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**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF I-D-&C- LLC

DATE: NOV. 19, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a business consulting firm,<sup>1</sup> seeks to extend the Beneficiary's employment as its Executive Manager under the L-1A nonimmigrant classification. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The Director, Vermont Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director concluded 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 concluding that the Beneficiary will act as a first-line supervisor of part-time employees. The Petitioner contends that the evidence of record establishes that the Beneficiary supervises full-time subordinate supervisors and that he performs 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:

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<sup>1</sup> According to New York State corporate records, the Petitioner changed its name to [REDACTED] on [REDACTED] 2015. The Petitioner is advised that any future filings with USCIS should acknowledge this change and include a statement confirming whether [REDACTED] is merely a name change or whether this entity is a successor-in-interest to the Petitioner.

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- (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.

## II. ISSUE ON APPEAL

The sole issue to be addressed is whether the Petitioner established that the Beneficiary would be employed in a qualifying managerial or executive capacity under the extended petition.

### A. Facts

The Petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on July 10, 2014. The Petitioner operates a business consulting firm with one employee and claimed gross sales in the amount of \$79,500 for 2013. In a July 27, 2014 letter submitted in support of the petition, the Petitioner stated that the Beneficiary will be employed in the position of Executive Manager and would be responsible for overseeing a function of the organization, specifically, the creation of the Energy Department. As Executive Manager, the Petitioner stated that the Beneficiary would be performing the following duties:

[The Beneficiary] is in charge of managing [the Petitioner's] day-by-day activities. [The Beneficiary] has the authority to hire and fire employees, to manage and set-up policies regarding the employees' salaries, to set-up policies and strategies for the business development of the company, to manage clients' relationships and to manage Integra's contractual obligations (i.e. Lease) and to supervise the close interaction with [the foreign employer] in Rome.

Moreover [the Beneficiary] is in charge for the company's financial legal and administrative activities and consulting services. [The Beneficiary] establishes budgets plans, reviews and monitors fees structures and client related activities and exercise full authority over negotiations with customers and outside professional service providers.

The Petitioner further explained that with the development of the Energy Department, the Petitioner hired its first employee to serve as an executive assistant. The Petitioner also stated that it is seeking junior consultants with experience in the “energy and renewable industry sector.”

The Petitioner provided a business plan. The plan stated that the Beneficiary devoted much of his career to the “study of tax law” and gained experience in mergers and acquisitions both nationally and internationally. The plan stated that the mission of the company is to provide services to Italian companies willing to invest and expand their interests into the United States market as well as services to United States companies interested in investing in Italian markets.

The business plan also included a staffing plan, which stated that the Beneficiary is managing the business and a junior assistant was hired in June of 2014. The plan further explained that a “panel of local consultants” has been and will be selected to “cover knowledge required” by offered services, and that the Petitioner plans to hire two to five local professionals. The plan also provided a list of five current Italian-based clients and four prospective Italian-based clients.

In addition, the business plan included the foreign entity’s organizational chart, which showed 19 employees from the foreign entity reporting to the Beneficiary. Specifically, the plan identified three clerical employees, one accounting position with three subordinates, one tax position with four subordinates, one consulting position with two subordinates, one finance position with two subordinates, and one legal position.

The Petitioner also submitted balance sheets, profit and loss sheets, and a copy of the Beneficiary’s IRS Form 1040NR, U.S. Nonresident Alien Income Tax Return for 2013 with Schedule C, Profit or Loss from Business.

Finally, the Petitioner included copies of consulting agreements with various clients. The purpose of the agreements was as follows: (1) analysis of the United States market for potential business opportunities; (2) scouting of potential companies which may be acquired by the client; and (3) analysis of the accounting, tax, and legal issues connected or related to the entrance of the client in the United States market. The Petitioner also included brief project analyses for four United States projects related to building various power plants.

In a request for evidence (RFE) issued on July 22, 2014, the Director requested, among other items, evidence to show that the Petitioner can support an executive or managerial position. Specifically, the Director requested the following: (1) a statement explaining the Beneficiary’s duties for the previous year and his proposed duties on extension; (2) a statement describing the new operation’s staffing; and (3) evidence of the financial status of the United States operations.

In response, the Petitioner provided a seven-page letter describing the Beneficiary’s duties as the claimed function manager of its renewable energy division as well as duties performed by the Beneficiary from September 2013 to date. The Petitioner’s list of duties for the Beneficiary was provided on a project-by-project basis with the duties performed for each, and the Petitioner

identified the employees that the Beneficiary supervised on each individual project. The Petitioner also provided additional information pertaining to ongoing projects, including the development of an energy plant in Chile, e-mails between the Beneficiary and clients, and invoices for services.

The Director denied the petition, concluding that the Petitioner had not established that the Beneficiary would be employed in a qualifying managerial or executive capacity under the extended petition. In denying the petition, the Director noted that based on the organizational structure, the Beneficiary would be directly performing the claimed function he is managing: specifically, the consulting services provided by the Petitioner. The Director further noted that because the Beneficiary supervises a non-professional employee, he does not meet all four parts of the definition of manager.<sup>2</sup>

On appeal, the Petitioner states that the record supports a finding that the Beneficiary would be acting in a managerial position. The Petitioner states that the Director did not take into account that the Beneficiary is managing professional-level employees from the foreign entity in the performance of his duties for the United States organization. The Petitioner states that the business plan provided in the initial submission includes degrees and positions of each of the foreign employees, and submits its organizational chart again on appeal. The Petitioner states that the Beneficiary's duties are primarily managerial despite his performance of some non-qualifying duties.

#### B. Analysis

Upon review, and for the reasons stated herein, the Petitioner has not established that the Beneficiary will be employed in a primarily 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 submitted by the Petitioner in response to the RFE is insufficient to establish that the Beneficiary in this matter will be primarily performing managerial duties. Specifically, duties such as "advise clients on the feasibility of the project," "[interactions] with US

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<sup>2</sup> We note that the supervision of a non-professional employee does not disqualify the Beneficiary from qualifying as a function manager. The Director's language in this regard will be withdrawn.

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based attorneys,” “[c]oordinate the negotiations between Client and a U.S. based Advisory,” “Direct approach to Client,” and “Business Development of the projects” are the tasks used to produce the product and provide the services of the company. 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).

Furthermore, the Petitioner has not established any definite distinctions between the proposed qualifying and non-qualifying duties of the Beneficiary. We note that the Petitioner’s description of the Beneficiary’s tasks in response to the RFE, although broken down by percentages, did not add up to 100%; therefore, we are unable to determine what percentage of the Beneficiary’s total time is spent performing non-qualifying duties. For example, in its July 30, 2014 letter, the Petitioner provided a description of the duties the Beneficiary would perform with regard to each of its client projects. With regard to the [REDACTED] the Petitioner claimed that the Beneficiary would devote (1) 55% of his time directing and supervising the work of [REDACTED] in the drafting and preparation of the project’s feasibility study; (2) 70% of his time directing and supervising [REDACTED] in activities related to the costs, operating expenses, and construction of the plant; and (3) 60% of his time interacting with U.S.-based attorneys regarding the contract drafting. Similar disparate breakdowns of duties were provided in the same letter for the additional client projects identified by the Petitioner. These breakdowns are confusing and provide little clarity with regard to the true nature of the Beneficiary’s actual duties. We find, therefore, that the Petitioner submitted limited and contradictory information to establish the percentage of time the Beneficiary actually performs or will perform the claimed managerial or executive duties.

It has been noted in the record that at the time of filing there was only one other employee working at the United States office, and that the Beneficiary maintains a full-time position. There is no mention in the record of any subordinate employee on staff to perform the client development work, client management, sales, and marketing plan for the United States operations. Collectively, this brings into question how much of the Beneficiary’s time can actually be devoted to managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Furthermore, the petitioner bears the burden of documenting what portion of the beneficiary’s duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of these percentages, the record in this matter does not demonstrate that the Beneficiary will function primarily as a manager or executive.

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. §§ 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).

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, 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. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, 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 "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 *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. at 604). In this matter, the Petitioner has not provided evidence that the Beneficiary manages an essential function.

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.

The petitioner acknowledges that the Beneficiary supervises only one non-professional level employee in the United States. On appeal, however, the Petitioner claims that the Beneficiary supervises a team of professional-level employees with the foreign entity in the performance of his United States duties. We note that an organizational chart was submitted showing the structure of the foreign office. The Petitioner did not, however, specify on the chart names and specific duties of each employee to be supervised by the Beneficiary in the performance of his duties in the United States. Furthermore, the business plan submitted in the initial petition and on appeal did not claim or mention the use of foreign-based employees in the section describing the staffing plan for the United States operations. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In response to the RFE, the Petitioner's description of the Beneficiary's duties included the name of each employee supervised for each of the particular projects performed by the United States entity. The Petitioner, however, did not list any foreign employees assigned to projects associated with the renewable energy division function which it claims is managed by the Beneficiary. Furthermore, for

other projects, the petitioner lists only two Certified Public Accountants out of the 19 employees of the foreign entity for work on other projects since the United States organization's inception. 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.

Additionally, the Petitioner claims that the Beneficiary uses the services of contracted professionals in areas such as legal and tax for the consulting services provided to his clients. The Petitioner has not presented evidence to document the existence of these employees nor has it provided details regarding what services each project would require. Additionally, the Petitioner has not explained how the services of the contracted employees obviate the need for the Beneficiary to primarily conduct the Petitioner's business. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998).

Finally, in addition to the non-qualifying duties submitted by the Petitioner, the organizational structure does not support the claim that an executive-level position exists for the Beneficiary. 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.*

At the time of filing, the Petitioner had a single-tiered organizational structure where the Beneficiary directly managed one subordinate employee. The Petitioner has not shown how this structure allowed the Beneficiary to primarily oversee the management of the company and focus on the broad policies and goals of the organization, rather than on its day-to-day operations.

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 or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. Here, the totality of the evidence submitted does not support a finding that the Beneficiary will be employed in a qualifying managerial or executive capacity.

### III. CONCLUSION

The appeal will be dismissed for the above stated reasons. 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.

Cite as *Matter of I-D-&C- LLC*, ID# 11818 (AAO Nov. 19, 2015)