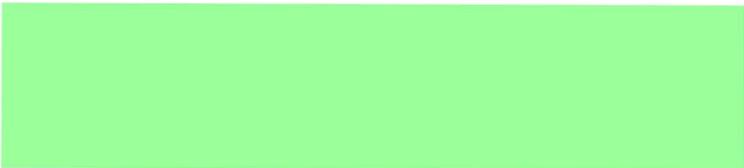


(b)(6)

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



U.S. Citizenship
and Immigration
Services

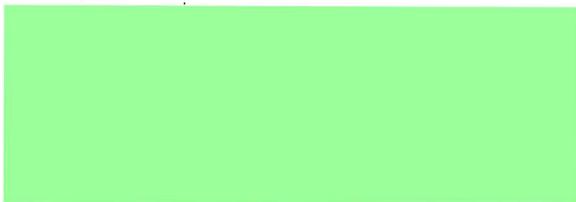


DATE: **APR 26 2013** Office: CALIFORNIA SERVICE CENTER FILE:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, ("the director") denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

This nonimmigrant petition was filed seeking to classify 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 states on the Form I-129, Petition for a Nonimmigrant Worker, that it is a wholesale cosmetic retailer established in 2006 with nine employees and a gross annual income of \$1,700,284. The Form I-129 Supplement L indicates that the petitioner is affiliated with foreign companies wholly owned by one individual.¹ The petitioner seeks to continue the employment of the beneficiary as its production manager for an additional two years and seeks to change the beneficiary's visa classification from L-1B to L-1A.

The director denied the instant petition determining that the petitioner had not established that the beneficiary would be employed 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. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the evidence of record is sufficient to satisfy the petitioner's burden of proof in that the evidence establishes that the beneficiary would be employed in a primarily managerial or executive position.

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 the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a parent, subsidiary, or affiliate of the foreign employer.

If the beneficiary will be serving the United States employer in a managerial or executive capacity, a qualified beneficiary may be classified as an L-1A nonimmigrant alien. If a qualified beneficiary will be rendering services in a capacity that involves "specialized knowledge," the beneficiary may be classified as an L-1B nonimmigrant alien. *Id.*

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;

¹ The petitioner states that its owner and sole shareholder also solely owns [REDACTED], and a U.S. based corporation, [REDACTED]

- (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.

The regulation at 8 C.F.R. § 214.2(l)(3) provides 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.

II. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a managerial or executive position.

In a letter appended to the petition, the petitioner stated that it had officially commenced business in August 2006 primarily to import the proprietary cosmetic lines of [redacted] and [redacted], to move some existing production to the United States, and to create new products produced in the United States. The petitioner added that its purpose "has been to stir and craft products that serve the fashion

industry within the U.S. specifically; [sic] to create cosmetics that fit the desires and needs of the U.S. consumer" and "to translate the needs of the U.S. clientele and consumer base as well as to establish American business contacts to which [the petitioner's] products can be distributed for resale, and to source new U.S. production facilities." The petitioner distributes its cosmetic products in the United Kingdom, Australia, and the United States and has established distribution lines to major stores in the United States, such as [redacted] and [redacted]. It uses both domestic and international manufacturing facilities.

On the Form I-129 Supplement L, the petitioner described the beneficiary's proposed duties in the United States as:

Manage development and production of new concepts and products; provide creative and technical input; develop products with packaging suppliers; manage manufacturing process; negotiate costs; visit suppliers; source packaging suppliers, laboratories, and filling facilities; negotiate supply and payment terms.

In the letter submitted in support of the petition, the petitioner provided a detailed description of the beneficiary's duties that elaborated upon the duties summarized on the Form I-129. The petitioner also provided the petitioner's organizational chart depicting in pertinent part individuals in the positions of production assistants and graphic designers. In addition, the organizational chart showed the beneficiary's position managing foreign and domestic manufacturing facilities. The petitioner, through counsel in response to the director's RFE, elaborated on the beneficiary's specific duties in detail as well as allocating the beneficiary's time to specific aspects of the management operations of the petitioner's production department.

Upon review, the director determined that the petitioner had not established the beneficiary would be employed in either a managerial or executive capacity. The director determined that the beneficiary would be engaged primarily in first-line supervisory and operational activities that do not fall within the statutory definitions of managerial or executive capacity.

On appeal, counsel for the petitioner states that the petitioner has only two main divisions: (1) the sales and marketing department; and, (2) the product development and production department. Counsel avers that all major components and functions fall under the control of one of these two divisions and that each division is managed by only one individual whose position in the corporate hierarchy falls directly under the first executive tier. Counsel identifies the beneficiary as the manager who supervises and directs the product development and production department.

III. Analysis

Upon review, the petitioner has established that the beneficiary will be employed in the United States in a managerial capacity as a function manager. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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.* To establish eligibility the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity.

In this matter, the petitioner establishes that the beneficiary will perform the duties of a function manager. The statutory definition of "managerial capacity," allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (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. 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 *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'r 1988)).

On appeal, counsel for the petitioner clarifies that the beneficiary manages the process of researching, selecting, and developing cosmetic products for each season and that this is an essential function of the organization. A review of the petitioner's detailed description of the beneficiary's actual duties provides sufficient information to demonstrate that the beneficiary will not primarily perform the development and production work but that the work will be performed by others inside and outside of the organization.

The petitioner initially provided a broad description of the beneficiary's primary duties including managing the development of the technical and visual designs, the development of products with packaging suppliers, the development of products with foreign and domestic laboratories, and the manufacturing process. The petitioner also noted that the beneficiary had authority to negotiate costs and recommend alternative manufacturing processes and packaging methods. The petitioner's initial description of the beneficiary's duties suggested that the beneficiary would also be performing some of the day-to-day functions of the production department, such as negotiating costs, sourcing suppliers, issuing purchase orders, and managing the payment of the purchases. Accordingly, the director requested a description of the beneficiary's actual duties and the allocation of time the beneficiary would spend on particular duties. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). In this matter it was necessary for the petitioner to allocate the amount of time the beneficiary would spend on qualifying and non-qualifying duties.

In response, the petitioner further described the beneficiary's duties indicating that the beneficiary spent a portion of his time on hiring and supervising subordinates. The petitioner, however, also detailed the beneficiary's duties in managing the overall function of the product development and production department, as he evaluated and approved the packaging, marketing, and promotional

designs, as he oversaw the manufacturing process both foreign and domestic and ensured the quality of the manufactured product, and as he managed the timely production of the petitioner's products. The petitioner emphasized in its description of duties that the majority of the beneficiary's time would be spent on managing the product development and production function and that the actual day-to-day work would be carried out by other employees and facilities

Counsel on appeal further clarifies the beneficiary's actual role in the organization by accentuating that the beneficiary is the individual in the United States who spearheads and supervises the entire process by which all the petitioner's products are developed and distributed. A review of the record shows that the petitioner employs individuals who carry out the research, the design, the packaging, and the manufacturing of the petitioner's products, relieving the beneficiary to manage these processes. A review of the totality of the record also reveals that the beneficiary operates at a senior level within the small organization and in respect to the function managed. The petitioner also provided examples of the beneficiary's exercise of discretion over the day-to-day operations of the product development and production department.

Accordingly, the AAO reviewed the totality of the record in this matter, including not only the job duties, but also the petitioner's organizational structure, the duties of all the petitioner's employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and other factors that contributed to a complete understanding of a beneficiary's actual duties and role in the business. Upon review, the record includes sufficient evidence to establish that the beneficiary will be employed in a bona fide function manager position for the U.S. business entity. Accordingly, the director's decision will be withdrawn and the appeal will be sustained.

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. Here, the petitioner has sustained that burden. Accordingly, the director's decision is withdrawn. The appeal will be sustained and the petition approved.

ORDER: The appeal is sustained.