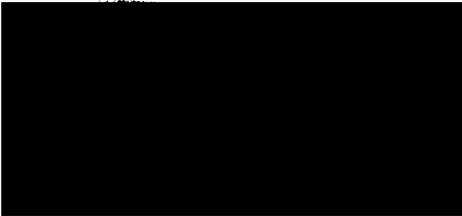




U.S. Citizenship
and Immigration
Services

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File: SRC 04 095 50947 Office: TEXAS SERVICE CENTER Date: **SEP 07 2005**

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).

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

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, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas 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 employment of its president as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Florida that operates four retail carts in a shopping mall, selling aromatherapy products, incense, cellular phone accessories and video game controllers. The petitioner claims that it is the subsidiary of [REDACTED] located in Lima, Peru. 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 stay.

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, the petitioner asserts that Citizenship and Immigration Services (CIS) erroneously concluded that the beneficiary is not primarily employed in an executive or managerial capacity, due to inappropriate emphasis on the number of individuals employed by the petitioner. In support of the appeal, the petitioner submits a detailed letter and additional evidence.

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 management 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.

In a February 9, 2004 letter appended to the Form I-129 Petition, the petitioner described the beneficiary's duties as:

1. Manage, control and coordinate our projects. Participation with other members of the organization. Manage and organize the work of the employees under his supervision (Dedicating approximately 30% of his time to this duty)
2. Hire employees for the correct functioning of the enterprise. Name and fix salaries and bonuses. (dedicating 15% of his time to this duty)
3. Direct sales and service outlets of the organization; Negotiates contracts. (dedicating 10% of his time to this duty)
4. Report to the Board of Directors his yearly actions, and present the Balance Sheet and a project of the distribution of the utilities (dedicating 10% of his time to this duty)
5. Identify potential trading deals. Coordinate sales distribution by establishing sales territories, quotas, and goals and advises dealers, distributors, and clients concerning sales and advertising techniques. (13% of his time to this duty)
6. Supervise a team of top management personnel who run the day-to-day operations at the Corporation in the United States. (Dedicating 10% of his time to this duty)
7. Set guidelines for quality management, technical support management, and attend trade shows. Direct and control work flow, setting the standards for the general guidelines. (Dedicating 10% of his time to this duty)

A separate statement submitted with the petition included the same job duties, as well as one additional duty: "will supervise shipping details, such as licenses, customs declarations, and packing and shipping, and routing of products." The petitioner indicated that the beneficiary would devote two percent of his time to these tasks.

The petitioner further discussed how the beneficiary meets each of the four criteria for “managerial capacity” as defined at section 101(a)(44)(A) of the Act. Specifically, the petitioner noted that the beneficiary: (1) manages the whole organization; (2) hires employees, and supervises the work of managers and an accountant with a professional degree; (3) has the authority to hire all personnel; and (4) exercises discretion over the day-to-day operations of the company. The petitioner also provided that the beneficiary will supervise an operations manager and a sales manager who provide him with weekly reports and market analyses, and will review the financial matters of the company, including monthly reports prepared by the accountant.

On Form I-129, the petitioner indicated that it had five employees as of February 2004. The petitioner submitted an organizational chart dated January 1, 2004 depicting the beneficiary as president, an operations manager, an accountant, and one sales person who reported to the operations manager. The petitioner’s Florida Form UCT-6, Employer’s Quarterly Report, for the fourth quarter of 2003 showed wages paid to the beneficiary (\$2,000), the operations manager (\$3,000), and the sales person (\$1,500).

In addition, the petitioner submitted job descriptions for its other positions. The petitioner indicated that the sales manager managed and supervised salesmen, planned and marketed products and services, trained sales personnel, interviewed and hired sales representatives, controlled new accounts, sales distribution and personnel activity. The petitioner indicated that its operations manager was in charge of promoting sales, telemarketing, business development, new accounts, marketing analysis, customer service, client visitations, client portfolio, and post-sales service. The petitioner provided that the accountant managed the day-to-day accounting and finance duties including billing, banking, taxes and financial reports, and payroll duties. Finally, the petitioner indicated that its sales personnel are responsible for the storefront, cashier operation, credit card machine operations, client service and on-site sales.

On April 2, 2004, the director requested additional evidence, specifically, instructing the petitioner to clarify whether any of its employees are employed on a part-time basis. The director noted the low wages paid to employees during the fourth quarter of 2003 and asked the petitioner to provide an explanation. In addition, the director requested a copy of the petitioner’s first quarter tax return for 2004.

In response, the petitioner provided: (1) a May 18, 2004 letter discussing compensation paid to its workers; (2) an organizational chart for the petitioner updated March 31, 2004; (3) an unsigned copy of a commission agreement between the petitioner and the operations manager, dated January 25, 2003; (4) unsigned copies of commission agreements between the petitioner and two sales persons, both dated February 2003; (5) an undated, unsigned copy of an independent contractor agreement between the petitioner and an “accountant & bookkeeper”; (6) copies of 2003 Forms W-2, Wage and Tax Statement, for the beneficiary and two other employees; (7) copies of the petitioner’s Internal Revenue Service (IRS) Forms 941, Employer’s Quarterly Federal Tax Return, for the third quarter of 2003 and first quarter of 2004; and (8) copies of the petitioner’s Florida Forms UCT-6, Employer’s Quarterly Report, for the third quarter of 2003 and the first quarter of 2004.

The petitioner explained that the beneficiary, the operations manager and a sales person worked on a full-time basis in 2003 and received annual salaries of \$28,000, \$15,600, and \$13,000 respectively. The petitioner noted that the operations manager and sales person also received commissions. The petitioner indicated that

the company no longer employed [REDACTED] the operations manager, and the petitioner's Florida Form UCT-6 confirms that he was not on the company payroll when the petition was filed. Finally, the petitioner stated that it employs an accountant on an independent contract basis for a monthly fee of \$200, and that it employs a second sales person hired on a full-time basis in January 2004.

As of May 2004, the petitioner claimed to employ four payroll employees and two independent contractor employees. The petitioner's organizational chart dated May 31, 2004 depicts six employees, including the beneficiary as president, a secretary, an operations manager, an accountant, and two sales personnel. The petitioner's Form UCT-6 for the first quarter of 2004, the quarter in which the petition was filed, confirms the petitioner's employment of the beneficiary, the operations manager, one sales person and the secretary.

On June 5, 2003, 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. Specifically, the director found that: (1) the petitioner had not demonstrated that the beneficiary manages or directs the management of a department, subdivision, function, or component of the organization; (2) the petitioner had not established that the beneficiary will be involved in the supervision and control of the work of other supervisory, professional or managerial employees who will relieve him from performing the services of the business; and (3) the petitioner had not expanded to the point of requiring a full-time, bona fide president acting in a primarily managerial or executive capacity. The director concluded that the majority of the beneficiary's time would be spent in the non-managerial, day-to-day operations of the business. The director noted that the petitioner claimed to employ three employees with managerial or executive job titles and observed "it would be outside the corporate norm for a business to employ sixty percent of its' [sic] workforce in a mostly managerial and/or executive capacity."

On appeal, the petitioner asserts that Citizenship and Immigration Services (CIS) erroneously concluded that the beneficiary is not primarily employed in an executive or managerial capacity, due to inappropriate emphasis on the number of individuals employed by the petitioner. In support of the appeal, the petitioner submits a detailed letter, quoting previously provided descriptions of the beneficiary's duties.

The petitioner highlights that there is no requirement that it reach a certain size in order to be eligible to sponsor the beneficiary as a nonimmigrant intracompany transferee. The petitioner indicates that it is appropriate for it to have a president, as at the point of incorporation with the State of Florida, a corporation can name a president regardless of its size or number of employees. The petitioner asserts that the director contradicts herself when stating that the beneficiary does not supervise the work of other managerial employees, while also stating that there are too many managerial positions in the company. The petitioner states that it is its prerogative whether to hire a high percentage of managers to operate its business, and objects to the director's observation that "it would not be the norm in the corporate world" to have three managers in a company with five employees. The petitioner asserts, "[a] finding [that the beneficiary is not primarily employed in an executive or managerial capacity] is support[ed] by no evidence."

In support of the appeal, the petitioner submits copies of Florida New Hire Reporting Forms for six employees, including the beneficiary and various documents which were previously submitted.

Upon review, the petitioner's assertions are not persuasive. 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.*

While the petitioner has provided various accounts of the beneficiary's duties, many of the listed tasks are vague and therefore do not provide the AAO with sufficient information to determine whether they are managerial or executive in nature. Further, the AAO notes that the job description provided with the instant petition is identical to that submitted with the petitioner's request to employ the beneficiary in a new office. The petitioner provided a copy of its February 13, 2003 letter submitted with the previous petition, which states that the company intended to "export . . . and promote direct sales of Peruvian products to the United States." However, since the petitioner neither imports nor distributes goods from overseas as of 2004, many of the job duties do not relate to the petitioner's actual business operations. For example, the petitioner states that the beneficiary "sets guidelines for quality management, technical support management," "establishes sales territories," "identifies potential trading deals," "advises dealers, distributors and clients concerning advertising techniques," and "arranges shipping details, such as licenses, customs declarations, and packing and shipping, and routing of product." These job duties do not seem plausible within the context of the petitioner's current business model as an operator of four small retail carts in a shopping mall. Furthermore, without additional information, many of these duties appear to be non-managerial. 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 petitioner's job description does not provide a clear or credible account of the beneficiary's actual duties, such that the AAO can classify them as managerial or executive in nature. The actual duties themselves reveal the true nature of the employment. *Id.*

Counsel cites *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Mars Jewelers, Inc. v. INS*. It is noted that the case cited by counsel relates to an immigrant visa petition, and not the extension of a "new office" nonimmigrant visa. As the new office extension regulations call for a review of the petitioner's business activities and staffing after one year, the cases cited by counsel are distinguishable based on the applicable regulations. *See* 8 C.F.R. § 214.2(l)(14)(ii). Additionally, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

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, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of

the organization. As noted above, 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.

Here, a critical analysis of the nature of the petitioner's operations undermines the petitioner's assertions that the beneficiary's subordinates relieve him from performing non-qualifying duties associated with operating the petitioner's business. The petitioner states that, including the beneficiary, it employed five workers at the time the petition was filed and it operates four retail carts. The petitioner's Form UCT-6 Employer's Quarterly Report for the first quarter of 2004, the quarter in which the petition was filed, indicates that the company had a total of four payroll employees, including the beneficiary, a secretary, an operations manager and a sales person. The petitioner also claims to employ an accountant on an independent contract basis, and at least one additional sales person on a commission basis. However, the petitioner has not presented sufficient evidence to document payments to these employees, nor has it indicated the amount of time the claimed contracted employees actually devote to the petitioner's business. Copies of unsigned commission agreements are not sufficient to establish that the claimed contracted and commissioned employees actually worked for the petitioner. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

As noted above, the petitioner operates four retail carts in a shopping mall that is open daily. It is assumed that each cart requires an employee to sit next to it throughout business hours, in order to greet customers, answer sales questions, demonstrate products, operate a cash register, execute sales, restock merchandise, and reconcile cash register receipts. The petitioner has provided no indication of which employees actually operate these carts on a day-to-day basis, other than one sales person. Thus, as there are four carts and four documented employees, the AAO must presume, and it has not been proven otherwise, that the beneficiary, whose work address is at the shopping mall, must operate one of these carts each day. The tasks associated with conducting business through a retail cart are not deemed managerial or executive in nature. 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). Even if the petitioner had documented payments to one or two commissioned sales staff, such staff would not be sufficient to relieve the beneficiary from regularly operating a retail cart, directly supervising employees operating retail carts, or otherwise performing the day-to-day duties of the petitioner.

As highlighted above, considering the beneficiary is one of only four employees of the petitioner, it appears that the reasonable needs of the petitioner require the beneficiary to invest a significant amount of time performing the non-managerial tasks associated with operating a retail cart. The petitioner has not provided evidence to show otherwise. The definitions of executive and managerial capacity have two parts. First, the

petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

The petitioner indicates that the beneficiary devotes 55 percent of his time to hiring employees, managing and organizing their work, and supervising "top management." 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. The petitioner claims to employ a sales manager, an operations manager and an accountant with a professional degree. The petitioner has provided no evidence to establish that it ever employed a sales manager, and insufficient evidence to establish that it utilizes a contracted accountant. As discussed above, it is evident from the record that the operations manager, as one of only four employees, must personally operate a retail cart, rather than supervise other employees who do so.

When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (CIS) reviews the totality of the record, including descriptions of a beneficiary's duties and his or her subordinate employees, the nature of the petitioner's business, 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 managerial 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 subordinates are supervisors, managers, or professionals. Instead, the record indicates that the beneficiary's subordinates, and the beneficiary himself, must perform the actual day-to-day tasks of operating the four retail carts. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher, at best, 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.

The petitioner asserts that it is appropriate for it to employ a president, particularly given that at the time of incorporation, the State of Florida invites a company to name a president irrespective of the initial size of the company. The petitioner states: "It is our understanding that a Business does not need to be expanded to have a President." However, an employee's executive title alone is not sufficient to show that he is functioning in a primarily executive or managerial capacity. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. In the instant matter, evidence reflects that the beneficiary must carry out the day-to-day tasks of providing the petitioner's products and services. Again, 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. at 604.

In the instant matter, the petitioner has not established that it has reached the point that it can employ the beneficiary in a predominantly managerial or executive position. Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily executive or managerial capacity, as required by 8 C.F.R. § 214.2(1)(3). For this reason, the appeal will be dismissed.

Although the appeal will be dismissed, the AAO acknowledges the petitioner's objections to the director's comment that the U.S. company's personnel structure is "outside the corporate norm for a business . . ." The director's comments are inappropriate. The director should not hold a petitioner to his undefined and unsupported view of the "corporate norm." The director should instead focus on applying the statute and regulations to the facts presented by the record of proceeding. Although CIS must consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the director must articulate some rational basis for finding a petitioner's staff or structure to be unreasonable. *See* section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The fact that a petitioner is a small business or engaged in a particular industry will not preclude the beneficiary from qualifying for classification under section 203(b)(1)(C) of the Act. For this reason, the director's comments as they relate to the staffing structure of the petitioner's business will be withdrawn.

In visa 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, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.