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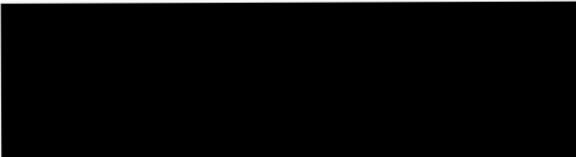
File: WAC 05 101 53790 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



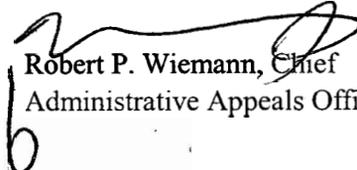
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 extend the employment of its manager 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, a California corporation, states that it is engaged in retail liquor and grocery sales. The petitioner claims that it is a subsidiary of [REDACTED] located in Birmingham, United Kingdom. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's status.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily 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 in his role as chief financial officer of the U.S. company, the beneficiary manages a function or component of the organization. Counsel further contends that the director mischaracterized the scope of the beneficiary's supervisory duties, and asserts that the beneficiary does not supervise any lower-level personnel. Finally, counsel contends that the director erred by concluding that the beneficiary primarily performs tasks necessary to produce the product or perform the services of the U.S. business. Counsel asserts that the beneficiary does not perform the day-to-day functions of operating the petitioner's retail store. Counsel submits a brief in support of the appeal.

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)(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.

The issue in the present matter is whether 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 visa petition was filed on February 25, 2005. The petitioner indicated on Form I-129 that the U.S. company has five employees, and seeks to continue to employ the beneficiary as its "manager." The petitioner stated that the beneficiary's duties are as follows: "Budgeting; coordination with UK operations; planning the expansion of the US company; liason [sic] with customer, vendors, attorneys and accountants."

The petitioner also included an organizational chart which depicts the beneficiary as the company's chief financial officer, reporting to the company president, Chamkaur Singh. The chart shows that the beneficiary supervises the manager-operations [REDACTED] who in turn supervises two store clerks ([REDACTED] and [REDACTED]) a maintenance clerk [REDACTED], a bookkeeper (the beneficiary), and a stockroom assistant ([REDACTED]). Therefore, the chart shows that the president also serves as a store clerk, the other store clerk also serves as a stockroom assistant, and the beneficiary serves as both chief financial officer and bookkeeper. The petitioner provided job descriptions for the maintenance clerk and two store clerks. The AAO notes that the employee identified as a store clerk on one of the job descriptions, [REDACTED] is identified as the "manager-operations" on the organizational chart.

The petitioner submitted its California Forms DE-6, Quarterly Wage and Withholding Report, for all four quarters of 2004, which confirmed the employment of five individuals at the end of the year. Based on the reported wages, two of the employees [REDACTED] and [REDACTED], appear to be employed on a part-time basis.

On March 7, 2005, the director requested additional evidence to establish that the beneficiary will be performing the duties of an executive or manager within the U.S. company, including: (1) a copy of the U.S. company's organizational chart identifying the beneficiary's position and listing all employees under the beneficiary's supervision by name and job title, along with a brief description of job duties, educational level and annual salaries/wages for the beneficiary's subordinates; and (2) evidence that the beneficiary supervises and controls the work of supervisory, professional or managerial employees, or manages an essential function

within the organization. The director also requested IRS Forms 941, Employer's Federal Quarterly Tax Return and California Forms DE-6, although the petitioner submitted these documents with the initial petition filing.

In a response dated March 25, 2005, the petitioner re-submitted the same organizational chart and provided the following job descriptions for the beneficiary and the other employees:

[The beneficiary] (Financial Officer)

[The beneficiary] is responsible for purchasing all stock, dealing with salespersons for liquor companies beer merchandisers, soft drink suppliers and other vendors, establishing all prices for products, planning promotions and sales, supervising the activities of the operations manager and all personnel matters, including the hiring and firing of employees, preparing daily sales reports and handling all banking and tax matters. . . .

(Operations Manager)

██████████ is responsible for organizing, arranging and displaying stock, supervising the activities of the store clerks and preparing daily sales reports for the Financial Officer make decisions regarding the day to day operations of the business. ██████████ has a Bachelor of Arts degree. He receives \$7.75 per hour and works 35 to 40 hours per week.

(Store Clerk)

Amolok Singh is responsible for stocking and displaying merchandise, maintaining stockroom, assisting customers and acting as cashier. Amolok Singh has a high school diploma. He receives \$7.50 per hour and works 18 to 20 hours per week.

██████████ (Store Clerk)

██████████ is responsible for stocking and displaying merchandise, assisting customers and acting as cashier. Chamkaur Singh has a high school diploma. He receives an annual salary of \$24,000.00.

██████████ (Maintenance Clerk)

██████████ is responsible for cleaning the premises of the store and assisting in the other duties of the store clerk as indicated above. ██████████ has a high school diploma. She receives \$6.75 per hour and works 12 to 15 hours per week.

In response to the director's request for evidence that the beneficiary will manage a staff of supervisory, managerial or professional personnel, or a function or subdivision or the organization, counsel for the petitioner stated that the beneficiary, as chief financial officer, "manages that department or subdivision of the corporation."

The director denied the petition on April 7, 2005, concluding that the petitioner failed to establish that the beneficiary would be employed in a managerial or executive capacity under the extended petition. The director noted that although the beneficiary is identified as the company's chief financial officer, "there is no Financial Department or Subdivision within the petitioning organization for the beneficiary to manage." The

director observed that the beneficiary also serves as the company's bookkeeper and "as such, the beneficiary himself must handles [sic] all of the petitioner's financial matters."

The director further determined that the beneficiary's duties, as described by the petitioner, are tasks necessary to provide a service or produce a product and therefore determined that he would not be performing primarily managerial or executive duties. The director found that the beneficiary would not supervise a subordinate staff of professionals who would relieve him from performing non-qualifying duties. The director concluded that the U.S. entity does not contain the organizational complexity to support another managerial or executive position and that the preponderance of the beneficiary's duties will be directly providing the services of the petitioning company.

On appeal, counsel objects to the director's conclusion that the beneficiary does not manage a department or subdivision of the petitioning organization, noting that section 101(a)(44)(A)(i) of the act "includes managing and directing, respectively, a *function* or *component* of an organization." (Emphasis in original). Counsel states: "[T]he fact that petitioner does not have a Financial Department per se in its [sic] organizational chart does not mean that the petitioner failed to establish the criteria in the statute. Certainly one who is responsible for the financial matters of an organization must be deemed to manage and direct a function or component of that organization."

Counsel further contends that the director mischaracterized the beneficiary's supervisory authority to include the company's lower-level clerks and stockroom assistant. Counsel claims that the beneficiary supervises only the operations manager, a supervisory employee. Thus, counsel claims that the scope of the beneficiary's supervisory authority falls within the definition of managerial capacity pursuant to section 101(a)(44)(A)(ii) of the Act.

Finally, counsel disputes the director's finding that the beneficiary primarily performs the tasks necessary to produce the product or perform the services of the petitioner's business. Counsel asserts that since the petitioner operates a retail liquor and grocery store, "the tasks necessary to produces [sic] the product or perform the services of petitioner's business are maintenance of the premises. . . , receiving of the products that the business sells, displaying the products, waiting on customers and collecting payment from customers for the product it sells." Counsel asserts that all of these tasks are performed by subordinate staff, while the beneficiary's duties involve "purchasing of the products that the business sells, establishing the prices of products and planning promotions and sales. While the beneficiary's duties are indispensable to the operation of a retail store, they related to matters of policy or how the business is run." Counsel further asserts that the beneficiary's duties concerning financial matters, such as preparing daily sales reports, bookkeeping and handling banking and tax matters, "have nothing to do with the actual sale of products to customers."

Upon review of the petition and supporting evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity under the extended petition. 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(1)(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.*

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 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. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The test is basic to ensure that a person not only has the requisite authority, but that a majority of his or her duties are related to operational or policy management, not to the supervision of lower-level employees or the performance of the duties of another type of non-managerial or non-executive position.

In the instant matter, the petitioner has failed to show that non-qualifying duties will not require the majority of the beneficiary's time. The petitioner has provided a brief explanation of the beneficiary's job duties which describes an employee who primarily performs non-managerial and non-executive tasks related to the petitioner's day-to-day purchasing and bookkeeping functions. Specifically, the petitioner indicates that the beneficiary is responsible for purchasing all inventory for the store, communicating with vendors, implementing sales promotions, bookkeeping, preparing daily sales reports, paying bills, and handling banking and tax matters. These duties, while essential to successful operation of the petitioner's store, do not rise to the level of managerial or executive capacity as contemplated by the statutory definitions.

As correctly noted by the director, 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. 1988). While the petitioner's lower-level employees may perform the day-to-day duties associated with stocking and selling goods in the petitioner's retail store, counsel's focus on these particular tasks is misplaced. Job duties performed in connection with a business' marketing, purchasing, finances and general administration are non-qualifying if they involve the actual performance of the function. As discussed above, the beneficiary is personally performing these non-qualifying tasks rather than managing or supervising the performance of these routine duties by other subordinate employees.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. The petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Here, the petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, as discussed above, do not fall directly under traditional managerial duties as defined in the statute. However, based on the job description provided and as discussed further below, it is reasonable to assume, and has not been shown otherwise, that the beneficiary primarily performs purchasing, bookkeeping and other non-qualifying tasks that prevent him from serving in a "primarily" managerial or executive capacity.

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. Furthermore, 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 those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. 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. 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.

In the present matter, the totality of the record does not support a conclusion that the beneficiary's claimed subordinate, the operations manager, is employed in a supervisory position. Instead, the record indicates that the beneficiary's subordinates, including the operations manager, perform the actual day-to-day tasks of operating the petitioner's retail store. Although Malkit Singh is identified on the petitioner's organizational chart as "manager-operations," the initial job description submitted for this employee identified him as a "store clerk." 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). It also appears that the petitioner has attempted to add complexity to its organizational structure by assigning more than one job title to various employees, including identifying the company president as a "store clerk." To the extent that the beneficiary supervises lower-level employees, 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 employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial or executive under the statutory definitions.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

The petitioner operates a retail grocery and liquor store and employs three full-time employees and two part-time employees to perform all of the day-to-day functions of ordering merchandise and supplies, arranging and stocking merchandise displays, cleaning the store, processing customer purchases, receiving deliveries, reconciling daily cash register receipts and many other routine duties. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be

met by a president, a chief financial officer/bookkeeper, a part-time cashier, an "operations manager," and a part-time maintenance employee. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

On appeal, counsel claims that the beneficiary qualifies as the manager of a function or component of the organization, asserting that "certainly one who is responsible for the financial matters of an organization must be deemed to manage and direct a function or component of that organization." 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 provide a detailed job description that 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.** 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 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 manages an essential function. The fact that the beneficiary is the only employee in the company responsible for purchasing and financial activities will not elevate his position to that of a function manager. In such a situation, the AAO recognizes that other employees carry out the functions of the organization, even though those employees may not be directly under the function manager's supervision. The addition of the concept of a "function manager" by the Immigration Act of 1990 simply eliminates the requirement that a beneficiary must directly supervise subordinate employees to establish employment in a managerial capacity. However, the statute continues to require that an employee perform primarily managerial or executive duties in order to qualify for this visa classification. Moreover, federal courts continue to give deference to CIS's interpretation of the concept of "function manager," especially when considering individuals who primarily conduct the business of an organization or when the petitioner fails to establish what proportion of an employee's duties might be managerial as opposed to operational. See *Boyang Ltd. v. INS*, 67 F.3d 305(Table), 1995 WL 576839 at *5 (9th Cir. 1995)(unpublished)(citing to *Matter of Church Scientology Int'l* and finding an employee who primarily performs operational tasks is not a managerial or executive employee); see also, *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999); *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C.Cir. 1991).

Based on the foregoing discussion, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. For this reason, the appeal will be dismissed.

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. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.