



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

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

MATTER OF A-B-P-, INC.

DATE: JAN. 28, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an exporter of auto parts, seeks to extend the employment of the Beneficiary in the position of president under the L-1A nonimmigrant visa 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, initially approved the petition for a nonimmigrant visa. On further review of the record, the Director determined that the Petitioner was not eligible for the benefit sought. Accordingly, the Director properly served the Petitioner with a notice of her intention to revoke (NOIR) the approval of the petition, and her reasons therefore. The Director ultimately revoked the approval of the petition based on the conclusion that the Petitioner did not establish that the Beneficiary, who was initially granted a one-year period of stay to open a new office in the United States, has been and will be employed in a qualifying managerial or executive capacity under the extended petition. The matter is now before us on appeal. The appeal will be dismissed.

I. ISSUE

The issue before us is whether the Beneficiary has been and will continue to be employed in a qualifying managerial or executive capacity in accordance with the applicable statutory and regulatory provisions.

II. 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:

- (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.

Further, with regard to the Director's decision to revoke a previously approved petition, under U.S. Citizenship and Immigration Services (USCIS) regulations, the approval of an L-1A petition may be revoked on notice under six specific circumstances. 8 C.F.R. § 214.2(l)(9)(iii)(A). To properly revoke the approval of a petition, the Director must issue a NOIR that contains a detailed statement

of the grounds for the revocation and the time period allowed for rebuttal. 8 C.F.R. § 214.2(l)(9)(iii)(B).

In the present matter, the Director provided a detailed statement of the ground for the revocation. The Director reviewed the Petitioner's rebuttal evidence and concluded that the Petitioner had not established that the Petitioner has been employing the Beneficiary in the United States in a qualifying managerial or executive capacity. Therefore, the Director revoked the approval under 8 C.F.R. § 214.2(l)(9)(iii)(A), noting that the Beneficiary is not eligible for the benefit requested under section 101(a)(15)(L) of the Act.

III. U.S. EMPLOYMENT IN A QUALIFYING CAPACITY

The sole issue to be addressed in the instant proceeding is whether the Director properly revoked approval of the petition based on the finding that the Beneficiary is not employed in the United States in a qualifying managerial or executive capacity as required by regulation. *See* 8 C.F.R. § 214.2(l)(3)(ii).

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.

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. *See* section 101(a)(44)(C) of the Act.

A. Facts

The record shows that the Petitioner filed a Form I-129 on May 23, 2014. In support of the petition, the Petitioner provided a cover letter, dated May 19, 2014, which included a description of the U.S. and foreign entities as well as a list of the Beneficiary's job duties in each of his respective positions. With regard to the Beneficiary's position in the United States, the Petitioner provided the following list of duties:

- Teleconference with Venezuelan Parent authorities and Board of Directors regarding status of operations/development and the discussion of monthly reports.
- Approve investments in real property and the purchase of chattels[.]
- Develop and implement policies, standards, and procedures for operations[.]
- Manage workforce and organization, i.e. human resource management including structure, training and development and recruitment and selection.
- Analyze technology, resource needs, and market demand to plan and assess the feasibility of projects.
- Evaluate the marketing strategies proposed by the marketing manager. He will be the only official with the power to authorize the use of the name of the company in promotional events.
- Approve investments in advertising.
- Conduct a general meeting with the managerial staff of each department to supervise the goals[.]
- Evaluate sales reports and charts [as] well as month to month sales development. A comparative and analytical look of the sales charts.
- Evaluate sales plans development and make decisions concerning the expansion and the acquisition of new markets.
- Establish and control internal procedures and policies.
- Conduct meeting with the company's attorney, accountant, advertising professionals and other occasional service providers.
- Supervise protocols in the service department to establish a uniform service method. Review and analyze reports about the quality of service rendered.

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- Analyze market trends to determine the best selling and buying time periods and to determine the best selling products.
- Oversee the completion of sales contracts and forms in order to proper record [*sic*] sales information.

The Petitioner also submitted 22 supporting exhibits pertaining to the U.S. operation and its foreign parent entity, including a copy of its business plan which included the company's internal organizational chart. According to the organizational chart, the Petitioner employed the Beneficiary, a warehouse manager, [REDACTED], and an administrative assistant/salesperson, [REDACTED]. According to the chart, [REDACTED] reported directly to the Beneficiary, and [REDACTED] would be indirectly supervised by the Beneficiary through a business director who was not yet hired. According to the Petitioner's business plan, the Petitioner intended to hire a total of five additional employees over the next three years, including a vice president, a second warehouse manager, a warehouse operator, a marketing director (outsourced), and a marketing assistant.¹ In support of its claimed staffing, the Petitioner submitted a copy of its IRS Form 941, Employer's Quarterly Tax Return, for the first quarter of 2014, which demonstrated that the Petitioner had three employees (the Beneficiary, [REDACTED] and [REDACTED]) during that period.

On February 3, 2015, following two USCIS site visits to the Petitioner's place of business on October 8, 2014, and November 3, 2014, and after reviewing information provided by the Petitioner's counsel regarding the Beneficiary's U.S. job duties, the Director issued a notice of her intent to revoke approval of the Petitioner's Form I-129.

In response, the Petitioner provided a statement, dated March 6, 2015, which reiterated information that was provided originally in support of the petition, including the list of the Beneficiary's U.S. job duties. The Petitioner also provided a copy of counsel's response to USCIS's email request, which followed the two site visits. The Petitioner's response to the NOIR included an updated business plan and organizational chart, along with 29 other supporting exhibits, which addressed and provided information pertaining to a number of eligibility factors, including the Petitioner's qualifying relationship with the Beneficiary's foreign employer, the ongoing business activities of the Petitioner and its foreign parent entity, and the Beneficiary's job duties with the foreign and U.S. entities.

After reviewing the Petitioner's response, the Director determined that the evidence submitted did not establish that the Petitioner is currently employing the Beneficiary in a qualifying capacity. The Director found that the Petitioner offered a deficient job description which was comprised of job duties that were not consistent with the Petitioner's current staffing and organizational complexity. The Director concluded that in light of the Petitioner's limited support staff, the Beneficiary is not primarily performing job duties that are within a qualifying managerial or executive capacity.

¹ We note that the Petitioner's personnel plan, set forth in Section 6.1 of the business plan, proposes the hiring of a second warehouse manager in the next three years. This position, however, is not identified on the Petitioner's organizational chart. Likewise, the business director position, by whom [REDACTED] will ultimately be supervised according to the organizational chart, is not identified in the Petitioner's personnel plan.

On appeal, the Petitioner contests the Director's finding, asserting that the Beneficiary is currently, and will continue to be, employed in a primarily executive position. The Petitioner also asserts that its business plan, which was submitted in response to the NOIR, described a projected three-year hiring plan, which included additional employees who would fill the vacant positions in the Petitioner's current organizational chart. The Petitioner also pointed out that one of the named positions – that of the marketing director – is an outsourced position that would be filled on an as-needed basis.

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 provided sufficient evidence to overcome the ground for revocation.²

B. Analysis

We generally commence our analysis of the Beneficiary's proposed employment by looking first to the description of the Beneficiary's job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The job description must clearly describe the job duties to be performed 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 within the context of the organizational structure of the U.S. employer, the existence of in-house or contractual support personnel capable of relieving the Beneficiary from having to allocate his time to primarily non-qualifying operational tasks. These factors contribute to a comprehensive understanding of the beneficiary's daily tasks and his prospective role within the petitioning organization.

Looking to the job description in the present matter, we find that the descriptions of the Beneficiary's job duties were overly broad and thus did not convey a meaningful understanding of the tasks that the Beneficiary has performed and would continue to perform on a daily basis. For instance, the Petitioner stated that the Beneficiary's job duties include “[m]anag[ing the] workforce of [the] organization, i.e.[,] human resources management including structure, training and development and recruitment and selection.” The Petitioner did not, however, disclose the specific tasks the Beneficiary currently performs in association with managing human resources or explain how this currently falls within the scheme of daily tasks, given that the Petitioner has been and continues to be currently staffed with a total of three employees, including the Beneficiary. In fact, the Petitioner's organizational chart does not include a human resource department, thus leaving open the possibility that the company's recruitment, hiring, and training of employees, outside of the warehouse department,³ may continue to be among the Beneficiary's assigned job duties, regardless

² While we have considered all evidence that has been submitted into the record, we will specifically reference only those submissions that are relevant to the above listed ground for revocation.

³ The Petitioner's business plan indicates that the warehouse manager will have authority to hire, train, and evaluate employees within the warehouse department.

of the Petitioner's plans for future hires. It is unclear how the operational tasks of a human resources department fit the criteria of managerial or executive capacity.

We further note that the Petitioner's claim that the Beneficiary establishes and controls internal procedures and policies is similarly vague, as the Petitioner provided no information about specific policies or procedures, nor disclosed the actual tasks that are indicative of controlling the unidentified policies and procedures. 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. *Id.* at 1108.

The Petitioner also stated that the Beneficiary would "[a]nalyze technology, resource needs, and market demand to plan and assess the feasibility of projects." While it is likely that analyzing market research and using the discovered information to make discretionary business decisions may come under the guise of a manager or executive, it is unclear how the act of conducting market research tasks to gather the data used to make those business decisions can similarly be deemed as time spent in a qualifying managerial or executive capacity. Likewise, despite the Beneficiary's authority to "[e]valuate the marketing strategies proposed by the marketing manager,"⁴ which would be deemed as qualifying, it is unclear who is currently performing the Petitioner's marketing-related tasks in the absence of an in-house or outsourced marketing employee. While the Petitioner contends that the marketing manager is an outsourced position, the record contains no evidence to show that the Petitioner has actually used the outside services of any contracted employees, thus indicating that the Beneficiary currently performs those services and will continue to do so until the position is otherwise filled. 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)).

Further, as discussed in the Director's decision, the Petitioner made references to a managerial staff and a service department, despite having provided no evidence to establish that a managerial staff and service department were part of the Petitioner's organizational hierarchy at the time of filing. The Petitioner addresses this anomaly on appeal, pointing out that its original petition was filed when it was a new office and claiming that the updated business plan that was provided in support of the extension petition and in response to the NOIR includes a projected three-year hiring plan for filling the vacant positions in its organizational chart.⁵ This assertion indicates that the Petitioner intends to operate as a new office in the years following its initial year of operation. However, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the

⁴ We note that while the Beneficiary's job description refers to a marketing manager position, that position title does not appear on the corresponding organizational chart that the Petitioner provided in response to the NOIR. Rather, the chart includes the position of a marketing director. While this anomaly may be indicative of an inadvertent error and may not be material for the purpose of adjudicating this appeal, it is hereby noted for the record.

⁵ See 8 C.F.R. § 214.2(l)(1)(ii)(F) for definition of the phrase "new office."

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business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

In the instant matter, the Petitioner's provisions for a three-year hiring plan is, in itself, indicative of the Petitioner's current lack of readiness to employ the Beneficiary in a qualifying managerial or executive capacity. Despite providing a job description, which indicates that the Beneficiary requires support personnel to relieve him from having to allocate his time primarily to the performance of daily operational tasks, the Petitioner expressly states that it is not currently at full hiring capacity. As demonstrated by the Petitioner's Form 941 for the first quarter of 2014, the Petitioner employed only two subordinate employees to the Beneficiary (the warehouse manager and the administrative assistant/salesperson) at the time the instant petition was filed, thus indicating that five positions would remain vacant for the time being. The Petitioner's limited support staff naturally gives rise to questions concerning who within the Petitioning organizational hierarchy would carry out the necessary operational tasks and how, with only two subordinates, the Beneficiary would be able to devote his time primarily to the performance of managerial or executive tasks. While no beneficiary is required to allocate 100% of his time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988).

We note the Petitioner's assertion on appeal that, 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. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the Petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. Again, 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. at 165.

Furthermore, in examining the organizational chart included in the Petitioner's updated business plan, we find that the Petitioner provided inconsistent information with regard to the position held by [REDACTED]. As noted previously, the original organizational chart submitted in support of the petition identified [REDACTED] as "administrative assistant/salesperson." The organizational chart submitted in response to the NOID and again on appeal identified this individual's position as that of vice president, yet section 6.1 of the accompanying business plan identified [REDACTED] position as "administrative assistant/salesperson," and provided a job description consistent with such a position. 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 Petitioner has provided no evidence to reconcile or resolve the inconsistency between its updated business plan and organizational chart.

Finally, 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. *See* 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.*

While the definition of “executive capacity” does not require the petitioner to establish that the beneficiary supervises a subordinate staff comprised of managers, supervisors and professionals, it is the petitioner’s burden to establish that someone other than the beneficiary carries out the day-to-day, non-executive functions of the organization. Here, despite the Petitioner’s assertions to the contrary, the Beneficiary has not been shown to be employed in a primarily executive capacity. The Petitioner does not demonstrate that the Beneficiary’s duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. In fact, although the Petitioner claims that the Beneficiary is employed in an executive position at the U.S. company, the only executive duties listed for the Beneficiary merely paraphrase the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act. 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. at 1108, *aff’d*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In summary, the Petitioner offered a job description that not only lacked a detailed account of the Beneficiary’s actual daily tasks, but also made references to a staffing structure that was not yet in place at the time the petition was filed. Despite the Petitioner’s relatively early stage of development, the Petitioner can no longer be considered a new office and therefore has not established that it is ready and able to employ the Beneficiary in a managerial or executive capacity as of the date the petition was filed.

As fully discussed above, the Petitioner did not provide evidence establishing that it met the statutory and regulatory criteria as of the date of filing. On the basis of the evidentiary deficiencies described in this decision, the instant petition cannot be approved and we find that revocation of the approval of the instant petition was properly issued.

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IV. CONCLUSION

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of A-B-P-, Inc.*, ID# 15270 (AAO Jan. 28, 2016)