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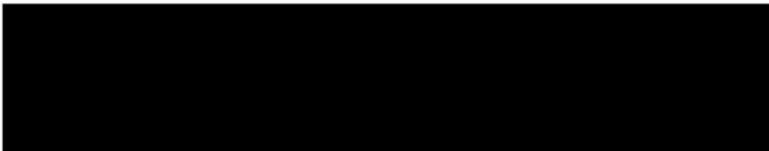
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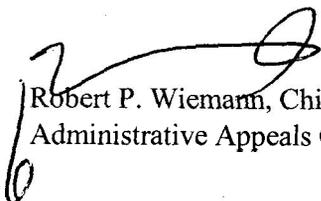
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ 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, a Florida limited liability company, states that it operates a convenience store. The petitioner claims to be an affiliate of Nishman Comforts Ltd., located in Lusaka, Zambia. The petitioner seeks to employ the beneficiary as its marketing manager for a three-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would 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 director erroneously determined that the beneficiary will not serve in a managerial or executive capacity. Specifically, counsel contends that the beneficiary would be employed as a functional manager responsible for the expansion of the petitioner's business. Counsel asserts that the director placed undue emphasis on the number of employees working for the company, but failed to take into account the reasonable needs of the business in determining that the beneficiary will not be employed in a managerial capacity.

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 sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed by the United States entity in a primarily managerial capacity. The petitioner does not claim that the beneficiary would be employed in an 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.

The nonimmigrant petition was filed on August 22, 2007. In a letter dated August 7, 2007, the petitioner indicated that it intends to employ the beneficiary as its marketing manager with responsibility for "management of the marketing function of our company." The petitioner further described the beneficiary's proposed position as follows:

[The petitioner] would like to employ [the beneficiary] in this position to aid in the growth of our business by identifying market opportunities and planning their acquisition. Employing someone devoted solely to the marketing function is essential to the growth of [the petitioning company].

[The beneficiary] would be responsible for leading the operational design and implementation of our expansion. He will have full authority over this function and may enter into contracts on behalf of the company as necessary. Additionally, he will have discretionary budgetary authority for this function with little supervision.

As Marketing Manager, [the beneficiary] will manage an essential function and component of our business, that is, the expansion of our business to include more convenience stores over a period of time as discussed in the attached business plan. [The beneficiary] will have a significant effect on the company's profits and operations.

[The beneficiary] will have overall managerial responsibility for the following crucial operations:

- Defining and managing our operational model for expansion.
- Defining and managing the tactics aimed at increasing our market share and identifying new stores and/or locations for expansion;
- Representing [the petitioner] in all meetings related to these duties.

[The beneficiary] will manage marketing strategy and direction, as well as business details including financial issues and business forecasting.

[The beneficiary] will maintain broad authority with respect to the analysis, operational design, organization, and execution of these strategies. In managing these activities, [the beneficiary] will function at a senior level within [the petitioning company].

In a letter dated August 17, 2007, counsel for the petitioner further described the beneficiary's proposed position as follows:

[The beneficiary's] presence in the US will allow [the petitioner] to utilize his expertise in order to research the market and manage the business in a way that future expansions will be possible, such as acquiring other convenience stores in the Orlando area. As Marketing Manager, [the beneficiary] will conduct marketing research and/or hire personnel to do so, in order to determine competitive prices so that the company can attract more traffic and therefore increase sales.

Some of his duties will also include identifying similar businesses that are for sale in the Orlando area and determine which ones may be a good acquisition to [the petitioner].

The petitioner further stated that the beneficiary will engage in "functional managerial duties" as its marketing manager, and described the following duties:

Specifically, [the beneficiary] is charged with identifying new markets that will increase the sales and profits of the company and attract new customers.

Further, [the beneficiary] will study the market in order to identify convenience stores that are for sale that could possibly present an opportunity for [the petitioner], therefore allowing the company to expand its business. Additionally, [the beneficiary] will be responsible for the oversight of and financial viability of [the petitioner] via his role as marketing manager responsible for the expansion of [the petitioner] according to market conditions.

Because [the beneficiary] is primarily charged with managerial capacity duties at [the foreign entity] and [the petitioner] he fulfills all necessary managerial capacity requirements under the statute.

The petitioner also submitted a 13-page business plan which outlined the company's intention to hire the beneficiary to develop an expansion plan, and to develop a marketing plan that will increase revenues for the company's present and future locations. The petitioner's business plan provides a detailed overview of its current convenience store operation, the products it sells and the demographic it serves. The store is staffed by one manager and two cashiers. The business plan indicates that the beneficiary "will not participate in day to day store operations. His function will be to develop marketing and expansion plans and to supervise their implementation." The beneficiary's proposed marketing activities are further described as follows:

The L-1 applicant during his first year will develop a marketing plan that will serve to increase sales in the present location, but also serve as a marketing model for future locations. The Company plans to eventually have multiple locations. The marketing will be directed by corporate staff. The L-1 applicant will be devising plans for a corporate directed marketing initiatives program.

However, during the first year of this plan, the Company will undertake marketing activities to include:

- Advertising in local newspapers
- Coupon program
- Promotional activities

The petitioner estimated that advertising would cost the company approximately \$300 per month, while the coupon program and promotion activities were given a budget of \$2,500, for a total annual cost of \$6,100.

The business plan further indicated the petitioner's intent to open a second convenience store during the second year of its plan, and to eventually grow to include at least five locations. In this regard, the petitioner indicated that the beneficiary would perform the following duties:

Expansion planning will be the L-1 applicant's primary responsibility. He will research the market and observe Store operations to develop an expansion plan that will include:

- Benchmarks to determine if it is more feasible to buy existing operations or develop new locations
- Methods to integrate the operations of units to maximize efficiency in purchasing and marketing
- Marketing plans for multi-unit operations
- Organizing the computer systems required for centralized financial operations
- Formulating a staffing structure for central management of a multi-unit organization.

The L-1 applicant will oversee the implementation of expansion plans.

On August 30, 2007, the director requested that the petitioner submit additional evidence to support its claim that the beneficiary would be employed in a managerial or executive capacity. The director noted that, based on the evidence submitted, it did not appear that the beneficiary would function at a senior level within the petitioner's organizational hierarchy, or that he would be supervising and controlling a subordinate staff of managerial, professional or supervisory employees. The director instructed the petitioner to submit an organizational chart for the U.S. entity which clearly identifies the beneficiary's proposed position and those of his proposed subordinates. The director further requested a detailed explanation outlining how the duties of the subordinate employees are managerial or require the expertise of a professional.

In a response dated October 11, 2007, counsel for the petitioner clarified that the petitioner seeks L-1A classification for the beneficiary as a functional manager, and as such, he is not required to supervise or control the work of subordinate staff. Counsel emphasized that the petitioner had gone to great expense to hire a professional to prepare a business plan to determine the feasibility of hiring the beneficiary to manage its marketing function, which is "necessary and critical" to the petitioner's growth. Counsel stated that the "outside contractors will be managed once the beneficiary is in place." The petitioner re-submitted its letter dated August 7, 2007 as evidence that the beneficiary would be employed as a function manager.

The director denied the petition on October 24, 2007, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial capacity. The director acknowledged the petitioner's assertion that the beneficiary would manage an essential function, but determined that the petitioner failed to establish that the beneficiary would function at a senior level within the petitioner's organizational hierarchy, other than in position title. The director further observed that the petitioner had not established that its "small convenience store" has a need for the services of a bona fide marketing manager who would perform the described duties on a fulltime basis.

On appeal, counsel for the petitioner asserts that the director failed to apply the law to the facts of the case and denied the petition without merit. Counsel emphasizes that section 101(a)(44)(C) of the Act requires the director to take into account the reasonable needs of the organizational, component or function in light of the overall purpose of the organization, component or function, rather than basing his determination on the number of employees the beneficiary would supervise or direct.

Counsel reiterates that the beneficiary will be overseeing the expansion of the petitioner's business and asserts that the petitioner's three employees are sufficient to staff the one convenience store it currently operates. Counsel contends that the director provided no basis for discrediting the submitted evidence. Counsel asserts that the petitioning company has a reasonable need for the beneficiary's services as marketing manager because the petitioner's president is too busy to undertake the marketing project for the expansion of the business. In addition, counsel emphasizes that the beneficiary is a partial owner of the U.S. entity, will operate at a senior level, will eventually supervise the work of contractors and employees to carry out the marketing function, and will "have discretionary latitude over day-to-day operations for the marketing function."

Counsel's assertions are not persuasive. Upon review of the petition and supporting evidence, the petitioner has not established that the beneficiary would be employed by the petitioner in a *primarily managerial* capacity. The petitioner claims that the beneficiary, as marketing manager, will be responsible for managing the marketing function and the expansion of the petitioner's business.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. The term "essential" is commonly defined as "inherent" or "indispensable." *Webster's II New College Dictionary* 384 (2001). Accordingly, based on the plain meaning of the word "essential," the petitioner must establish that the function managed by the beneficiary is inherent and indispensable to the petitioner's operations rather than a non-essential or superfluous task.

Based on the statutory definition of managerial capacity, a petitioner must prove the following elements to establish that a beneficiary is primarily serving as a function manager within an organization:

First, the beneficiary must manage an "essential function" within the organization, or a department or subdivision of the organization;

Second, the beneficiary must function at a "senior level" within the organizational hierarchy or with respect to the function managed; and

Third, the beneficiary must control and "exercise discretion" over the day-to-day operations of the function.

See sections 101(a)(44)(A)(ii), (iii), and (iv) of the Act.

When examining the executive or managerial capacity of the beneficiary, CIS 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.*

If a petitioner claims that the beneficiary is primarily managing an essential function, the petitioner must furnish a detailed position description that clearly explains the duties to be performed in that capacity, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. If a petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). In addition, the petitioner's description of the beneficiary's daily duties must clearly demonstrate that the beneficiary primarily *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 *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Here, the petitioner's description of the beneficiary's proposed duties was too vague to establish that he would be primarily performing managerial duties associated with the petitioner's marketing and expansion functions. The petitioner stated that the beneficiary would be "identifying marketing opportunities and

planning their acquisition,” “leading the operational design and implementation of our expansion,” “defining and managing the tactics aimed at increasing [the petitioner’s] market share,” “managing marketing strategy and direction,” “identifying new markets,” “identifying similar businesses that are for sale,” maintaining “broad authority with respect to the analysis, operational design, organization and execution of these strategies,” and functioning “at a senior level” within the company. While the petitioner has outlined the beneficiary’s overall objectives and intended purpose for the creation of the position, the record contains no detailed description of what tasks the beneficiary would perform on a day-to-day basis to achieve these goals, or whether such duties would be managerial in nature. 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 has failed to provide any detail or explanation of the beneficiary’s activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *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).

The petitioner’s business plan provided some additional insight into the beneficiary’s responsibilities and the purpose for his transfer, but is also insufficient to establish that he would be employed in a primarily managerial capacity. The petitioner indicated that during his first year of employment, the beneficiary would “develop a marketing plan” and undertake marketing activities to include advertising in local newspapers, coupon programs and promotional activities, such as sponsoring a community event. The petitioner did not describe the specific duties to be performed by the beneficiary with respect to these marketing activities. It is not clear based on the limited information provided that placing advertisements or planning an in-store coupon program would actually require the beneficiary to perform any managerial tasks, nor does the record establish that such tasks would require the full-time services of a marketing manager. 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’s business plan did indicate the petitioner’s intent to open a second convenience store during the second year of the plan. However, the petitioner again failed to delineate the specific managerial duties to be performed by the beneficiary with respect to the petitioner’s expansion activities. The petitioner stated that the beneficiary would develop an expansion plan, listed several general components to be included in the plan, and stated that the beneficiary would “oversee the implementation of expansion plans.” The petitioner did not, however, describe the specific duties the beneficiary performs to “oversee” the company’s expansion or what tasks would be involved in developing the plan, and the AAO will not speculate as to the related managerial duties. 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). Based on this limited explanation and documentary evidence, it cannot be concluded that the beneficiary would devote a substantial amount of time to performing managerial duties associated with the petitioner’s marketing or expansion activities.

On appeal, counsel for the petitioner simply reiterates that the beneficiary “will operate at a senior level,” “have discretionary latitude over day-to-day operations for the marketing function,” and “oversee the expansion of the business.” 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. at 1108.

Overall, the descriptions of the beneficiary's duties do not allow the AAO to determine the actual duties to be performed by beneficiary, such that they can be classified as managerial in nature. Furthermore, whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. In the present matter, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as managerial, but it fails to quantify the time the beneficiary spends on them. Absent a clear and credible breakdown and description of the beneficiary proposed duties and the amount of time to be spent on them, the AAO cannot determine what proportion of his duties would be managerial or executive, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d at 24.

Beyond the required description of the job duties, CIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

As discussed above, the petitioner has provided a vague job description that fails to convey any understanding of the actual duties the beneficiary will perform on a daily basis or the amount of time he will devote to duties related to managing the assigned function. The beneficiary may function at a "senior level" within the three-person company by virtue of being a partial owner of the company, but it does not automatically follow that he qualifies as a function manager. According to the petitioner's business plan, the beneficiary would be responsible for a marketing budget of only \$6,100 during his first year of employment and would be charged with placing advertisements in local newspapers and developing an in-store coupon program, activities which have not been shown to be managerial in nature. Although the petitioner states that the beneficiary will hire marketing employees or contractors as necessary to assist him in managing his assigned function, such intentions are not reflected in the petitioner's three-year business plan.

On appeal, counsel states that the director placed undue emphasis on the petitioner's small staff size in making his determination, noting that the statute and regulations do not impose such a requirement with respect to the size of the petitioning organization. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. However, it is appropriate for CIS to consider the size of the petitioning company in conjunction

with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

A review of the record with respect to the petitioner's staffing levels undermines the petitioner's claim that the beneficiary would perform primarily managerial activities associated with the petitioner's marketing and expansion activities. The petitioner has established that it employs two cashiers and an owner/manager. The petitioner operates one convenience store that is open for business for 83 hours per week and claims that its three-person staff is sufficient to operate the store. While the petitioner claims that the beneficiary would not be required to participate in the day-to-day operations of the store, it has not provided a financial plan to support its claim that it is prepared to undertake an expansion project requiring the full-time services of a marketing manager. The record shows that the director did take into consideration the petitioner's overall purpose and stage of development, and properly concluded that the petitioner had not established that it has a reasonable need for a full-time manager to oversee its marketing and expansion functions.

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

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.