U.S. Department of Homeland Security
20 Massachusetts Ave. N.W., Rm. 3000
Washington, DC 20529-2090

PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

[redacted]

D7

File: EAC 08 092 51239 Office: VERMONT SERVICE CENTER Date: FEB 06 2009

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting 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 extend the employment of its director 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 corporation, is an optical services provider. It claims to be a subsidiary of Centro Optico La Salle IV, S.R.L., located in Venezuela. The beneficiary was initially 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 her status.

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 beneficiary would be employed as a functional manager responsible for the petitioner's merchandising function. Counsel contends that, in denying the petition, the director erroneously relied on the fact that the beneficiary will not supervise or control a subordinate staff of managerial, supervisory or professional personnel. Counsel submits a brief in support of the appeal.

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.

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed by the United States entity in a primarily managerial capacity, specifically as a function manager. 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 petitioner filed the nonimmigrant petition on February 11, 2008. The foreign entity submitted a letter dated January 31, 2008 in support of the petition, in which it noted that the U.S. company, similar to its parent company, offers eye examinations, an optical laboratory, and a wide selection of eyewear for men, women and children. The foreign entity described the beneficiary's duties as follows:

(1) setting business standards and general specifications (2 hours/week);
(2) directing the development of internal and external operations to support business with local markets (2 hours/week);
(3) overseeing the distribution and control of goods in the U.S. market (2 hours/week);
(4) liaising among suppliers and distributors (1 hour/week);
(5) overseeing customer accounts and maintaining regular communications with customers and associates (1 hour/week);
(6) negotiating pricing and contracts (1 hour/week);
(7) maintaining operations within budgetary constraints, analyzing costs and implementing cost reduction measures as necessary (3 hours/week);
(8) coordinating and supervising the work performed by employees (3 hours/week);
(9) distributing and assigning daily work activities (1 hour/week).

The foreign entity stated that in addition to these duties, the beneficiary would be "primarily responsible for managing all merchandising aspects within our organization." The foreign entity noted that the petitioner had been required to change its merchandising strategy during the first year of operations based upon the preferences of U.S. consumers, and noted that "merchandising is the essential element/function of the U.S. eyewear industry, more so than pricing." The foreign entity stated that the beneficiary will manage the essential function of merchandising, with the following responsibilities:

(1) assure consistent operational implementation of merchandising plans and business building initiatives including: discontinued/markdown product, product initiatives (2 hours/week);
(2) initiate product assortment changes based on market visits/analysis to align store assortment to market needs (2 hours/week);
(3) assure implementation of merchandising initiatives relative to product knowledge communication, sales focuses, visual standards, program implementation, and in-store merchandising (2 hours/week);
(4) communicate and execute project initiatives (2 hours/week);
(5) lead meetings, address and resolve merchandising product related opportunities (2 hours/week);
(6) develop, define, and execute relocation inventory management related processes to support store's achievement of proforma [sic] (2 hours/week);
(7) initiate assortment recommendations and approve store assortment changes (2 hours/week);

(8) initiate store capacity changes and provide information and updates to store personnel (2 hours/week);
(9) communicate to merchandising associate on product segment assortments and segment voids and potential consumer trends (2 hours/week);
(10) monitor store target inventories, discontinued/markdown product, and department/price point stock to sales ratios, and provide resolution to inventory associate on action steps to align/alleviate (2 hours/week);
(11) complete store capacity process and update information throughout the year (1 hour/week);
(12) determine store retail floor layout and develop product planograms [sic] (1 hour/week);
(13) manage the in season planning process, develop timely action plans that maximize sales opportunities, enhance margin, mitigate liabilities and improve inventory productivity (1 hour/week);
(14) participate in eyewear lifecycle management by driving appropriate assortment changes with timely entrance, markdown and exit strategies (1 hour/week).

The foreign entity indicated that the petitioner employs two part-time sales associates and two part-time merchandise/inventory associates, and provided evidence in the form of payroll records and quarterly wage reports to demonstrate that each claimed employee was working 20 hours per week as of the end of 2007.

The sales associate's duties are described as follows:

> Sell eyewear to individuals in store, utilizing knowledge of products sold; greets customers on sales floor and ascertain make, type, and quality of eyewear desired; display merchandise, suggest selections that meet customer's needs, and emphasize selling points of article, such as quality and utility; prepare sales slip or sales contract; receives payment or obtains credit authorization; places new merchandise on display.

The merchandise/inventory associate's duties include:

> Implementing new techniques given by merchandise director in product procurement process; assisting in the customer order flow management process to ensure accurate order fulfillment; managing inventory levels and integrity of the inventory database; creating and disseminating all information and statistics on product/brand related procurement, inventory and general sales trends; working closely with the contract fulfillment entity, to ensure the timely processing of shipments and weekly processing of returns, monthly closing, and reconciliation procedures; processing of daily and weekly inventory-related paperwork, including receivers, manifests and purchase orders; process merchandise invoices; verify processed items are accurately recapped on daily merchandise reports; ensure stores holding/suspense items are valid and follow up on the prior month invoices that have not cleared; reconcile store audit inventory to book inventory for store.

The director found the initial evidence insufficient to establish that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. Accordingly, on February 14, 2008, the director issued a request for additional evidence (RFE). The director observed that the petitioner had not established that the beneficiary would function at a senior level within the organizational hierarchy other than in position title, or that she would be involved in the supervision and control of managerial, supervisory or professional employees. The director requested that the petitioner provided a list of clearly delineated duties for each position within the company, with an explanation as to how the beneficiary's subordinates perform duties that are either professional or managerial in nature.

In a response dated February 27, 2008, counsel for the petitioner reiterated the position description recited above, noting that the beneficiary is "in charge of the entire organization, including the ability to hire and fire any and all employees as well as complete discretion over the day-to-day operations of all activities." Counsel conceded that the petitioner's four part-time employees are not managers, supervisors or professionals, but argued that the beneficiary qualifies as the manager of the petitioner's merchandising function. Counsel provided a detailed explanation as to why merchandising is critical to the petitioner's business, and explained that successful merchandising is based upon: inventory (determining the quantity of product to be displayed at the point of purchase); position (finding the right position for displaying the product); and presentation (the manner in which the product is displayed).

Counsel further explained that the beneficiary will function at a senior level within the petitioner's organizational hierarchy, and be in charge of all aspects of the organization, while the beneficiary's four subordinate employees are responsible for performing the tasks necessary to provide the products of the organization.

The director denied the petition on March 21, 2008, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial capacity. The director once again noted that the petitioner had failed to establish that the beneficiary's subordinates are professionals, managers, or supervisors. The director acknowledged that a beneficiary who does not supervise such staff may qualify as a function manager, but only if the petitioner clearly demonstrates that the manager does not directly perform the function. The director determined that the petitioner did not appear to require a full-time manager, and that the beneficiary would be engaged in the non-managerial, day-to-day operations of the petitioner's business.

On appeal, counsel for the petitioner asserts that the director erroneously relied on the fact that the beneficiary does not supervise or control supervisory, professional or managerial employees in concluding that the beneficiary does not qualify for L-1A classification. Counsel emphasizes that the petitioner is relying on the fact that the beneficiary manages the petitioner's merchandising function, and therefore it is not necessary for the beneficiary to supervise supervisory, professional or managerial employees. Counsel submits a brief in support of the appeal; however, the content is essentially identical to that of counsel's letter dated February 27, 2008.

Upon review of the petition and supporting evidence, the petitioner has not established that the beneficiary will be employed in a primarily managerial capacity. As a preliminary matter, the AAO acknowledges that the director did not specifically acknowledge the petitioner's argument that the beneficiary will be employed as a "function manager" as opposed to a manager who supervises and controls a staff of managerial, professional or supervisory personnel. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). Accordingly, the AAO will address the beneficiary's eligibility as a function manager.

The petitioner claims that the beneficiary, in her position as director, will be responsible for managing the petitioner's merchandising function.

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 New College Dictionary* 392 (2008). 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, U.S. Citizenship and Immigration Services (USCIS) 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, while the petitioner provided a list of 24 duties performed by the beneficiary and the amount of time she devotes to such duties, the majority of the listed tasks are too vague to establish that she will primarily perform managerial tasks. The petitioner provided a list of fourteen duties to be performed by the beneficiary within the scope of managing the merchandising function, and indicated that such duties would require 60 percent of her time. The list of duties was nonspecific and repetitive, and conveyed little understanding as to what the beneficiary would actually do to manage merchandising within the petitioner's small retail store. For example, the petitioner indicated that the beneficiary will "assure consistent operational implementation of merchandising plans," "assure implementation of merchandising initiatives," "communicate and express project initiatives," "develop timely action plans that maximize sales opportunities," and "determine store retails floor layout and develop product planograms [sic]." The petitioner has neither described its projects or its merchandising initiatives or plans, nor described the specific managerial tasks to be performed by the beneficiary in implementing such plans and initiatives. These duties, which account for 20 percent of the beneficiary's time, remain ill-defined and have not been shown to be managerial in nature. 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 indicates that the beneficiary will also "initiate product assortment changes based on market visits/analysis; "initiate assortment recommendations and approve store assortment changes," "communicate product segment assortments and segment voids" to the merchandising associate; and "participate in eyewear lifecycle changes." The petitioner has not explained how these duties are managerial in nature. Rather it appears that the beneficiary simply performs market research to determine which products the petitioner should carry.

The petitioner indicates that the beneficiary devotes an additional eight hours per week to "develop, define and execute relocation inventory management related processes," "monitor store target inventories, "initiate store capacity changes," and "complete store capacity processes." While the beneficiary's responsibility for defining processes may be considered managerial, it is unclear why she would be required to continuously develop processes on a weekly basis. The beneficiary's responsibilities related to "store capacity" and monitoring inventories have not been adequately explained.

Overall, the beneficiary's duties associated with the management of the merchandising function appear to amount to deciding which products to carry, how much inventory to have on hand, and how to best display the products. The photographs submitted of the petitioner's business depict a small retail store with a few display cases of eyeglass frames and sunglasses. At the end of 2007, the petitioner had inventory valued at only $1,343. Given the nature of the petitioner's business, it is reasonable to question whether it plausibly requires a full-time manager to devote the majority of her time to performing management-level duties associated with merchandising.

The petitioner indicates that the remaining 40 percent of the beneficiary's time is devoted to a combination of general managerial functions and operational tasks. For example, the petitioner states that the beneficiary's duties include: "setting business standards and general specifications"; "directing the development of internal and external operations"; and "overseeing the distribution and control of goods and services in the United States." Again, these duties provide little insight into what the beneficiary actually does on a day-to-day basis. The actual duties themselves 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 remainder of the beneficiary's duties include "liaising among suppliers and distributors," "maintaining regular communication with customers," "negotiating pricing and contracts," and supervising and assigning work to non-professional employees. The petitioner has not established how any of these duties fall under the statutory definition of managerial capacity. The record does not clearly establish that the beneficiary's subordinates wholly relieve her from such routine tasks as purchasing inventory, and it can therefore not be concluded that her responsibilities for liaising with suppliers and negotiating contracts are managerial-level tasks.

Moreover, with respect to the petitioner's claim that the beneficiary will be primarily a "function manager" as opposed to a "personnel manager," it is noted that the beneficiary is the only full-time employee of the petitioner's store and the only employee who possesses any supervisory authority. Furthermore, her job duties include working in the store, supervising personnel, assigning their work, and providing them with instructions in carrying out their duties. While the petitioner claims that the beneficiary will spend substantially more time "managing the merchandising function" than she will supervising the petitioner's part-time, non-professional staff, a review of the totality of the evidence in the record does not support this assertion. 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). The AAO does not doubt that the beneficiary makes the ultimate decision as to what inventory the store will carry, how much inventory to purchase, and how it will be displayed. The petitioner has not, however, demonstrated that the beneficiary will perform primarily managerial tasks associated with merchandising.

Furthermore, the petitioner claims to offer on-site eye examinations in its store, has provided evidence that it purchased $12,000 in optical equipment, and provided a photograph of an examination room located on its premises. The petitioner does not claim to employ an optometrist to provide eye examinations, nor provided evidence that it has a relationship with an independent optometrist that provides such services on its premises. It is unclear whether the petitioner simply neglected to document who is providing eye examinations to its customers, whether one of the petitioner's five employees is actually providing such services, or whether the petitioner is not in fact providing these services. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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 noted above, the record shows that the petitioner does not offer a wide variety of merchandise or carry a large inventory. The claim that it requires a full-time manager to perform high-level duties associated with its merchandising function is not credible.

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). As discussed above, the petitioner has provided a vague job description that fails to explain the actual duties the beneficiary will perform on a daily basis or the amount of time she will devote to activities related to managing the assigned function. The beneficiary may function at a "senior level" compared to the four part-time employees working for the petitioner's store, but it does not automatically follow that she qualifies as a function manager.

The AAO does not dispute that small companies require leaders or individuals who plan, formulate, direct, manage, oversee and coordinate activities; the petitioner in this matter, however, has not demonstrated that the beneficiary would spend a substantial amount of time performing duties at the managerial level. The petitioner must establish with specificity that the beneficiary's duties comprise primarily managerial or executive responsibilities and not routine operational or administrative tasks. The fact that the beneficiary manages a business, regardless of its size, does not necessarily establish eligibility for classification as an intracompany transferee in an executive capacity within the meaning of section 101(a)(15)(L) of the Act. Here, the record fails to establish that the majority of the beneficiary's duties will be primarily directing the management of the organization or a component or function of the organization.

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a primarily managerial capacity under the extended petition. Accordingly, 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.