



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **SEP 25 2013**

Office: CALIFORNIA SERVICE CENTER

FILE: [Redacted]

IN RE:

Petitioner: [Redacted]

Beneficiary: [Redacted]

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:

[Redacted]

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, California 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 extend the beneficiary's status 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 Nevada limited liability company established in November 2010, states that it engages in wholesale and distribution. The petitioner claims to be a subsidiary of [REDACTED] located in Bangkok, Thailand. The beneficiary was previously granted one year in L-1A classification in order to open a new office in the United States and the petitioner now seeks to extend his employment in the position of president for a period of three years.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity in the United States.

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 for the petitioner asserts that the petitioner has established that the beneficiary is employed in an executive capacity as the president of the U.S. company. Counsel for the petitioner submits a brief in the record 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(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.

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.

II. THE ISSUE ON APPEAL

The sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed in a qualifying managerial or executive capacity in the United States.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on December 12, 2012. The petitioner indicated on Form I-129 that it has eight current employees and a gross annual income of \$200,000. In its business plan, the petitioner indicates that it is "a distributor and marketing consultant company specializing in the sales of [redacted] merchandise as well as offering a training system for network marketers who want to become successful in multilevel marketing business in statewide and regional markets."

The petitioner submitted a letter of support from the foreign entity describing the beneficiary's U.S. duties as follows:

As our President, the beneficiary will be responsible for making the final determinations as to the locations where we will maintain offices. These decisions will be based on advice given to him by our marketing analysts and his personal expertise and experience. The President will also continue to oversee the orientation of new employees until he establishes a supervisory staff that he is satisfied is qualified to perform those duties. The President is also the person ultimately responsible to see that the goals and policies of the company are continually adhered to.

Aside from the basic duties mentioned above, the additional duties of the President will be to review everything from daily, monthly and yearly budget reports to analyzing marketing

summaries. The President will use the information obtained to determine and make decisions on opening new offices and possibly closing existing offices if they are not financially sound. Final decisions regarding marketing and product distributions is [sic] the responsibility of the President. Furthermore, any contracts for services or merchandise in an amount in excess of \$10,000 will also require the President's approval.

In addition to the duties above, the President is responsible for resolving any disputes among workers or customers that cannot be resolved by lower management. In no circumstance can a monetary settlement be proposed without the President's authorization.

Although it is impossible to state exactly the percentage of time that will be expended performing his various duties since they will often vary not only from day to day but from week by week, month to month and year to year as well, generally it could be estimated that the following would be the approximate percentage of time expended in each area. For the most part, the President's duties in the United States "mirror" those duties he performed as our President of the Thai Entity except as to the duties that are in regards to start-up operations.

- 50% - Managing the day-to-day operations of our company. In managing the day-to-day operations, he is responsible [for] overseeing the entire operations. In other words, it is the President's responsibility to insure [sic] business profitability and growth which of course relies on customer satisfaction. Since customer satisfaction, in turn, depends on efficiency, product availability, friendly staff, and competitive pricing, it is the President's duty to see that it all "comes together." This also includes being the "executive contact" for our customers and suppliers. In addition to customers, it is essential that the President work closely with our suppliers and vendors. The President needs to be kept aware of the competition in the area to insure that we will be competitive in regards to the goods we offer and their pricing. A working knowledge of our costs is also essential in determining our pricing and to improve profitability.
- 30% - Operations management. The President has the ultimate responsibility overseeing the entire operation of the business. This would include staffing, and customer satisfaction. This portion of the President's job also involves the interaction with the employees and customers either directly or thru subordinate managers. The President needs to provide inspirational motivation while at the same time making sure that employees are diligently working and concentrating on customer satisfaction. The President is also responsible for seeing that the employees are aware of our company's Vision, Mission and Values and that they are carried out. It is the President's duty to assure that they all working together in harmony and with efficiency.
- 10% - Operations improvement. This portion of the President's duties includes making final decisions on increasing, or decreasing, staff, making any other necessary changes.
- 5% - Setting and implementing company goals and policies with respect to advertising, marketing and personnel administration. The President is ultimately responsible for assuring that the company goals and policies are implemented.

- 5% - Setting and achieving sales and profit levels and monitoring the same. The President sets profit levels and continuously monitors operations to see that the goals are maintained or exceeded.

The petitioner submitted an organizational chart for the U.S. company which depicts the beneficiary as its president. The chart identifies his subordinates as a vice president, a financial manager, a marketing manager, and an administrative employee. According to the chart, the financial manager supervises a bookkeeper and the marketing manager supervises an "online marketing" employee and a marketing trainer.

The petitioner submitted its IRS Forms 941, Employer's Quarterly Federal Tax Return, for the first, second, and third quarters of 2012, indicating that it had three employees and paid \$15,840 in wages, tips, and other compensation for the first quarter, five employees and paid \$23,520 for the second quarter, and seven employees and paid \$27,360 for the third quarter. The petitioner also submitted Forms I-9, Employment Eligibility Verification, and summaries of its state quarterly wage reports. Based on this information, five of the petitioner's employees are based in Los Angeles, while the remaining three reside and work in the Seattle, Washington area. These employees include the financial manager, the marketing manager and the online marketing employee.

On December 21, 2012, the director issued a request for additional evidence ("RFE") in which he instructed the petitioner to provide additional evidence to establish that the beneficiary will be performing the duties of a manager or executive with the U.S. company. The director also requested a more detailed organizational chart and a summary of duties for each employee in the company.

In response to the RFE, the petitioner submitted essentially the same description provided at the time of filing and simply added:

Overall, the President has the responsibility for planning, directing and overseeing the policies to achieve our company's goals. In addition, the President is in charge of reviewing our financial statements, supervising our professional staff, both domestic and international, and developing plans to maximize the company's profit.

The petitioner went on to provide very brief descriptions of duties for each of the beneficiary's subordinates and provided a copy of the same organizational chart previously submitted with the petition.

On February 20, 2013, the director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in a position that is primarily executive or managerial in nature. In denying the petition, the director found that the petitioner's description of the beneficiary's duties was insufficient to demonstrate what the beneficiary does on a day-to-day basis. The director noted that without more specific information regarding the duties of the U.S. position including how and at what frequency the stated duties are performed, the job description provided is insufficient to show that the position is primarily managerial or executive.

On appeal, counsel for the petitioner asserts that the beneficiary will be employed in an executive capacity. Counsel for the petitioner contends that the director failed to properly analyze the duties of the beneficiary's position. Counsel submitted the same list of job duties with percentages of time allotted to them. Counsel went on to state:

How a petitioner can be more specific regarding the daily job duties than the duties described in the response to the Request for Evidence is incomprehensible. . . . As indicated above, the petitioner gave a detailed breakdown of the beneficiary's duties and the approximate percentage of time spent performing those duties.

The petitioner explained that as President of the company, the beneficiary's duties change from day-to-day depending on need. . . .

As indicated and explained in the duties of the petitioner, the beneficiary, as President of the company, basically has final "say" on the entire operations of the business and only needed to report to the Board of Director which in turn only had general supervision of the president. If the president of a company, who is assigned duties as listed in the response to the [RFE], is not a managerial or executive position, it difficult [*sic*], if not impossible, to imagine who is. Obviously someone must be running the business and in charge of making critical decisions regarding the business and in this case, it is the president of the company. There is no "higher" officer in the business.

* * *

In the case at hand, the duties of the beneficiary, as described by the petitioner, are clearly within the definition as stated in the U.S. Code of Federal Regulations. The duties of the president, and the frequency of the stated duties, were as specific as could possibly be explained and not just simply a matter of reiterating the regulations.

In light of the above, it is respectfully submitted that the petitioner has clearly explained the duties of its president and that those duties are clearly those of a person holding an executive position within the business.

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

As discussed above, the petitioner has requested the extension of a petition that involved a new office. The one-year "new office" provision is an accommodation for newly established enterprises, provided for by USCIS regulation that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or

managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

After one year, USCIS will extend the validity of the new office petition only if the entity demonstrates that it has been doing business in a regular, systematic, and continuous manner "for the previous year." 8 C.F.R. § 214.2(l)(14)(ii)(B). There is no provision in USCIS regulations that allows a petitioning corporation additional petitions under the "new office" regulatory accommodation for managers and executives. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension of the prior approved L-1 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(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.*

The AAO does not doubt that the beneficiary will have the appropriate level of authority over the petitioner's business as its president. However, 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 or her time on day-to-day operational 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 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 instant matter, the petitioner indicates that the beneficiary will be employed primarily as an executive, pursuant to section 101(a)(44)(B) of the Act. The petitioner characterized the beneficiary's role as president, noting he will "manag[e] the day-to-day operations of [the] company"; "oversee the entire operation of the business"; "mak[e] final decisions on increasing, or decreasing staff, [or] making any other necessary changes"; and "set and implement company goals and policies with respect to advertising, marketing and personnel administration." Those duties merely paraphrase, in part, the statutory definition of executive capacity. See section 101(a)(44)(B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The petitioner further detailed the beneficiary's duties indicating that he will "insure [*sic*] business profitability and growth"; "be the 'executive contact' for customers and suppliers"; "work closely with

suppliers and vendors"; "insure that [the petitioner] will be competitive in regards to the goods offer[ed] and their pricing"; "interact with employees and customers either directly or thru subordinate managers"; "provide inspirational motivation while at the same time making sure that employees are diligently working and concentrating on customer satisfaction"; "see that the employees are aware of [the] company's Vision, Mission and Values and that they are carried out"; "assure that [employees are] all working together in harmony and with efficiency"; "mak[e] final decisions on increasing, or decreasing, staff, making any other necessary changes"; "assur[e] that the company goals and policies are implemented"; and "set profit levels and continuously monitor operations to see that the goals are maintained or exceeded." The petitioner failed to identify any specific tasks the beneficiary would perform on a day-to-day basis and merely listed broad areas of responsibility. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner failed to provide any detail or explanation of the beneficiary's actual activities in the course of his daily routine or a breakdown of the amount of time the beneficiary devotes to each specific task, even after the director specifically requested a more detailed description of the beneficiary's duties. 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).

The AAO acknowledges the petitioner's assertion that the amount of time the beneficiary allocates to specific duties on a daily basis varies; however, it failed to provide any further specificity to vague areas of responsibility such as "managing the day-to-day operations of our company" a broad area, which is stated to require half of the beneficiary's time. This omission is critical as the petitioner indicates that this responsibility includes a number of customer-focused responsibilities, from "wining and dining" to handling customer complaints, which may not fall within the statutory definitions of managerial or executive capacity. Further, none of the subordinate employees, based on the brief position descriptions provided, have significant interactions with customers, vendors and suppliers.

On appeal, counsel suggests that the breakdown of responsibilities provided is detailed and sufficient to establish the nature of the beneficiary's duties; however, the information provided does not provide a clear picture of the beneficiary's daily routine or specific tasks that would elevate his position to that of an executive. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990). The actual duties themselves reveal the true nature of the employment. *Id.* at 1108.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the

enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

Here, the beneficiary has not been shown to be employed in a primarily executive capacity. The petitioner failed to demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations or the provision of goods or services on behalf of the U.S. company. This failure is also due, in part, to the lack of explanation and evidence pertaining to the nature and scope of the petitioner's business activities. As noted, the petitioner stated that it operates as "a distributor and marketing consultant company specializing in the sales of [redacted] merchandise as well as offering a training system for network marketers who want to become successful in multilevel marketing business in statewide and regional markets." The petitioner indicates that its "California facility will be handling the 'hands on' administration involving shipping, printing, purchasing of merchandise, distribution, marketing, training and customer liaison/support." Based on the position descriptions provided for the beneficiary and his subordinates, it is unclear who is performing many of these functions, particularly in light of the fact that both of the subordinate managers are located in Washington and not in the California facility. The petitioner has hired administrative, financial, and marketing staff; however it is unclear who is providing consulting and training services, purchasing merchandise, providing customer support, and performing duties related to distribution. The petitioner reports \$125,096 in "fees earned" for the first six months of 2012, but it is unclear how these fees were earned or exactly what types of products or services the petitioner is providing. Overall, the lack of information pertaining to the beneficiary's duties, the subordinates' duties, and the nature and scope of the business prohibits a finding that the beneficiary is able to allocate more than 50% of his time to qualifying executive duties.

Although not explicitly stated by the petitioner, the AAO will also examine the beneficiary's position in terms of managerial capacity. 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). 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). Here, the petitioner indicates that one of the beneficiary's direct subordinates will be the marketing manager, whose stated duties include some supervisory functions "oversee[ing] [the petitioner's] entire marketing department including [its] online marketing director and the marketing research associate." The description of the marketing manager's duties indicates that she allocates some time to specific marketing functions and some time to managing the marketing department and staff. Although the beneficiary is shown to have one subordinate with vague supervisory duties, he has not been shown to *primarily* supervise and the control the work of other supervisory, professional, or managerial employees. The fact that one of his subordinates may supervise lower-level employees is not sufficient to elevate the beneficiary to a position that is managerial in nature. The petitioner has failed to demonstrate that the beneficiary's duties will primarily focus on the management of the organization, rather than producing a product or providing a service of the petitioner.

The petitioner has not established, in the alternative, that the beneficiary will be employed primarily 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). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must 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. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating 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. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Here, the petitioner did not indicate that the beneficiary qualifies as a function manager. The petitioner did not articulate the beneficiary's duties as a function manager and did not provide a breakdown indicating the amount of time the beneficiary devotes to duties that would clearly demonstrate he manages an essential function of the U.S. company.

Based on the foregoing discussion, the petitioner has not established that it will employ the beneficiary in a qualifying executive or managerial capacity, or as a function manager. Accordingly, the appeal will be dismissed.

III. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.