

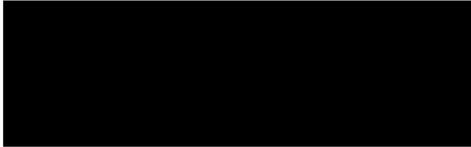
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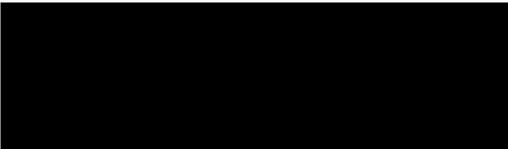
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IN RE: Petitioner:  
Beneficiary:



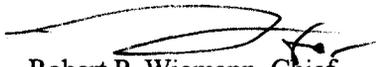
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a general partnership organized in the State of California that claims to be engaged in the import, wholesale, and retail sale of coffee machines and coffee beans. The petitioner claims that it is a subsidiary of the Coffee Trade B.A. Ltd., located in Tel Aviv, Israel. The petitioner seeks to employ the beneficiary as its vice president/marketing manager for a three-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director applied an erroneous standard in requiring that the petitioner employ "a subjectively devised 'number' of employees to establish executive capacity." Counsel contends that the director neglected to consider whether the beneficiary would serve as a function manager.

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 sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

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.

The nonimmigrant petition was filed on June 9, 2003. On the Form I-129, the petitioner indicated that it employed five workers, and stated that it intended to employ the beneficiary as its vice president/marketing

manager. In a letter dated May 20, 2003, counsel for the petitioner described the beneficiary's proposed duties as follows:

- (1) Determine the demand for products and services offered by its parent company and identify potential customers;
- (2) Develop pricing strategies with the goal of maximizing parent company's profits or share of the market while ensuring the firm's customers are satisfied;
- (3) Oversee product development or monitor trends that indicate the need for new products and services; Develop long term and short term international marketing policy;
- (4) approve large amount transaction or extension of credit to retailers;
- (5) recruit and train sales representatives; conduct business analysis and market forecasting on routine basis and
- (6) report business performances to the President of parent company.

The petitioner also submitted an organizational chart for the U.S. company, which shows that the partners of the company supervise a general manager, who in turn supervises two area sales managers, an office manager, an import manager, and a finance manager. The office manager is depicted as supervising two service technicians and a warehouse/delivery supervisor. The chart does not depict the beneficiary's proposed position, nor does it identify any employees by name.

In addition, the petitioner provided copies of state and federal quarterly tax and wage reports and IRS Forms W-2, Wage and Tax Statement, for 2002, indicating that the company employed a total of four employees during the year preceding the filing of the petition, only one of whom appears to have worked on a full-time basis. The petitioner did not provide any payroll or wage records for 2003.

The director requested additional evidence on June 20, 2003, instructing the petitioner to submit: (1) a more detailed description of the beneficiary's proposed duties, including all duties to be performed and the percentage of time to be spent on each listed duty; (2) an organizational chart for the U.S. company that clearly identifies the beneficiary's proposed position and all employees under the beneficiary's supervision; and (3) a brief description of job duties, educational level, annual salaries/wages and immigration status for all employees of the U.S. company.

In a response dated September 9, 2003, the petitioner reiterated the job duties submitted with the initial petition and added the following:

[The beneficiary] is the manager for the international marketing department. As such, she is responsible for overseeing the sales managers as well as outside sales representatives. She has the final word in regards to the hiring and firing of employees under her supervision. [The beneficiary] establishes the policies, principals and procedures for the international marketing department and then delegates the power to her employees to implement the policies and ensure that the production, distribution and sales are in accordance with her guidelines.

The petitioner submitted a revised organizational chart for the U.S. company, which shows that the company is managed by its partners, who in turn supervise a general manager, who is also one of the partners of the company. The general manager is depicted as supervising an office administration department consisting of an office manager, a service technician and a warehouse/delivery supervisor; an international marketing department, managed by the beneficiary, who would supervise two sales managers; and a finance department, which is outsourced to a contracted CPA firm. The petitioner indicated that the two sales managers to be supervised by the beneficiary are responsible for coordinating sales promotions, planning and attending major trade shows, facilitating sales for major customers, implementing sales plans, and reporting market trends to the beneficiary. The petitioner indicated that one sales manager has a bachelor's degree and one has an associate's degree.

The director denied the petition on September 26, 2003, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director noted that the petitioner described the beneficiary's proposed duties in broad and general terms, and failed to provide sufficient detail regarding the beneficiary's actual duties and the percentage of time devoted to those duties. The director acknowledged the petitioner's claim that the beneficiary would supervise two sales managers, but noted that the petitioner did not claim to employ any lower-level sales personnel. The director found insufficient evidence to establish that the beneficiary would supervise a subordinate staff of professional, managerial, or supervisory personnel who would relieve her from performing non-qualifying duties.

On appeal, counsel for the petitioner submits the following statement on Form I-290B, Notice of Appeal:

The Service erred in utilizing the caprious [sic] standard to meet the criteria for "executive or managerial capacity." The Service insists that the petitioner must employ a subjectively devised "number" of employees to establish executive capacity. The Service is demanding that the petitioner conform to a set formula wherein the staff must include a supervisory level under the beneficiary and staff under the supervisory level or a level under the beneficiary containing at least one professional. These are not the only alternatives. The Service is neglecting the issue of "Function" which should have been settled with the 1990 Amendments to INS Act.

Counsel's assertions are not persuasive. Upon review of the petition and the evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look 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 either in an executive or managerial capacity. *Id.*

As noted by the director, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate that she will perform primarily managerial or executive duties. Rather, the position description includes several duties that suggest that the beneficiary would be responsible for performing market research activities for the company. For example, the petitioner indicated that the

beneficiary will be responsible for determining the demand for products and services, identifying potential customers, monitoring trends indicating the need for new products, and conducting business analysis and market forecasting. The petitioner did not indicate that the beneficiary would delegate these tasks to a subordinate employee, nor did it explain how these market research and analysis tasks would fall under the statutory definitions of managerial or executive capacity. The actual duties themselves 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).

The AAO acknowledges that the position description submitted included some responsibilities that could be considered managerial in nature, such as recruiting and hiring sales representatives, developing pricing strategies and developing the company's long-term and short-term marketing policy. However, the definitions of executive and managerial capacity 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 prove 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. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The petitioner's initial position description suggested that the beneficiary will perform a combination of non-qualifying and qualifying duties, and did not contain sufficient detail to establish the beneficiary's employment in a primarily managerial or executive capacity.

Accordingly, the director requested additional evidence to establish the beneficiary's eligibility for the benefit sought, including a detailed position description, a list of all duties to be performed on a day-to-day basis, and the percentage of time the beneficiary would devote to each specific job duty. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). Here, the evidence requested was critical, given the deficiencies of the initial position description. In response, the petitioner re-submitted the same inadequate job description, and failed to provide any indication as to how the beneficiary's time would be divided between managerial and non-managerial duties. Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Furthermore, on appeal, counsel for the petitioner does not even acknowledge the director's finding that the position description was inadequate and overly vague to establish the beneficiary's claimed employment in a managerial or executive capacity. The petitioner's failure to submit the evidence requested by the director is sufficient grounds for dismissal of the appeal.

On appeal, counsel alleges that the director placed undue emphasis on the size of the petitioning organization and the number of subordinate employees to be managed by the beneficiary. 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, CIS 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 marketing research and analysis tasks. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). As discussed above, the petitioner failed to provide requested evidence which would have assisted in determining whether the beneficiary's duties are in fact primarily managerial in nature, and therefore the petitioner has failed to establish this essential element of eligibility.

In addition, although not discussed by the director, the petitioner has failed to document its claimed staffing levels. The petitioner claimed to employ a general manager, an office manager, a warehouse/delivery supervisor, a service technician, and two sales managers, and proposed employing the beneficiary as its marketing manager. The petitioner has not submitted any documentary evidence to corroborate that it actually employed the claimed workers at the time of filing, as the petition opted to provide wage and salary records from 2002 only. The records submitted therefore only confirm the employment of the office manager, who was the only full-time employee of the company in 2002. While it is possible that the petitioner hired additional staff prior to the filing of this petition, 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.

Even assuming that the petitioner does in fact supervise the claimed employees, the AAO notes that all of the claimed employees have managerial or supervisory job titles. The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. Notwithstanding the managerial job titles granted to the beneficiary's subordinates, the petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional sales employees. An individual whose primary duties are those of a first-line

supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

The only claim made by counsel on appeal is that the director failed to consider whether the beneficiary will serve as a "function manager." 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 detailed position description that clearly describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)).

In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. As discussed above, the petitioner has not submitted evidence that it actually employs other workers to perform the sales and marketing functions of the company. In addition, the description of the beneficiary's duties includes a number of non-qualifying duties associated with the company's market research activities. While performing non-qualifying tasks 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. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. Again, the petitioner, because of its failure to submit a detailed account of the beneficiary's proposed duties and how her time will be allocated among those duties, has not met this burden. Absent a clear and credible breakdown of the time spent by the beneficiary performing her duties, the AAO cannot determine what proportion of his duties would be managerial or executive, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Based on the foregoing discussion, the petitioner has failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the remaining issue to be discussed in the present matter is whether the petitioner has established that a qualifying relationship exists between the U.S. company and the beneficiary's overseas employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer

(i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The petitioner states that it is a subsidiary of Coffee Trade B.A. Ltd, which the petitioner claimed was "established in 1999" and incorporated in Mexico on June 20, 2002. In support of this assertion, the petitioner submitted a general partnership agreement for the U.S. company, dated February 1, 2001, which indicates that the partnership would have a capital contribution of \$15,000, and describes the ownership interest as follows:

Coffee Trade B.A. Ltd.	55%
[REDACTED]	25%
[REDACTED]	25%

The AAO notes that the partnership agreement was entered into by the foreign entity, under its incorporated name, more than 14 months prior to its incorporation. 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 petitioner also submitted the U.S. company's 2001 Form 1065, U.S. Return of Partnership Income, which indicates that the company has two partners, [REDACTED] and that the only capital contributed during the year, \$15,000, was provided by [REDACTED]. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The director subsequently requested evidence that the foreign entity had in fact paid for its purported interest in the U.S. company, including copies of original wire transfers or other documentary evidence related to the purchase of ownership. In response, the petitioner stated: "The total initial investment in [the petitioner] was \$15,000.00, the Israeli company paid \$8,250.00. [REDACTED] [the purported owner of the foreign entity] brought the cash from the profits made from his Israeli company on two business trips." The petitioner did not submit corroborating documentary evidence, such as bank deposit receipts or bank statements for the U.S. company, identifying the claimed deposits of funds from the foreign entity. 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. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Upon review of the totality of the evidence submitted, the AAO has serious doubts regarding the authenticity of the submitted partnership agreement, and the petitioner therefore has not established that the foreign entity actually owns any interest in the petitioner, or otherwise has a qualifying relationship with the U.S. company. For this additional reason, the appeal will be dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683

(9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1362. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.