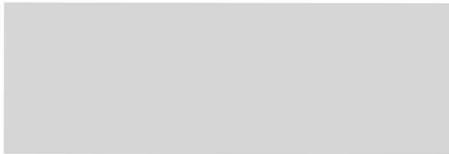




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **JUN 25 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 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 Form I-129, Petition for a Nonimmigrant Worker, 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 indicates that it is a business telephony company providing unified communications solutions for enterprises, contact centers and service providers. The beneficiary was previously granted L-1A status in order to work for the petitioner's U.S. affiliate and the petitioner now seeks to employ the beneficiary as its vice president of sales for a period of two years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, the petitioner disputes the director's finding with regard to the beneficiary's proposed employment and submits evidence to support its assertions. The director declined to treat the appeal as a motion and forwarded the appeal to us for review.

### I. The Law

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

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

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

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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

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

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

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

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

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on March 27, 2014. The petitioner provided a statement, dated March 26, 2014, listing the supporting evidence, which included an affidavit from the company's president discussing the beneficiary's proposed U.S. position and the job duties he would perform under an approved petition. The petitioner provided other evidence in the form of corporate and

financial documents to establish the nature of the company's services and its relationship with the beneficiary's foreign employer in Germany and the beneficiary's current L-1A employer.

On July 7, 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 listed the statutory and regulatory requirements that apply to the matter at hand, including evidence establishing that the beneficiary's prospective position with the petitioning entity would primarily involve job duties within a qualifying managerial or executive capacity. The director provided a list of documents the petitioner could submit to establish that the beneficiary's proposed position meets the applicable statutory and regulatory criteria.

The petitioner's response included an affidavit from the company's president, who listed the beneficiary's proposed job duties and responsibilities as well as the corresponding time allocations to show how the beneficiary's time would be distributed.

After reviewing the submissions the petitioner provided in response to the RFE, the director concluded that the petitioner failed to establish that the beneficiary's proposed employment in the United States would be in a qualifying managerial or executive capacity. Accordingly, the director issued a decision, dated September 9, 2014, denying the petition.

On October 9, 2014, the petitioner filed an appeal seeking to overturn the director's decision and approve the petition. Based on our own comprehensive review of the record and for the reasons provided in our discussion below, we find that the petitioner has not overcome the grounds for denial. While we consider all evidence that has been submitted into the record, this decision will reference only those submissions that are relevant to the beneficiary's proposed position with the petitioning U.S. entity.

### III. The Issue on Appeal

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 petitioner's organizational structure, the existence of a support personnel and the job duties they will perform, as well as any other relevant factors that may contribute to a comprehensive understanding of the beneficiary's daily tasks and his role in his prospective position in 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).

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 offers a job description, which is comprised of job duties that are indicative of someone whose role would be to not only manage the sales function, but rather to carry out the underlying sales-related tasks associated with that function, including seeking out and soliciting new clients and subsequently engaging in contract negotiations with those clients. The petitioner points to the beneficiary's heightened degree of discretionary authority "over the coordination of [sic] administration of teams within his department" and further asserts that the beneficiary would manage the sales function, which is critical to the success of the petitioning entity. However, there is little evidence to support the finding that at the time of filing the beneficiary was able to devote the primary portion of his time to tasks within a qualifying managerial or executive capacity. While the beneficiary's discretionary authority is a main focal point of the petitioner's discussion, it is only one of several key elements we consider in making a determination as to the qualifying nature of the proposed employment; the beneficiary's authority to make decisions that impact the petitioner's business, without taking account other relevant factors, is not dispositive of the issue at hand.

As indicated above, in order to gain a comprehensive understanding of the beneficiary's precise role and the nature of the duties to be performed, we consider other relevant factors, including the petitioner's organizational hierarchy and the staffing composition. It is appropriate, and often necessary, for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as 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). In other words, the burden is on the petitioner to not only provide a detailed job description of the proposed employment, but also to provide sufficient supporting evidence to show that it has the ability to relieve the beneficiary from

having to allocate his time primarily to performing non-qualifying operational and/or administrative tasks. Thus, we find that it is critical to consider the existence of support personnel, either in the form of direct employees or contracted workers, in order to determine who, if not the beneficiary, was available to carry out the petitioner's non-qualifying operational and administrative tasks at the time of filing.

In the present matter, the petitioner claimed to have only two employees, including the beneficiary, at the time of filing. While evidence on appeal shows that the petitioner retained the services of three commission-based sales representatives prior to the denial of the petition, the dates on the submitted sales commission agreements – August 26, September 4, and September 10, 2014 – indicate that all three sales representatives were retained after the petition was filed, thus leaving only the beneficiary to carry out the petitioner's sales tasks at the time the petition was filed. We note that the date of filing, not the date the denial of the petition was issued, determines which evidence is relevant for the purpose of establishing the petitioner's eligibility. A petitioner must establish eligibility at the time of filing; a petition cannot 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). Therefore, the retention of additional sales representatives will not be considered in determining the petitioner's ability to support the beneficiary in a qualifying managerial or executive capacity at the time filing.

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, 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).

Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as vice president of sales and one additional employee. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

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 was filed, we find that the petitioner did not 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 conclusion this petition cannot be approved.



**IV. 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.