



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

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

MATTER OF N-G-T-, LLC

DATE: SEPT. 28, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner intends to operate an export company and seeks to temporarily employ the Beneficiary as the general manager of its new office under the L-1A nonimmigrant classification. *See* Section 101(a)(15)(L) of the Immigration and Nationality Act, 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 Petitioner had not established that the Beneficiary was employed abroad by its affiliate in Angola in a qualifying managerial or executive capacity for at least one year within the three years preceding the filing of this petition. The Director also found that the Petitioner did not establish that the United States operation, within one year of the approval of the petition, would support an executive or managerial position.

On appeal, the Petitioner asserts that the Director erred in her findings. The Petitioner contends that the Beneficiary will perform in an “exclusively managerial” position and that the record supports its claims. The Petitioner also asserts that the Director did not consider all of the evidence demonstrating that the foreign entity has the financial ability to support the U.S. operation during its first year as a new office. The Petitioner submits a brief in support of the appeal.

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)(3)(v) further provides that if the petition indicates that the Beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the Petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The Beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the Beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

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. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

The first issue to be addressed is whether the Petitioner established that it would support the Beneficiary in a managerial or executive capacity within one year of approval of the petition.

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A. Facts

The Petitioner submitted a letter dated May 1, 2014 in support of the Form I-129. The Petitioner stated that it was established as a Virginia limited liability corporation in [REDACTED] and it would operate as an export company trading in food commodities such as beans and popcorn. The Petitioner intends to employ the Beneficiary as its general manager for one year at an annual salary of \$45,000.

The Petitioner provided a letter, dated May 1, 2014, written by the Beneficiary as general manager describing his own proposed duties as follows:

1. Based on the reports, recommendations and advice from Operations Manager, Sales and Marketing officer, Accountant and Financial adviser, as General Manager, I will direct, oversee and coordinate the entire activities of the company through the following specific duties. Based on the information, I make decision in matters related to the commodity types to be purchased, the volumes and schedule of shipments, managing risks entering partnerships, as well as approving the compensation and benefits employees. I will also approve budgets and manage the financing requirements, determine and approve the mode of marketing.
2. I will also be responsible for outlining objectives, and strategic plans, and approve short-and long-term action plans and closely monitor their proper implementation by managers and outside contractors. I periodically hold meetings with employees, consultants, and suppliers to assess performances ensure properly implementation of plans. As deemed necessary, as General Manager, I will make appropriate adjustments and changes on the plans and oversee the proper implementation of those adjustments.
3. As General Manager, in consultation with other managers and advisors, I set out ways to hire and retain productive and efficient employees. While the Office Manager or outside employment agencies are actively engaged in the process of screening and recruiting process I will have the ultimate authority of the final decision in hiring and retaining the employees.
4. As a General Manager, I am vested with the highest authority in the overall operations of the company, though the subordinates actually perform the technical and professional activities and provide me with recommendations.

The Petitioner provided a proposed organizational chart depicting the Beneficiary as general manager with one proposed direct subordinate serving as operations manager and acting general manager. In turn, the chart indicated that the operations manager would oversee the positions of office administrator, accountant/bookkeeper, and independent contractors.

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The Petitioner submitted a business plan with its mission statement and objectives that included a description of the business activities of its affiliate, [REDACTED] located in Angola. The business plan also included a description of the Beneficiary's proposed duties and responsibilities that was consistent with the description in its letter. The plan also included duty descriptions for the company's proposed employees and contractors as follows:

Operations Manager and Acting General Manager

The Operations Manager is responsible for the proper implementation of strategies and the company's goals set and approved by the General Manager.

1. The Operations Manager prepares the schedule of orders and shipments; follows up with the suppliers; tracks deliveries; manages and measures performance as well as overseas and coordinates the activities of other managers and report to the General Manager.
2. The Operations Manager engages in hiring and firing of employees and provides the General Manager with reports and recommendations.
3. In consultation with the General Manager, he represents the company in communicating with suppliers, partners, clients, government agents, and professionals, and independent contractors working for the company.
4. He will be responsible for supply chain operations to include: strategic sourcing of commodities and procurement planning, supply chain partnerships, partnerships and collaboration, inventory management, warehousing, shipping and logistics.
5. In the absence of the General Manager, he will be working as Acting General Manager. If the General Manager departs the US at the end of the L-1 Visa term, the Operations Manager will assume the responsibilities of the General Manager to keep the existence and operations of the Company.

Office Administrator (Part-time)

The office administrator will be responsible for

1. The administrative and organizational management of the office, and assists the general manager and the Operations manager, with daily schedules and duties, to include managing their calendars, and commitments, and travel arrangements.
2. Performing general administrative duties, including receiving, interacting with clients, partners, suppliers, maintaining and managing files and records of the Company.
3. Arranging meetings and conferences,
4. Managing inventory and supplies, and office facilities,
5. Maintaining payrolls human resources files and maintaining financial records.

Accountant/Book keeper (Part time)

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The part-time accountant will be responsible for

1. Recording, maintaining accounting records;
2. Preparing periodic financial statements for management;
3. Preparing and processing payroll and all local, provincial and federal tax obligations of the company;

The accountant will be working from his/her office in close coordination with office manager.

Independent Contractors

The Company will be hiring various independent service providers and contractors during the procurement of goods, forwarding, inspecting an shipping processes. The services providers include, but not limited to, truck drivers, lawyers, and researchers and investment advisers. At the early stage of the business development, the business will only retain an office, and does not need to own storage. The commodities are loaded directly from sellers' facilities and transported to the destination with the help of the independent contractors. [REDACTED]

[REDACTED] will be among the carriers/shippers and forwarders that our Company intends to hire.

According to the Petitioner's business plan, the company anticipated that it would begin hiring employees during its first year of operations and it intended to begin full operations in June 2014.

Regarding its financial status, the business plan explains that the Petitioner anticipates an initial need for a total working capital in the amount of \$412,639. This amount includes an investment requirement of \$378,000 plus \$34,639 for expenses covering the first three months. The Petitioner forecasts that a specifically identified buyer will prepay for an initial order of the Petitioner's goods in the amount of \$113,400, with a \$264,600 balance to be paid upon shipment. The Petitioner expects to cover the remaining three quarters of its first year expenses through its "cash inflow from operation." The Petitioner explained that its forecast was based on an assumption that there would not be a major change in price or supply. The plan included a table depicting the Petitioner's forecasted balance sheet with cash assets of \$282,229 as of June 2014. The Petitioner projects accounts receivable of \$456,435- for a total of \$541,800 in assets in June 2015. The Petitioner also includes a table projecting sales totaling \$2,173,500 during its first year of operation.

The Petitioner submitted bank statements, a wire transfer from the foreign entity for \$5,600, and copies of business documents for the foreign entity.

On May 28, 2014, the Director issued a request for evidence (RFE) advising the Petitioner to provide additional evidence to establish that the new office will support an executive or managerial position within one year of petition approval. Specifically, the Director advised the Petitioner to provide evidence regarding the proposed number of employees to be hired, including their positions, their duties, and educational requirements, among other evidence. The Director also requested evidence

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to demonstrate the size of the U.S. investment and the financial ability of the foreign entity to pay the Beneficiary and to begin doing business in the United States.

In response to the RFE, the Petitioner provided a letter from the foreign entity, dated August 22, 2014, in which it asserts that it has estimated assets in the amount of “approximately \$2,308,262.83.” In addition, the Petitioner a letter dated August 22, 2014. The letter included another duty description for the Beneficiary, as follows:

He will direct, oversee and coordinate the entire activities of the company through the following specific duties.

He will make decision in matters relating to the categories of commodities to be purchased, the volumes and schedule of shipments, managing risks entering partnerships, as well as approving the compensation and benefits employees. He will also approve budgets and manage the financing requirements, determine and approve the mode of marketing.

He will also be responsible for outlining objectives, and strategic plans, and approve short-and long-term action plans and closely monitor their proper implementation by managers and outside contractors.

He will periodically hold meetings with employees, consultants, and suppliers to assess performances ensure properly implementation of plans.

As deemed necessary, as General Manager, he will make appropriate adjustments and changes on the plans and oversee the proper implementation of those adjustments. In consultation with other managers and advisors, he will set out ways to hire and retain productive and efficient employees and independent contractors and will have the ultimate authority of the final decision in hiring and retaining the employees and contractors.

The Petitioner also referred to its employees in the letter stating that “in-order to achieve envisioned targets” the Beneficiary “has already put in place” [REDACTED] as operations manager, [REDACTED] as legal consultant, and [REDACTED] as an accountant/bookkeeper. The Petitioner explains that once the Beneficiary’s L-1 Visa is approved, he will hire other employees and independent contractors to fill positions such as purchasing, logistics coordination, marketing, sales manager, office manager, and truck drivers.

The Petitioner’s letter described the operations manager’s duties as follows:

Overseeing and supervising the purchasers and logistics coordinator in the sourcing and transportation of the commodities from the suppliers to the destination.

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Preparing the schedule of orders and shipments; follows up with the suppliers; tracks deliveries; manages and measures performance as well as oversees and coordinates the activities of other managers and reports to the General Manager.

The Operations Manager engages in hiring and firing of employees and provides the General Manager with reports and recommendations.

In consultation with the General Manager, he represents the company in communicating with suppliers, partners, clients, government agents, and professionals, and independent contractors working for the company.

He will be responsible for supply chain operations to include: strategic sourcing of commodities and procurement planning, supply chain partnerships, partnerships and collaboration, inventory management, warehousing, shipping and logistics.

Despite the Petitioner's identification of [REDACTED] as operations manager and acting general manager, the Petitioner also stated that he works as an independent contractor and he will primarily work from his own office in California. The Petitioner further explained that [REDACTED] will perform purchasing and logistic functions until these positions are filled in the future. The Petitioner provided duty descriptions for these unfilled positions and the vacant truck driver position, office manager position and the marketing and sales manager positions. Finally, the Petitioner described the duties of its accountant/bookkeeper, a position held by an independent contractor, [REDACTED]

The Petitioner's letter included a revised organizational chart depicting the Beneficiary with three direct subordinates, specifically legal advisor, [REDACTED] (consultant), operations manager [REDACTED] and a vacant sales and marketing manager position. Two vacant departments and a vacant office manager position are subordinate to the operations manager. Each of these departments and the office manager position have vacant positions listed as subordinate to them. [REDACTED] position as accountant/bookkeeper is depicted subordinate to the vacant office manager position, which is subordinate to the operations manager.

With regard to the financial status of the U.S. and foreign entity, the Petitioner stated that the foreign entity and its two shareholders have sufficient assets to run the petitioning company. The record indicates that the Beneficiary and another individual are partners each owning 50% of both the petitioning company and the foreign entity. The Petitioner explained that these partners have transferred a total of \$30,000 to the petitioning company. Further, the Petitioner stated that restrictions in transferring currency outside of Angola created some problems but that upon approval of this petition, the Petitioner "will easily be able to transfer their fund to the US Company." The Petitioner asserted that the foreign entity transferred \$19,780 to the petitioning company's account. The record also demonstrates a \$5,600 initial investment into the U.S. petitioning company. In total, the Petitioner asserted that the investment currently totaled \$55,380. The Petitioner supplemented its

claim with banking documents, including an untranslated banking document from the foreign entity, unaudited balance statements and other self-prepared financial documents from the foreign entity. The Director denied the petition on September 5, 2014, finding that the evidence of record indicates that the Beneficiary would be involved in the actual day-to-day duties of the office operation rather than primarily engaged in qualifying managerial duties within one year of approval of the petition. The Director also found that the Petitioner had not established that it would have the ability to support the Beneficiary's employment in a managerial capacity or that the foreign entity has the ability to remunerate the Beneficiary and sustain the U.S. business operation during its initial year of operations.

On appeal, the Petitioner asserts that the Director erred in finding that the Beneficiary would not be employed in a managerial position. The Petitioner states that it previously submitted evidence showing that the Beneficiary's duties are "exclusively managerial." Further, the Petitioner asserts that the Beneficiary's reduced salary in the United States in comparison to a higher salary received while working abroad is not a discrepancy because the Beneficiary's remuneration in the United States is not limited to his monthly salary. Finally, the Petitioner asserts that the Director erred by failing to consider the entire assets of its foreign affiliate in determining that the Petitioning company did not demonstrate an ability to pay the Beneficiary and support the new U.S. business during its first year of operations.

B. Analysis

Upon review, the Petitioner has not established that it will support the Beneficiary's proposed employment in a managerial capacity within one year of approval of this petition.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the Petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

When examining a beneficiary's executive or managerial capacity, we will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). Here, while the Petitioner's description of the Beneficiary's proposed duties suggests that he will have the appropriate level of authority over the Petitioner's operations, the Petitioner provided little insight into what he would actually do on a day-to-day basis by the end of the first year of operations. For example, the Petitioner initially stated that the Beneficiary will "direct, oversee and coordinate the entire activities

of the company,” “be responsible for outlining objectives and strategic plans,” and hold “the highest authority in the overall operations of the company,” but it offered no examples of specific tasks he would perform on a day-to-day basis in carrying out these broad responsibilities. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). The Petitioner re-submitted essentially the same list of duties in response to the RFE, and thus has not submitted sufficient information regarding the role to establish that the Beneficiary would be performing primarily executive or managerial duties within one year.

Therefore, the Petitioner's general description of the Beneficiary's duties alone is insufficient to establish that his duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity. As discussed above, the Petitioner has the burden to establish that the U.S. company would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering the Petitioner's anticipated staffing levels and stage of development within a one-year period. *See generally*, 8 C.F.R. § 214.2(l)(3)(v)(C).

At the time of filing, the Petitioner identified only three employees to be hired, including an operations manager, a part-time office administrator, and an accountant/bookkeeper, and it indicated that other work would be performed by independent contractors. The Petitioner's business plan included these same employees but did not include a timeline for hiring personnel. Further, it identified no other staff to be hired in the first year or beyond. The “sales and cost projections” included in the Petitioner's business plan identified anticipated expenses of \$119,000 for wages and salaries, and no expenses for independent contractors. Based on the initial evidence, it is reasonable to conclude that the Petitioner, as of the date of filing, anticipated hiring, at most one full time and two part-time staff during its initial year of operations.

The Petitioner's RFE response included a second organizational chart with additional vacant employee positions along with a description of their duties and requirements but the Petitioner, once again, did not provide a timeline for the hiring of any of its employees, nor did it explain the inconsistency between its two organizational charts. 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). The expanded organizational chart was not accompanied by any evidence, such as a revised business plan accounting for the additional proposed staff. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). Here, the evidence submitted in response to the RFE did not add further

clarification to the company's initial business and hiring plans, but rather materially changed those plans. Accordingly, we will give greater weight to the initial organizational chart in analyzing the Beneficiary's proposed role within the new office during its initial year.

The Petitioner asserted that it has "already put in place" named employees or contractors including its operations manager, legal consultant, and accountant/bookkeeper. We are unable to determine if the Petitioner now claims that it has hired employees, because the Petitioner provided no documentation to establish that any of these employees have actually been hired or have received any salary or pay. 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)). In addition, even if the Petitioner had established that these individuals were being paid, the Petitioner asserts that both the accountant/bookkeeper and the operations manager are independent contractors and the operations manager is permitted to work remotely for much of the time. Based on these assertions we are unable to find that the Beneficiary will be relieved from primarily performing the day-to-day operational duties within one year of filing this petition. The Petitioner has not explained how the services of the contracted employees will 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. *Id.* The Petitioner has provided insufficient evidence to establish that it will have sufficient employees on staff to perform operational duties and relieve the Beneficiary from primarily performing them. 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).

Finally, we agree with the Director that the record does not establish the size of the U.S. investment and the financial ability to commence business operations in the United States. *See* 8 C.F.R. § 214.2(l)(3)(v)(C)(2). We note that the U.S. entity may have received up to approximately \$60,000 in investments from the foreign entity and its shareholders, however this is far less than the "more than \$400,000" that the Petitioner states it requires for the first year of its operations. In addition, we will neither consider untranslated foreign banking statements nor unaccredited balance sheet documents from the foreign entity. Because the Petitioner failed to submit certified translations of the documents, we cannot determine whether the evidence supports the Petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

On appeal, the Petitioner asserts that the foreign entity and its owners' bank accounts have \$167,225.57 in available funds. Assuming that the Petitioner's assertions are correct and all money is available for use by the U.S. entity, the amount is still not sufficient to meet its stated monetary requirements for the first year.

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Finally, the Petitioner also asserts on appeal that the Director erred in considering the Beneficiary's higher salary in Angola versus his salary in the U.S. as grounds for denial because the Beneficiary's remuneration is not limited to his salary in the U.S. We do not find the Beneficiary's salary to be a dispositive factor in our decision.

Based on the lack of information regarding the Beneficiary's proposed duties, the inconsistencies in the record regarding the Petitioner's hiring plans and organizational structure, and insufficient evidence of the size of the financial investment in the new office, the Petitioner has not met its burden to establish that it would support a managerial or executive position within one year of the approval of the petition. Accordingly, the appeal will be dismissed.

III. EMPLOYMENT ABROAD IN A MANAGERIAL OR EXECUTIVE CAPACITY

The remaining issue to be addressed is whether the Petitioner established that the Beneficiary has been employed abroad in a qualifying managerial or executive capacity.

A. Facts

The Petitioner provided a letter, dated May 1, 2014, from its affiliate, [REDACTED]. According to the foreign entity's head of import and distribution and acting general manager, [REDACTED], he and the Beneficiary each own 50% of the company that they established in January 2010. The letter also provided a list of the Beneficiary's duties as general manager, including:

1. Based on the various reports and market data, he determines in matters related to the products types to be imported to Angola, the size, interval of shipments, risk management, partnerships, compensation and benefits manager and other employees. He also determines the budget for a specific period, mode of marketing (advertising, website, personal connections, etc), evaluates current local markets data and identifies potential buyers, and suppliers. He oversees the activities of his subordinates and other managers.
2. [The Beneficiary] periodically evaluates the activities of the Company and determines if there are changes in demand or supply and makes appropriate adjustments on the type and size of goods to be imported to Angola, countries and locations of supply of the commodities, and the number of employees to be retained and oversees the implementation of plans.
3. [The Beneficiary] sets out ways to hire and retain productive and efficient employees. While the immediate supervisors and department heads are actively engaged in the HR process of hiring, training, supervising, evaluating performances etc. the General Manager has the ultimate authority of the final decision on the human resources management issues based on reports and recommendations.

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4. [The Beneficiary] enjoys the highest authority in the overall operations of the company, though his subordinates actually perform the technical activities and provide him with reports recommendations.

According to the letter, [REDACTED] performs as import and distribution head with six employees in his department to support him. He stated that the company has 33 employees and the local shop department, which is responsible for sales and distribution, employs 25 of them. The letter indicates that the company has a full time accountant and financial advisor.

The Petitioner provided the foreign entity's organizational chart depicting the Beneficiary as general manager with two direct subordinates, [REDACTED] as local shop head and [REDACTED] as import & distribution head. The chart shows that [REDACTED] supervises six distributor employees, while [REDACTED] supervises a salesman head and a purchaser head. Finally, the chart shows 20 salesmen and two purchase employees who report indirectly to [REDACTED]. The chart did not identify any lower-level employees by name. The Petitioner provided unaudited balance sheets and cash flow documents but none included salary or employee pay entries.

On May 28, 2014, the Director issued a request for evidence (RFE) advising the Petitioner to provide additional evidence relating to the Beneficiary's employment abroad in a managerial or executive capacity. Specifically, the Director found the Beneficiary's duty description to be vague and general and requested that the Petitioner provide a list of duties with a percentage of time allocated to each duty and a list of the foreign entity's employees by name, job title, job duties, educational level and salary, among other information.

In response to the RFE, the Petitioner a letter from the foreign entity dated August 18, 2014. The letter stated that the foreign entity has three divisions: (1) import and distribution department; (2) local shops department; and (3) head office. According to the letter, the head office was staffed by the Beneficiary, an accountant, an office administrator and a delivery officer. The letter included another description of the Beneficiary's duties abroad as follows:

Periodically, reviewing the overall performance of the company in light of its short- and long-term plans, identify the shortcomings and adjust existing ways or design new procedures to better achieve the company's goals. Such adjustments are related, among other things, to the number of employees, size of investment (capital), kinds or quantities or goods, location of supplies, new potential markets, etc.

He periodically conducts meetings with the Department Heads and set budget for a given period, and makes necessary adjustments in the overall day-to-day operations of the company. He reviews recommendations from the two Department Heads and the Accountant regarding the products types to be imported to Angola, size of shipments, duration and interval of shipments, and compensation and benefits employees. Based on his assessment of the report, he directs the Department Heads to achieve a certain goal in a given period of time.

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He has the final say as to the number of employees the company has at a given time and the hiring and firing of individual employee. The Department Heads usually provide the General Manager with their recommendations and assessments on a particular employee. Based on the recommendation and other information provided to him, the General Manager renders his final decision in hiring and firing employees.

Possessing the highest authority in the company, he manages the company's day-to-day operations. Because of the complex nature of the company's operations, he heavily relied on the assessments and recommendations of the Department Heads, the company's accountant, and other external consultants in making decisions.

The letter further described [REDACTED] duties as the import and distribution department head with nine subordinate staff members and [REDACTED] as the local shops department head with "about 21 staff members." None of the subordinates were identified. Finally, the letter gave a brief description of the office administrator and accountant positions but did not indicate if the positions were filled.

In support of the claims, the Petitioner submitted payroll information from the foreign entity that established payments made to the Beneficiary from January 2013 through July 2014. The Petitioner also included employee payroll tables for nine employees beginning in January 2014. These payroll tables included [REDACTED] [REDACTED] an office administrator/accountant, three store managers, a marketing and saleswoman, a delivery officer, and a storage keeper. The Petitioner also provided three sets of payroll tables with employees identified as drivers, security, cashiers, and sales which were identified as "Kinda Braca employees," "Kikolo Braca employees," and "Kantito Braca employees," respectively.

The Director denied the petition finding that the Petitioner did not establish that the Beneficiary was employed abroad in a qualifying managerial or executive capacity. The Director emphasized that the Petitioner provided only a vague duty description for the Beneficiary, and did not submit evidence clearly showing the foreign entity's organizational structure.

On appeal, the Petitioner asserts that the Director erred in denying the Petition, but does not specifically acknowledge the Director's finding that the Petitioner did not establish that the Beneficiary was employed in a qualifying capacity abroad.

B. Analysis

Upon review, we concur with the Director's finding that the Petitioner has not established that the Beneficiary was employed abroad in a qualifying managerial or executive capacity.

When examining the executive or managerial capacity of the Beneficiary, we will look first to the Petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The definitions of executive and managerial capacity each have two parts. First, the Petitioner must show that the Beneficiary

performs the high-level responsibilities that are specified in the definitions. Second, the Petitioner must show that the Beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his 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 foreign entity's part owner and general manager, the evidence does not establish that his actual duties are primarily managerial or executive in nature. Specifically, the Beneficiary appears to have been heavily involved in the daily operations of the company and his initial duty description included many non-qualifying tasks such as evaluating markets and finding suppliers, finding buyers, and determining all matters relating to products to be imported. Not only are many of these duties non-qualifying but they are described in only vague and nonspecific terms, such that we are unable to determine the nature of the Beneficiary's actual duties while employed abroad. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (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 provided another vague and generalized description including such tasks as reviewing the overall performance of the company, periodically conducting meetings with the Department Heads, making necessary adjustments in the overall day-to-day operations, and reviewing recommendations from the two department heads and the accountant. Furthermore, despite the Director's request, the Petitioner did not provide a specific allocation of time that the Beneficiary devoted to any of his specific duties so that we might understand how the Beneficiary spent his time on a day-to-day basis.

Further, the Petitioner's response to the RFE included copies of e-mail correspondence between the Beneficiary and several food commodity suppliers. This evidence reflects that the Beneficiary is in fact directly performing the purchasing and logistics functions attributed to his subordinate, the Import and Distribution Head, such as contacting suppliers through e-mail and on-line searching, negotiating prices and confirming shipment and delivery of purchased goods. 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). Therefore, while the Petitioner did not include sourcing or purchasing among the Beneficiary's duties, the evidence shows that he spends some portion of his time performing these non-qualifying duties and the description provided must be considered incomplete.

Absent a clear and credible breakdown of the time spent by the Beneficiary performing his duties, we cannot determine what proportion of those duties were 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.

In regards to the foreign entity's staffing, the Petitioner provided payroll evidence for the foreign entity's employees for 2014, and only a general overview of its organizational structure, with few positions or employees clearly identified on its organizational chart. While the payroll evidence appears to show sufficient staff to handle the sales and distribution component of the business, the record does not contain corroborating evidence of the three purchasing employees identified on the organizational chart or of the six to nine unidentified employees working in the import and distribution department. The lack of evidence in this regard is significant, as the record shows that the Beneficiary himself is involved in sourcing and purchasing goods and arranging their shipment to Angola. The record does not contain evidence of sufficient staff, other than the import and distribution department head, to relieve him from performing these functions. Therefore, the record demonstrates that the foreign entity has, at most, two employees including the Beneficiary, to perform the work of a department that is depicted as having up to nine subordinate workers. 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)).

As noted, the Petitioner has not contested the Director's finding with respect to this issue or offered additional evidence on appeal to overcome that finding. For the reasons discussed above, we find the evidence is insufficient to establish that the Beneficiary had been employed abroad in a qualifying managerial or executive capacity. For this additional reason, the appeal will be dismissed.

IV. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of N-G-T-, LLC*, ID# 13743 (AAO Sept. 28, 2015)