

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE: SEP 13 2013

OFFICE: CALIFORNIA SERVICE CENTER

FILE: WAC

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:

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INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you.

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center denied the nonimmigrant visa petition and certified his decision to the Administrative Appeals Office (AAO) pursuant to the regulation at 8 C.F.R. § 103.A(a). The AAO will withdraw the director's decision and approve the petition.

The petitioner filed this nonimmigrant petition seeking classification of the beneficiary as an L-1A intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation engaged in the import, distribution and sale of packaging solutions for clients in the food, beverage, and pharmaceutical industries. The petitioner is the wholly-owned subsidiary of [REDACTED], a publicly-traded [REDACTED] company. The beneficiary was previously granted L-1A status for a period of one year in order to open a "new office" in the United States. The petitioner now seeks to extend his status for two years so that he may continue to serve as its Vice President and Chief Operating Officer at a salary of \$150,000 per year.

The director denied the petition on June 17, 2013, concluding that the petitioner failed to establish that it would employ the beneficiary in a qualifying managerial or executive capacity. On July 29, 2013, the director certified the decision to the AAO and advised the petitioner that it had 30 days to submit a brief or other written statement for consideration. Counsel for the petitioner has submitted a brief and additional evidence contesting the denial of the petition.

On certification, the petitioner asserts that the beneficiary manages an essential function and relies on support from staff in the "International Department" of the [REDACTED] parent organization, whose duties directly relate to the objectives and goals of the U.S. office. Counsel contends that the director did not adequately consider the role of this staff in the decision.

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.

With respect to a "new office," the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended business an initial one-year period to establish an operation that will support an executive or managerial position. *See also* 8 C.F.R. § 214.2(l)(3)(v)(C) (defining "new office"). After one year, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) provides that the "new office" visa petition 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.

Defining the term managerial capacity, section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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.

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. Employment in a Managerial Capacity

The sole issue to be addressed is whether the petitioner established that it will employ the beneficiary in a qualifying managerial capacity.

A. Facts

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on March 4, 2013. The petitioner states that its parent company, a publicly traded company, develops and manufactures packaging materials and solutions for clients in the life science, electronics, and civil engineering/construction industries. The parent company, which achieved net sales of \$917 million in the most recent fiscal year, encompasses a research and development laboratory, seven factories, and nine subsidiaries located in and several other countries. The foreign entity and its subsidiaries have over 1,500 employees. The petitioner, the U.S. subsidiary of the parent company, seeks to extend the beneficiary's status so that he can continue to serve as Vice President and Chief Operating Officer.

The petitioner stated that it was established in December 2011 for the purpose of importing and distributing packaging materials manufactured by its parent company to American customers in the food processing, pharmaceutical, beverage, and toiletries industries. The beneficiary was selected to head the U.S. operation based on his more than one year of experience as the manager in charge of developing the North, Central, and South America Territory within the parent company's International Department. The beneficiary was admitted to the United States in L-1A status in April 2012. The record reflects that the petitioner generated revenues of \$572,508 for the fiscal year ended on December 31, 2012.

In a letter dated February 1, 2012, the petitioner provided a description of the beneficiary's duties and the percentage of time he allocates to six areas of responsibility. Briefly, the petitioner indicated that the beneficiary directs and manages the company's financial, legal, trade, administrative, and sales activities; establishes financial and budgetary plans and goals; reviews and monitors sales activities performed by the sales manager; serves as a chief liaison with the parent company; and exercises full authority over negotiations with customers and outside professional service providers.

The director subsequently issued a request for evidence and, later, a notice of intent deny. In response, the petitioner supplemented the record with additional details regarding the duties the beneficiary performed during the first year of operations and the duties he will perform if the petition is extended. The petitioner emphasized that the beneficiary is primarily responsible for directing and managing the U.S. company's operations, with responsibility for implementing all operational goals and objectives established in liaison

with the parent company. In addition, the petitioner emphasized that the beneficiary, as vice president of the group's only U.S. subsidiary, reports to the general manager of the parent company's International Department, who in turn reports directly to the CEO of the parent organization.

The petitioner consistently stated that it hired two employees during the first year of operations, including a sales manager who is responsible for sales and marketing of packaging materials, and an administration and customer service specialist who is responsible for accounting, sales, administrative, and customer service activities. The petitioner provided evidence that it paid \$275,559 in salaries and wages in 2012, as well as evidence to corroborate its use of outside service providers including corporate attorneys, an accountant, and a payroll service.

In addition, the petitioner indicated that the beneficiary continues to have four direct and four indirect subordinate staff members within the parent company's headquarters office, explaining: "This is due to the fact that [the petitioner's] operations are carried out in close coordination and through interaction with [REDACTED] who perform production planning, and export and distribution of packaging materials in the Americas." The petitioner provided the names, education level, salaries, and a brief description of job duties for the eight foreign employees, which include: three sales employees responsible for the Americas; an employee responsible for managing shipping schedules and invoicing for customers in the Americas; and four engineers involved in research, development and production of products sold in the Americas. Overall, the petitioner indicated that both U.S. employees and seven of the [REDACTED] employees have at least a bachelor's degree, mostly focused on the sciences, engineering, or business.

The director issued a decision denying the petition, concluding that the petitioner failed to establish that the petitioner would employ the beneficiary in a qualifying managerial or executive capacity. In denying the petition, the director concluded that, based on the position description provided, "it appears nearly 80% of the beneficiary's duties involve activities related to your company's sales." The director further determined that neither of the beneficiary's U.S. subordinates is a manager, supervisor or professional, and thus the petitioner has not established that it has an organizational structure sufficient to elevate the beneficiary to a supervisor position that is higher than a first-line supervisor of non-professional employees.

In a brief submitted on certification, counsel asserts that the director mischaracterized the nature of the beneficiary's responsibilities and disregarded his placement within the corporate group's organizational hierarchy. Counsel contends that the beneficiary manages the essential function of developing the group's presence in the Americas, a role which reasonably requires him to rely on support from [REDACTED] staff in the International Department whose duties directly related to the objectives and goals of the U.S. office. Counsel asserts that the director overlooked this staff in the ultimate decision. Finally, counsel again emphasizes the larger organization and states that the beneficiary will heavily influence decision-making at the highest-level of the international organization with respect to U.S. market development and expansion.

With respect to the beneficiary's duties, counsel asserts that, although the word "sales" appears several times throughout the job description, the director incorrectly inferred that the beneficiary would be directly engaged in sales, without acknowledging that the beneficiary supervises a sales manager and an additional sales team located in [REDACTED] that is responsible for the U.S. and other North and South American markets. Counsel emphasizes that, while the beneficiary is not required to supervise professional personnel in order to qualify as a manager, the record does in fact establish that eight of his ten direct and indirect subordinates are professionals who possess Bachelor's degrees in fields directly related to the work they perform. Finally, counsel asserts that the director's failure to consider the beneficiary's supervision of the parent company's staff and failure to consider the beneficiary's role within the overall organization was clear error.

B. Analysis

Upon review, the petitioner's assertions are persuasive. The petitioner submitted sufficient evidence to establish that the beneficiary will be employed in a primarily managerial capacity. As noted by counsel, the director's decision appears to be based primarily on the staffing levels of the U.S. company rather than the larger organization.

When examining the executive or managerial capacity of the beneficiary, USCIS looks first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id*

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of an employee who is claimed to manage or direct an essential function, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

Here, the petitioner has established that the beneficiary's responsibilities have been and will be primarily managerial duties associated with development of the U.S. market for the petitioner's international organization. Based on the petitioner's description of the beneficiary's duties, the beneficiary is charged with managing the implementation of all goals, policies, strategies, and objectives pertaining to the import and distribution of the parent company's specialized products into the U.S. market and high-level planning for the new U.S. subsidiary's further expansion. The record further establishes that the beneficiary has been given significant discretion in decision-making, and that he is clearly a member of the senior management team,

working closely with the parent company's executives in determining the direction of the business in the United States and the Americas.

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. In this matter, the petitioner has provided evidence that the beneficiary manages an essential function.

Although the director based his decision almost entirely on the size of the U.S. company and the number of staff, the director did not take into consideration the reasonable needs of the organization as a whole. As required by section 101(a)(44)(C) of the Act, 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.

Upon review, the evidence establishes that the U.S. petitioner, which had been established for only 16 months at the time of filing, works closely with its [REDACTED] parent company's international department, which employs technical, sales, and administrative staff who are dedicated to supporting the growth of the group's business in the Americas. Thus, the fact that the U.S. company has only one sales manager and one customer service/administrative employee on staff should not lead to a conclusion that the petitioner would require the beneficiary, as vice president and chief operating officer, to perform day-to-day sales duties. Rather, it is reasonable to believe that the petitioner will continue to rely on the support of the parent company's well-documented international team.¹

¹ The statutory definition of managerial capacity refers to an assignment within an "organization." See section 101(a)(44)(A) of the Act. The term "organization" is broadly defined at section 101(a)(28) of the Act, 8 U.S.C. § 1101(a)(28), as: "an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action on any subject or subjects."

The statutory concept of organization would not reasonably include an unrelated corporation, a vendor, or a contracted service provider, but would plainly include the components of a "qualifying organization," as defined at 8 C.F.R. § 214.2(l)(1)(ii)(G). Here, the foreign corporation is the closely related parent company that researches, develops, and manufactures the petitioner's product. See 8 C.F.R. § 214.2(l)(1)(ii)(I) (defining "parent"). It is reasonable to consider the beneficiary's role, in part, within the wider qualifying

Notwithstanding the small staff size of the U.S. company, the petitioner has provided evidence that it achieved revenues of nearly \$600,000 in eight months of operation during 2012. The petitioner has explained that the purpose of the beneficiary's transfer is to oversee the expansion of the business in what is still a new market. The petitioner has documented that this growth is occurring and that it has a continued need for the temporary transfer of a senior level manager to oversee its expansion in the U.S. marketplace.

While the beneficiary is required to apply his business expertise in carrying out his job duties and perform some operational or administrative tasks, the petitioner has established by a preponderance of the evidence that the majority of the day-to-day non-managerial tasks associated with the function he manages are performed by his staff of ten direct and indirect subordinates and by external service providers. *Matter of Chavathe*, 25 I&N Dec. 369, 376 (AAO 2010). As the statutory definition discusses managerial capacity as a function of the duties that the beneficiary "primarily" performs, the petitioner need only establish that the beneficiary devoted more than half of his time to managerial duties. The petitioner has met that burden.

III. Conclusion

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has been met. Accordingly, the director's decision dated June 7, 2013 is withdrawn and the petition is approved.

ORDER: The petition is approved.

international organization. The petitioner has submitted sufficient documentary evidence to establish the existence of the subordinate employees in Japan, that the beneficiary continues to utilize the services of these employees, and that he would have discretionary authority over personnel actions related to the employees.