employed a second sales person at the time of filing, such that one sales person was effectively serving in a managerial position.

As noted above, if the petitioner claims that the beneficiary's duties involve supervising employees, then the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See section 101(a)(44)(A)(ii) of the Act. In determining whether the beneficiary managed professional employees, we must evaluate whether the subordinate positions required 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, 818 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686, 687-8 (D.D. 1966).

Therefore, we must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner did not provide evidence to establish that any of the beneficiary's subordinates occupied positions in which a baccalaureate degree is required. As such, we cannot conclude that the beneficiary would oversee the work of professionals in his proposed position. 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)).

We also find that the petitioner failed to establish that the beneficiary would 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.* As discussed above, the petitioner's limited organizational hierarchy indicates that the petitioner lacked subordinate staff to support the beneficiary in an executive role where he would focus primarily on directing the management of the organization and establishing its goals and policies.

Accordingly, in light of the above analysis, which contemplates the beneficiary's job description as well as the beneficiary's role within the context of the petitioner's organizational hierarchy at the time the petition of filing, we find that the petitioner failed to provide sufficient evidence to establish that the beneficiary's prospective employment with the petitioning U.S. entity would be in a qualifying managerial or executive capacity and on the basis of this adverse conclusion, this petition cannot be approved.

B. Doing Business for the Previous Year

The remaining issue addressed by the director is whether the petitioner established that it has been doing business for the previous year. The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year through the regular, systematic, and continuous provision of goods or services. See 8 C.F.R. § 214.2(l)(1)(ii)(H) (defining the term "doing business").

In a letter in support of the petition, the petitioner stated that it "purchases and packages raw materials utilized in the manufacturing process of pigments and additives used to produce plastic projects," and that it "will also manufacture the additives and pigments in their U.S. facility for trading within USA and around the globe. The petitioner explained that over \$2.5 million had been invested into the company for the purchase of the property where the company operates as well as \$400,000 in machinery and raw materials. The petitioner indicated that it initially intended to focus its first year of operations on exporting raw materials to its affiliate in Brazil, but explained that it decided to proceed with developing its manufacturing operations and quality control laboratory by purchasing machines, equipment and supplies. The petitioner submitted a copy of its Form 1065, Return of Partnership Income, for 2013 which indicates \$0 in income, as well as invoices for the purchase of various types of equipment and machinery.

In response to the RFE, the petitioner stated that it is moving from "solely distribution operations" to a manufacturing operation, which necessitates the purchase and installation of machines. The petitioner explained that "[o]nce the machines are delivered and installed at [the petitioner], the company will then start producing the products here in the USA, which will take place during the next few months." The petitioner indicated that it is currently importing samples of color pigments and plastic pallets from its Brazilian affiliate to show to prospective and potential clients in the United States in furtherance of its original sales and distribution operations. As evidence of these import activities, the petitioner submitted two invoices from a global logistics provider dated June 23, 2014.

In denying the petition, the director found that the submitted invoices did not establish that the petitioner has been providing goods or services, but rather showed only equipment purchases made to date. The director acknowledged the invoices for imported goods, but noted that they post-dated the filing of the petition. The director advised the petitioner that if it appealed the decision, it would need to establish that it has been doing business for the previous year.

The petitioner has neither acknowledged nor addressed the director's finding on appeal. On review, we agree with the director's determination that the record as presently constituted does not establish that the petitioner has been doing business as defined in the regulations for the previous year. The petitioner concedes that it has not commenced manufacturing operations. Although the petitioner's statements indicate that it has been acting as an importer and distributor, the record contains no evidence of import, export, sales or distribution operations during the year preceding the filing of the petition. As the petitioner has not addressed this issue on appeal, the petition will be denied for this additional reason.

IV. Conclusion

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