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U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
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U.S. Citizenship
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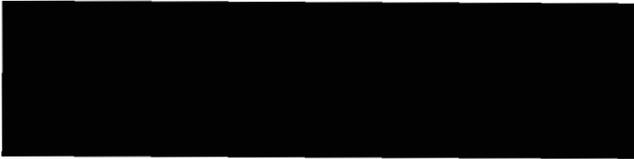
FILE: WAC 09 128 51360 Office: CALIFORNIA SERVICE CENTER Date: JAN 11 2010

IN RE: Petitioner:
Beneficiary:



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

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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's employment as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Nevada corporation, operates a global business coaching franchising/licensing company. The petitioner states that it is an affiliate of [REDACTED], located in Australia. The beneficiary was initially granted L-1A classification for a three-year period commencing in July 2006 and the petitioner now seeks to extend her status for three additional years in the position of Director of Sales and Marketing (Franchising).¹

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. On appeal, newly-retained counsel for the petitioner asserts that the petitioner did not clearly understand the amount and quality of proof necessary to sustain a petition for an extension of status pursuant to 8 C.F.R. § 214.2(l)(14)(ii), and now provides additional evidence further describing the nature of the petitioner's business and the scope of the proffered position. Counsel emphasizes that the beneficiary's employment in a managerial and executive capacity was "clearly proven and accepted by the Service previously," and that the denial of the extension petition was arbitrary and capricious. Counsel submits a brief and additional documentary evidence 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 the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate 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.

¹ The petitioner stated on the Form I-129, Petition for a Nonimmigrant Worker, that the beneficiary's position title is "Global Marketing Manager," but has since clarified that she assumed the position of Director of Sales and Marketing (Franchising), shortly before the instant petition was filed. There is ample evidence in the record confirming the beneficiary's current job title as such.

- (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 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), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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 Form I-129, Petition for a Nonimmigrant Worker, on March 31, 2009. The petitioner stated on Form I-129 that the beneficiary would be employed in the position of Global Marketing Manager. The petition was accompanied by a letter from the petitioner dated April 27, 2006, which presumably was provided in support of the previous L-1A petition submitted on the beneficiary's behalf. The petitioner also submitted several exhibits which had accompanied the previous petition, including a description of the Global Marketing Manager/Director position.

The director issued a request for additional evidence (RFE) on April 7, 2009, in which she requested, *inter alia*, additional evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. Specifically, the director instructed the petitioner to provide: (1) a detailed description of the beneficiary's proposed duties, including the percentage of time she will spend on specific tasks; (2) a copy of the petitioner's current organizational chart which clearly identifies the beneficiary's position and all employees under her supervision by name and job title; (3) brief job descriptions for all employees under the beneficiary's supervision; and (4) if the beneficiary will be employed in an executive capacity, a list of the specific discretionary decisions that the beneficiary has exercised over the last six months and a list of the duties she has performed on a day-to-day basis during the same period.

The petitioner's response to the RFE included a press release issued by the petitioner on February 1, 2009, in which it announced the beneficiary's appointment to the position of Director of Franchise Sales and Marketing. The press release indicates that the beneficiary "headed the marketing efforts of [the petitioner's] brand for four years as Director of Marketing," and has "moved on to the franchise sales side of the business." The press release includes a quote from the petitioner's founder and CEO who attributes to the beneficiary leadership of the petitioner's "entire coaching community the world over," and states that she was chosen to lead the company's franchise development efforts based on her "strategic thinking ability."

In response to the RFE, the petitioner submitted an organizational chart for the U.S. company, which depicts the beneficiary as Director of Marketing/Franchise Sales, reporting to the chairman/CEO of the petitioner's group. The position is identified as lateral to the positions of general counsel, director of marketing/IT, and director of training/COO. The petitioner's chart indicates that the beneficiary supervises a sales assistant and the director of franchise sales, and the petitioner provided position descriptions for both employees.

In a letter dated April 30, 2009, the petitioner's general counsel stated that the beneficiary's specific day-to-day duties over the last six months have included the following:

- Implements Hiring & Firing decisions of marketing and sales personnel;
- Restructuring of duties of sales and marketing personnel in line with specific goals and policies;
- Integral part of the executive team and requires no supervision from the CEO/Chairman on a day-to-day basis;
- Communicates and reports to the CEO/Chairman on a weekly basis regarding strategic progress and plans;
- Conducts webinars and group calls;
- Authorizes full budget responsibilities for sales and marketing transactions in line with Company policy and guidelines.
- Conducts Department meetings with business coaching leaders;
- Coaches and motivates the sales and marketing teams on success, leadership and goal achievement;
- Negotiates the sales of business in other regions of the world; and
- Promotes the marketing services of the company and the demand for its products and services globally.

The director denied the petition on May 14, 2009, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. In denying the petition, the director emphasized that the petitioner had failed to provide the requested breakdown of the percentage of time the beneficiary will allocate to specific duties. The director found that, based on the descriptions provided, it appears that the beneficiary would be performing the company's everyday marketing and public relations duties.

The director further emphasized that, while the beneficiary's position title is Director of Franchise Sales and Marketing, neither of the beneficiary's two subordinates is responsible for marketing. The director therefore determined that the beneficiary would be directly performing the claimed marketing duties, rather than allocating non-qualifying tasks to her subordinate personnel.

On appeal, counsel for the petitioner asserts that the director erred in denying the petitioner's extension petition, noting that the beneficiary's qualifications for the benefit sought were previously proved by detailed documentation when her prior L-1A petition was approved. Counsel asserts that, contrary to the director's findings, the beneficiary performs the high-level duties of an executive and manager and "actively oversees the day-to-day production work of the functions she manages."

Counsel asserts that the beneficiary "oversees the marketing efforts of the entire [company] brand, including Master Licensees and their subordinate network of coaches worldwide by giving them policy guidance via various sources." Counsel notes that the beneficiary also leads the marketing team in the development of media presence in print, on the web, in social media, and in news releases, and represents the entire brand at major international franchising expos. Counsel contends that such duties require the authority of an executive and are not "production line" duties.

Counsel further asserts that the beneficiary fulfills the four criteria for executive capacity in that: "(A) she directs the management of a major component or function of the organization (Marketing and Sales); (B) she establishes the goals and policies of the component or function; (C) she exercises wide latitude in discretionary decision-making (within the marketing function and department); and (D) she receives only general supervision or direction from the chief executive of the organization.

In addition, counsel asserts that the beneficiary qualifies as an L-1A manager because she supervises not only marketing and sales teams, but also "the IT Team for all Marketing Fund projects and the Joint Venture partners and Master Licensees and their subordinate Firm and Practice Owners throughout the world." Counsel asserts that the beneficiary supervises a team comprised of nine employees.

Counsel concludes by stating that, with the extensive additional evidence submitted on appeal, the petitioner has established by a preponderance of the evidence that the beneficiary's duties will be primarily managerial or executive in nature.

The petitioner's extensive supporting documentation includes a detailed sworn statement from the company's owner and CEO, [REDACTED] who provides a detailed description of the petitioner's global franchise and the beneficiary's role within the sales and marketing functions. [REDACTED] explains that the company's purpose is to provide strategic direction for the brand and to expand the franchise into new territories worldwide. He indicates that it has 46 Master Licensees ("MLs") in 26 countries that in turn are responsible for over 1,000 franchisees, categorized as firm owners, practice owners and employee coaches. The petitioner provides its joint venture partners, Master Licensees, firm and practice owners, and employee coaches with overall strategic vision, policies and direction; franchise contracts, trademark registration and production; research and development; systemization, IT and overall administrative infrastructure; branding/brand approval; marketing investment from Marketing Funds collected, award of Joint Venture Partner and ML franchises in new countries and regions; training for new partners and ML franchises; reviewing weekly reporting of numbers, Franchise compliance paperwork; monthly accountability coaching; issuance of contractual breach notices for non-performance or noncompliance; weekly communication via newsletters and forum announcements; weekly training and brainstorming webinars; and onsite visits of offices/audits. The petitioner, in turn, receives its revenue through granting of joint ventures, master licenses and franchises, monthly royalties, training income, product revenue, and a marketing levy contributed by all firm owners and practice owners.

[REDACTED] indicates that the beneficiary "was recently promoted to Chief of Sales and Marketing" a role in which she devotes 50% (or more) of her time on brand development and management of Marketing Fund initiatives, 25% of her time on "overall strategic planning of the company;" and the remaining 25% of her time on "sales, training and support of Joint Venture Partners and Master Licensees."

The petitioner submits a revised organizational chart indicating that the beneficiary supervises the "marketing team," "sales team" and the IT team (when the IT team is "working on Marketing Fund projects.") The petitioner further indicates that firm and practice owners must obtain trademark and brand approval from the beneficiary, and that joint venture partners and master licensees report directly to the beneficiary with regard to sales and marketing activities within their assigned territories, and are accountable to the beneficiary for contractual obligations and sales and performance obligations.

In addition, the petitioner states that the beneficiary supervises the following employees: the director of systems and information technology, for projects funded by the Marketing Fund; the public relations coordinator, who writes press releases and weekly newsletters; the copywriter, who writes content for websites and brochures; the graphic designer; the social media coordinator, a programmer, an IT manager/web designer, the director of franchising, and the sales assistant.²

The petitioner also provides a list of approximately 35 duties the beneficiary performs within the scope of the marketing and sales departments, and, as further evidence of her executive and managerial functions, has submitted, *inter alia*, the following: a European marketing plan presented by the beneficiary to the petitioner's owner and CEO; copies of 2008 quarterly marketing reports prepared for the beneficiary on behalf of the global marketing team; copies of newsletter articles written by the beneficiary; copies of corporate press releases related to the beneficiary; affidavits from the beneficiary's direct and indirect subordinates, who confirm her role within sales and marketing and her supervisory authority; and copies of performance appraisals conducted by the beneficiary for subordinate employees.

Upon review of the additional documentation submitted on appeal, the petitioner has overcome the director's objections to the denial of the petition. The director's decision will be withdrawn and the petition will be approved.

Although the petition will be approved, the AAO emphasizes that the petitioner's reliance on a previous approval as evidence of the beneficiary's ongoing eligibility was misplaced. It is worth emphasizing that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Furthermore, while the regulation at 8 C.F.R. § 214.2(l)(14)(i) indicates that supporting documentation is not required when extending a petition, the AAO notes that the petitioner failed to disclose at the time of filing that the beneficiary had assumed a new position in January or February of 2009. Pursuant to the regulation at 8 C.F.R. § 214.2(l)(7)(i)(C), the petitioner shall file an amended petition to reflect "any information which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the Act." The beneficiary's appointment to a new position within the petitioner's organizational hierarchy could potentially affect her continued eligibility and therefore should have been disclosed at the time the petition was filed. Nevertheless, the AAO concludes after reviewing the totality of the evidence that the beneficiary's former and current roles within the petitioning company qualify as executive or managerial in nature.

The director denied the petition primarily based on a conclusion that there are no subordinate employees to perform the marketing and public relations functions of the petitioning company, and an assumption that the beneficiary must be personally performing such non-qualifying functions. The evidence submitted on appeal clarifies how such tasks are allocated among the staff of the petitioner's global headquarters office, and establishes that the beneficiary does in fact at least indirectly supervise a number of personnel who are

² The AAO notes that the individual identified as "Director of Systems and Information Technology" on appeal was identified on a previous organizational chart as the "Director of IT/Marketing." The record contains a Master License Franchise Disclosure Document dated June 2008 which identifies this individual as "Director of Systems & IT." The record also contains a sworn affidavit from this individual indicating his title as Director of Systems and IT.

responsible for these functions. The AAO is satisfied that the beneficiary's role with respect to day-to-day marketing activities is limited to assigning and approving the creation of marketing and press materials developed by such staff, and ensuring consistent representation of the petitioner's brand both internally and externally.

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. 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 manages an "essential function" within the organization, or a department or subdivision of the organization; second, the beneficiary functions at a "senior level" within the organizational hierarchy or with respect to the function managed; and third, the beneficiary "exercises discretion" over the day-to-day operations of the function.

When examining the executive or managerial capacity of the beneficiary, USCIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). If a petitioner claims that the beneficiary is primarily managing an essential function, the petitioner must furnish a detailed job description that clearly describes the duties to be performed, 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. 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 *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 employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Beyond the required description of the job duties, USCIS 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, 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.

In this matter, upon review of the totality of the record, the petitioner has established that the beneficiary will be primarily serving as a function manager. First, the AAO is satisfied that the beneficiary's role within the organization is that of a senior-level manager or executive responsible for the management of an "essential function," specifically, ensuring the consistency and integrity of the public image of the petitioner's highly successful brand, and managing the petitioner's development of franchise opportunities in new territories.

Second, the petitioner has established that the beneficiary functions at a "senior level" within the organizational hierarchy and that the petitioner's sales, marketing, and IT teams perform the non-qualifying tasks necessary to market and sell franchise and licensing opportunities to potential customers. The beneficiary reports directly to the CEO and founder of the company, works closely with other senior managers/executives, and is identified to the public as a member of the company's executive team. The petitioner operates with a relatively small direct workforce of only 40 personnel; however, given the large international scope of its franchising and licensing efforts and the nature of the business, the petitioner has established that it has a need for a team of executives to provide strategic direction and high-level support for the petitioner's brand and product worldwide. Further, the petitioner has established that the beneficiary is a key member of the executive team, with accountability for overseeing marketing and public relations programs, controlling marketing costs, and monitoring compliance of joint venture partners and master licensees.

Although the director concluded that the beneficiary would primarily be performing marketing and public relations duties, the petitioner has submitted sufficient evidence to establish that it maintains a sufficient staff of sales, marketing, creative and IT personnel who would perform the associated non-qualifying duties, leaving the beneficiary free to primarily engage in developing and overseeing execution of long-term strategies. The AAO is satisfied that the beneficiary manages or directs, rather than performs, the functions assigned to her.

Finally, the petitioner has established that the beneficiary "exercises discretion" over the day-to-day operations of the function in that she controls a broad range of activities associated with management of the petitioner's brand and marketing activities, including budget responsibilities and providing strategic marketing direction to key master licensees responsible for implementing the petitioner's business model in assigned territories worldwide.

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, the petitioner has met that burden. For the foregoing reasons the decision of the director will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.