

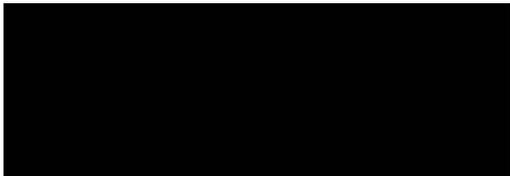


U.S. Citizenship
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Services

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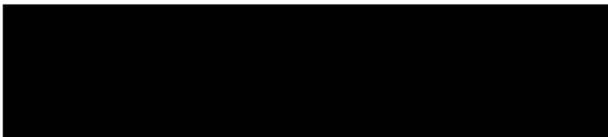
File: EAC 08 117 5236 Office: VERMONT SERVICE CENTER Date:

MAY 19 2009

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:



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, 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 nonimmigrant visa petition and 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 executive/chief operating officer 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 Texas limited liability company, operates a beauty, cosmetic and hairstyling salon, and claims to be a subsidiary of Family Hairdresser Fink GmbH, located in Germany. The beneficiary was previously granted L-1A classification for a period of one year in order to open a new office in the United States and the petitioner now seeks to extend her status for two additional years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

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 overlooked the fact that the petitioner had been operating for less than six months at the time of filing, and considered other irrelevant factors in determining whether the beneficiary will be employed in a primarily managerial or executive capacity. Counsel contends that the beneficiary performs primarily executive duties.

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 in a primarily managerial or executive capacity under the extended petition.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner filed the nonimmigrant visa petition on March 17, 2008. The petitioner stated on Form I-129 that the company, which operates a beauty salon, employs eight workers. In an attachment to Form I-129, the petitioner described the beneficiary's duties as follows:

Direct operations of beauty salon including:

- Direct finances of German and U.S. operations
- Restructure compensation system to increase return
- Direct ongoing renovations and expansion to achieve European-style salon
- Develop marketing program and oversee implementation
- Establish intern program in connection with area schools

The petitioner submitted an organizational chart which depicts the beneficiary as the company's president/chief executive officer responsible for "budgeting & finance, planning, marketing, hire, fire." The chart indicates that the beneficiary supervises a beauty salon manager/hairstylist, who in turn supervises three employees who provide hairstyling, pedicure, manicure and skincare services. The chart also identifies a human resources manager/sales representative, a receptionist/cashier, and vacant positions for skin care specialists, a massage therapist, a hairstylist and hairstylist trainees.

The petitioner submitted copies of its Texas Forms C-3, Employer's Quarterly Report, for the last two quarters of 2007, which show that the company began paying employees in September 2007. The petitioner reported seven employees for the months of September and October 2007, and five employees in November and December 2007.

Finally, the petitioner submitted a copy of its original business plan, and a statement from the beneficiary, who explained that when she arrived in the United States, she opted not to purchase the salon initially identified for acquisition because she had received invalid information regarding the business. The beneficiary stated that the petitioner purchased its salon on August 29, 2007, and has not been able to achieve all of the goals set forth in the original business plan.

The director found the initial evidence insufficient to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. Accordingly, the director issued a request for evidence (RFE) on April 29, 2008, instructing the petitioner to submit, inter alia, the following: (1) a comprehensive description of the beneficiary's duties; (2) a list of all employees by name and job title; (3) complete position descriptions for all U.S. employees, including a breakdown of the number of hours devoted to each employee's job duties on a weekly basis; (4) copies of all Forms W-2 and Forms 1099 issued in 2007; and (5) a copy of the petitioner's 2007 corporate tax return.

In response, the petitioner submitted the following position description for the beneficiary:

- Responsible for realization of positive net financial return on U.S. operation and continuation of same for German operation, including review of financial and accounting records to determine changes to business strategies
- Establish intern program with area secondary school and post-secondary schools that have cosmetology training programs: Negotiate terms of program with different schools
- Direct hiring and training to locate and retain qualified staff in face of aging of cosmetology workers generally; determine appropriate compensation systems (first restructuring of same has led to positive net return in 2008) to deal with retention.
- Direct marketing programs to achieve steadily increasing clientele seeking European system of salon experience, including military base personnel (who served in Germany); oversee implementation of same
- Enter into contracts with area businesses for specified volume of business: Major hospital contract under review
- Oversee expansion of facilities to allow for treatments associated with European salon experience: work with government entities for appropriate permitting; select construction options and enter into contracts for work as required
- Select accountant with knowledge of international tax reporting

The petitioner provided an updated list of employees which included four hairstylists who also provide manicures and other services, and a receptionist who is responsible for scheduling appointments and handling the cash register. The petitioner indicated that all five employees work 40 hours per week. The petitioner provided a copy of its Texas Form C-3 for the first quarter of 2008, which confirmed the employment of the workers identified on the employee list.

Finally, the petitioner submitted copies of various advertisements placed by the petitioner for its salon. The advertisements specifically mention the beneficiary's Masters in Cosmetology received in Germany and her

ability "to work on all hair types." Some of the advertisements refer to her as a "German Professional Hair Stylist."

The director denied the petition on August 6, 2008, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. In denying the petition, the director noted that the petitioner's description of the beneficiary's duties was generalized, and failed to identify the specific managerial or executive duties to be performed within the context of the petitioner's current staffing arrangement. The director further found that the petitioner did not establish that the beneficiary would supervise managers, professionals or subordinate supervisors, or that the subordinate staff would relieve the beneficiary from participating in providing the sales or services of the business. Finally, the director noted a discrepancy between the number of claimed and actual employees.

On appeal, counsel for the petitioner asserts that the beneficiary has functioned and will continue to function as an executive for the U.S. company. Counsel notes that the director's decision "ignores the fact that the petitioner had operated for less than six months at the time of filing the extension petition." Counsel further contends that the director inappropriately implied that a hair salon with six employees does not require an executive or manager, and incorrectly suggested that a company must employ professional workers in order to support a managerial or executive position.

Finally, counsel asserts that "the decision makes broad, conclusory statements about the beneficiary's duties, all of which seem premised on the number of non-degreed employees and the small amount of income the business realized in 2007."

Upon review, and for the reasons discussed herein, the AAO concurs with the director's determination. The petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

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 show 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 fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive"). While the AAO does not doubt that the beneficiary exercises discretion over the petitioner's day-to-day operations and has the appropriate level of authority, the petitioner has failed to show that her actual duties will be in a primarily managerial or executive capacity.

As noted by the director, the petitioner has failed to provide a sufficiently detailed description of the beneficiary's day-to-day duties. The initial position description identified five areas of responsibility, but failed to articulate any specific tasks the beneficiary performs on a daily basis. For example, the petitioner stated that the beneficiary "directs finances," "restructures compensation system," "directs ongoing renovations," "develops marketing program and oversees implementation," and "establishes intern program in connection with area schools." The petitioner did not explain the specific managerial or executive duties associated with any of these functions, nor did it provide evidence of any ongoing renovations or any documentation related to the intern program. While the AAO does not doubt that the beneficiary has or will have responsibility for these functions, it is reasonable to question whether the manager of a salon spends a significant portion of her time restructuring its compensation system on a daily basis. Moreover, while the petitioner stated that the beneficiary "directs" financing and "oversees" marketing, it does not claim to have anyone on its staff subordinate to the beneficiary, to perform day-to-day bookkeeping, banking or other financial duties, or anyone to perform marketing duties such as placing advertisements in local newspapers. 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 director therefore requested a comprehensive description of the beneficiary's' duties. As noted above, the director also instructed the petitioner to provide complete descriptions of *all* employees' duties, and a breakdown of the number of hours devoted to each employee's duties on a weekly basis. This request for a breakdown of each employee's duties would reasonably include the beneficiary. While the petitioner submitted a slightly lengthier description of the beneficiary's duties in response, it provided little additional insight into what the beneficiary primarily does on a day-to-day basis. For example, the petitioner added that the beneficiary has responsibility to hire and train qualified staff and to select an accountant. These duties may qualify as managerial in nature, but it has not been shown that such duties require a significant portion of the beneficiary's time. The petitioner indicated that the beneficiary has been negotiating with schools, contractors and area businesses for various purposes, but failed to submit any documentary evidence in support of this claim. 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)). 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 her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

In this case, the evidence of record, specifically the petitioner's advertisement, indicate that the beneficiary's actual duties include providing hairstyling services to the petitioner's customers. 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties,

or whether the beneficiary primarily performs non-managerial administrative or operational duties. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). The beneficiary's control, management or direction over a company cannot be assumed or considered "inherent" to her position merely on the basis of the beneficiary's job title, placement on a general organizational chart or broadly-cast business responsibilities. The petitioner's description of the beneficiary's duties is insufficient to establish that the beneficiary performs or will perform primarily managerial or executive duties.

When examining the managerial or executive capacity of a beneficiary, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

Here, the petitioner initially claimed to employ eight workers, including two subordinate managers. In response to the request for evidence, the petitioner identified the "beauty salon manager" as a hairstylist, while the "human resources manager" was absent from the updated employee list, which included one receptionist and four stylists. 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). The totality of the record does not support a conclusion that the beneficiary's subordinates are supervisors, managers, or professionals. The beneficiary does not qualify as a "personnel manager" based on her supervision of hairstylists or a receptionist.

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. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a position description that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's

daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. Here, the petitioner has not clearly articulated a claim that the beneficiary manages an essential function of the petitioning company. Furthermore, as discussed above, the petitioner has not provided a detailed description of the beneficiary's duties sufficient to establish that she performs primarily managerial duties.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* In this case, the beneficiary has the appropriate level of authority, but the petitioner has not shown that she spends the majority of her time focused on the broad goals of the organization. As discussed further below, the petitioner has not established that it has subordinate staff to relieve the beneficiary from many of the day-to-day aspects of operating the business.

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, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS 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 USCIS 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.

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for USCIS 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).

Here, the petitioner operates a beauty salon that is open for business 46 hours per week. It employs the beneficiary as president/CEO, four stylists and one receptionist. The petitioner has not established that the subordinate employees would relieve the beneficiary from performing non-managerial duties associated with administrative, financial and marketing/advertising functions, nor does it claim that any of the subordinate personnel are responsible for tasks such as purchasing supplies. In addition, although not acknowledged by the petitioner, the business does in fact promote the beneficiary's services as a hairstylist in its advertising materials. Collectively, this brings into question how much of the beneficiary's time can actually be devoted to managerial or executive duties.

The AAO acknowledges the petitioner's claim that the petitioner's growth was impacted due to the beneficiary's decision to not proceed with the purchase of the salon identified in its initial business plan. However, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

As noted above, 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 USCIS 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. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. 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.