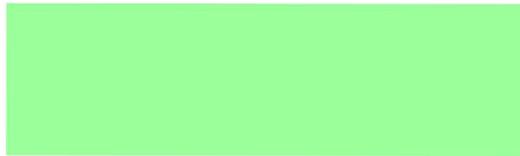




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **SEP 12 2013** Office: VERMONT 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 (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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. 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 classify the beneficiary as a 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 Florida corporation, is self-described as an investment business engaged in import and export of merchandise and operation of a franchised dry cleaning retail location. It claims to be a subsidiary of [REDACTED], the beneficiary's foreign employer in Venezuela. The beneficiary was previously granted one year in L-1A classification in order to open a new office and the petitioner seeks to extend his status so that he may continue to serve as its Operations Manager.

The director denied the petition, concluding that the petitioner failed to 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 the evidence of record establishes that the beneficiary will function in a qualifying managerial capacity. Counsel submits a brief and additional evidence in support of the appeal.

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.

The regulation at 8 C.F.R. § 214.2(1)(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 (1)(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.

II. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity under the extended petition.

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 petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on August 17, 2012. The petitioner indicated that it is an investment company engaged in import and export of merchandise and operation of a franchised dry cleaning retail store, with eight employees and a gross annual income of \$862,177. On the L Classification Supplement to the Form I-129, the petitioner stated that the beneficiary "will hold the maximum management and executive position in the company," and further described his duties as the following:

[G]eneral planning of operations, evaluating the projects geared at the growth and the expansion of the company, determining the feasibility of installing new branches, directly directing the managers at each of the service centers, organizing the general functioning of the division of the company, including the distribution of the personnel, the hierarchal levels.

The petitioner stated an attachment was included with further information; however, the record reflects that no supplemental position description was provided at the time of filing. The petitioner submitted an organizational chart for the U.S. company which identified the beneficiary's position as lateral to the position of administrative manager, purchase manager, and marketing manager. The chart identifies the beneficiary as "Dry-cleaners Department Manager," reporting to the General Manager, and supervising one store manager, who in turn is depicted as supervising two washing section employees and one assembly/finishing employee. The chart depicts two additional store positions, a customer attendant and a maintenance worker, as "to be hired." In addition, the chart indicates that two additional dry-cleaning stores are "to be opened."

The petitioner submitted a copy of its IRS Form 941, Employer's Quarterly Federal Tax Return, showing that eight employees were paid as of the first quarter of 2012. The petitioner's Florida UCT-6, Employer's Quarterly Report for the same quarter indicates that the petitioner employed seven employees as of March 2012 and a total of ten employees during the quarter. All of the employees identified on the organizational chart, with the exception of the beneficiary and the store manager, were listed on the Form UCT-6. The store manager appeared on earlier quarterly wage reports from 2011.

The director issued a request for additional evidence ("RFE") on September 13, 2012 in which he instructed the petitioner to submit, *inter alia*, the following: (1) a description of the typical managerial responsibilities to be performed and decisions to be made by the beneficiary; (2) the number of subordinates under the beneficiary's management and job duties of the employees managed; and (3) an explanation how much of the beneficiary's time will be spent performing non-executive/non-managerial functions.

The petitioner submitted a letter in response stating that the beneficiary's "basic functions" were the same as those previously reported on the Form I-129. The petitioner also added the following duties: determining the function of each employee as well as each supervisor; determining that the company is working at maximum capacity; obtaining new customers; advertising campaigns; financial control; and evaluating income and expenses in order to determine financial success and the ability for expansion.

The petitioner also provided a breakdown of duties as follows, with a description of each area of responsibility: internal business oversight, 25%; networking and business development, 20%; budgetary oversight and approval, 15%; legal affairs, 15%; and policy implementation and review, 10%. The petitioner emphasized that the beneficiary "is maintaining full responsibility for the direction and coordination of operations" for the company's dry-cleaning division. The petitioner concluded by stating that the beneficiary "carries the main executive authority within the company" and allocates 100% of his time to executive duties.

The petitioner stated that the company "has hired" a Store Manager who will be responsible for the day-to-day activities of the store. The petitioner further explained that this hire has "rendered [the beneficiary] available to conduct the executive operations." The petitioner did not specify when the Store Manager was hired. The petitioner stated that other store employees included two positions in the "washing section" and one employee in "Assembly and Finish." The petitioner further described the company's expansion plans and intentions to hire additional employees. Of the store employees, the petitioner states that the beneficiary supervises and controls the work of other supervisors, specifically, "the work of the Store Managers." The petitioner provided the same organizational chart submitted at the time of filing, as well as a position description for the Store Manager.

The director denied the petition. The director found that the petitioner had not established that the beneficiary will be employed in a managerial or executive capacity. The director determined that the beneficiary would not be managing a supervisory, professional, or managerial staff and that based on the organizational structure described, the beneficiary would be assisting in the day-to-day non-supervisory duties of the business. The director also observed that the beneficiary was not listed among the petitioner's employees on the IRS Forms W-2, Wage and Tax Statement or on its Florida Employer's Quarterly Reports, raising questions as to whether the beneficiary is actually employed by the petitioner.

On appeal, counsel asserts that the beneficiary's position is primarily managerial or executive in nature. Specifically, counsel states that at the time of the appeal, the beneficiary supervises the work of two managerial or supervisory employees, both store managers, [REDACTED] and [REDACTED]. The petitioner confirms that it continues to operate one retail dry-cleaning establishment. The petitioner states [REDACTED] employment is supported by previously submitted IRS Forms 941, while [REDACTED] "was placed into the position of Store Manager beginning October 1, 2012." The AAO notes that in the organizational chart submitted at the time of filing and in response to the RFE, the only store manager was identified as [REDACTED]. [REDACTED] was identified as a "washing section" employee.

In support of the appeal, the petitioner submits a revised organizational chart which identifies [REDACTED] as a store manager. The chart does not depict a [REDACTED] but rather shows [REDACTED] as occupying the positions of both purchase assistant and store manager. Only [REDACTED] is depicted as supervising the store staff, while [REDACTED] has no subordinates. The chart depicts four staffed positions reported to the store manager.

According to the petitioner's payroll summary and Florida Form UCT-6 for the second quarter of 2012, submitted for the first time on appeal, the employees on payroll at the time the petition was filed were the general manager, the beneficiary, the administrative manager [REDACTED] (identified as purchase assistant on the initial organizational chart), [REDACTED] (identified as "washing section" on the initial organizational chart), [REDACTED] (purchase manager), and [REDACTED] (washing section).

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity.

As a preliminary matter, the director noted in his decision that the Florida Department of Revenue Employer's Quarterly Report and IRS Forms W-2 do not show the beneficiary as employed by the petitioner. On appeal, counsel for the petitioner stated that these documents are **"ERRONEOUS and based on financial and/or accounting documentation which has been erroneously and negligently prepared."** The petitioner, however, failed to provide any documentation on appeal to show that the statements were erroneously and negligently prepared. While the petitioner submits amended state quarterly reports and IRS Forms 941 for the first two quarters of 2012, it has not provided evidence that these documents were actually filed with the appropriate authorities. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The definitions of executive and managerial capacity each 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 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 fact that the beneficiary manages a business or a component of a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

In the beneficiary's job duties submitted in response to the RFE, the petitioner claimed that the beneficiary will spend 25% of his time performing "Internal Business Oversight." As part of this duty, the beneficiary will "confer with Store Managers" including reviewing inventory reports provided by store managers. The petitioner also noted in their letter that the "company has hired a Store Manager." Although the petitioner did not specify when the store manager was hired, a review of the Florida Department of Revenue Employer's Quarterly Report for the quarter of filing does not show that the named store manager was employed as of the date of filing. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a

new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). While it appears that the petitioner employed this employee in 2011, there is no evidence that she was paid any wages in 2012.

On appeal, the petitioner states that an employee named at the time of filing as "presently working in the washing section" was actually the store manager. The petitioner failed to clarify when, if ever, the employee in the washing section was promoted to the position of store manager. 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).

Even though the petitioner claims that the beneficiary directs and manages the store operations, it does not claim to have anyone on its staff to actually perform the daily first-line managerial duties of the dry-cleaning store as described above. Rather, based on the petitioner's initial claims and the petitioner's payroll evidence, the store staff at the time of filing consisted of the beneficiary as operations manager and two washing section staff, while the positions of customer attendant and assembly/finisher were vacant. While the petitioner plans to hire additional staff, it has not established that it employed sufficient staff to perform all day-to-day non-managerial functions of a dry-cleaning business. If the beneficiary will be performing the first line management functions, or the day-to-day operational tasks of the dry-cleaning business, the AAO notes that 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. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988). While such duties are undoubtedly essential to the operation of the business, the fact that the beneficiary will perform them does not elevate his position to that of a function manager.

The statutory definition of "managerial capacity" allows for both "personnel managers" and a "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). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Although the beneficiary is not required to supervise personnel, if it is claimed that her 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.

According to the Florida Employer's Quarterly Report for the quarter of filing, the only subordinates employed were the two employees listed as working in the "Washing Section." As stated above, the petitioner later claims on appeal that one of these employees is actually the Store Manager. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). A petitioner

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may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). The petitioner has not established that the beneficiary qualifies as a personnel manager based on his supervision of two non-professional employees identified as "washing section."

Furthermore, the petitioner stated that the beneficiary will also spend 15% of his time performing "Budgetary Oversight and Approval." According to the petitioner, the "Administrative Manager" will be responsible for the preparation of the budgets. The petitioner's organizational chart submitted with the initial petition and on appeal show the administrative manager reporting directly to the General Manager and not to the beneficiary. There is no administrative manager designated for the "Dry-cleaners Department" as listed on the organizational chart. While the administrative manager may be providing some financial documentation related to the dry-cleaning operations, this position does not appear to be under beneficiary's management and supervision. Assuming *arguendo* that the beneficiary was responsible for supervising this position, the petitioner failed to provide a job description for the administrative manager as requested in response to the director's request for evidence. Accordingly, the record cannot support a finding that this is a professional level position. Additionally, the less than 15% of the beneficiary's time spent managing the administrative manager would not suffice to show that the beneficiary spends a majority of his time supervising a subordinate professional level position.

When examining the managerial or executive capacity of a beneficiary, U.S. Citizenship and Immigration Services (USCIS) 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 will manage a function or manage subordinates who are supervisors, managers, or professionals. Instead, the record indicates that the beneficiary's subordinates will perform the actual day-to-day tasks of supporting the company's dry-cleaning operations. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial under the statutory definitions.

Based on the foregoing discussion, the petitioner has failed to establish that it will employ the beneficiary in a managerial or executive capacity and the appeal will be dismissed.

The appeal will be dismissed for the above stated reasons. 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 not been met.

ORDER: The appeal is dismissed.