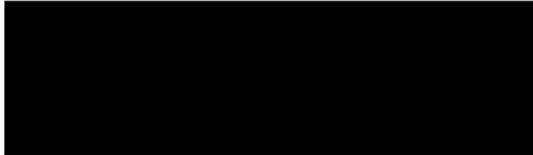


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**U.S. Citizenship  
and Immigration  
Services**



D7

DATE: **OCT 25 2011** OFFICE: CALIFORNIA SERVICE CENTER FILE:

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:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner, a Colorado corporation, claims that it is an "export coffee enterprise with customers in Europe, Japan and the USA." The petitioner states that it is a branch office of [REDACTED]. Accordingly, the United States entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) 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 was initially granted a one-year period of stay to open a new office. The petitioner now seeks to extend the beneficiary's stay in order to continue to fill the position of chief executive officer for a three-year period.

The director denied the petition on February 5, 2009, concluding that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company. The director noted that it did not appear that the beneficiary supervises a staff of professional, managerial or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties, and thus the beneficiary will be primarily involved in performing the day-to-day services essential to running a business.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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) further 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 issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity.

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 nonimmigrant petition was filed on August 29, 2008. The Form I-129 indicates that the beneficiary will continue to be employed in the position of chief executive officer/owner/co-founder. The petitioner claimed to have three employees. In a support letter dated March 19, 2007, the beneficiary and owner of the petitioner stated that the "U.S. market has vast potential," and that "I am currently working to obtain a 'foothold' in the U.S. market by establishing a regional office in Denver, Colorado." The petitioner also stated that "our strategy is to initially establish a local office in order to be closer to our current customers in the U.S. and market to new customers."

The petitioner submitted a receipt for Customs Bond as an importer or broker valid for one year from the effective date of June 2, 2008. In addition, the petitioner submitted the company's Certificate of Registration, Articles of Incorporation, Operating Agreement, and Denver Sales Tax, Use, Lodgers Tax License and/or Occupational Tax Registration. The petitioner also submitted documents pertaining to the parent company located in Nairobi, Kenya.

Furthermore, the petitioner submitted a company strategic plan. The plan explained the accomplishments the petitioner has made since first arriving into the United States in April 2008 to include: 1) registration of the petitioner with the city of Denver; 2) acquisition of EIN number and sales tax number; 3) opening of business bank account; and 4) acquisition of vehicles and residences. The plan also stated that the petitioner has contracted with two companies to start doing business. Furthermore, the plan stated that the petitioner has "managed to do some marketing, introducing [the petitioner] to several roasters and wholesalers by placing an advertisement that will

be appearing in the [REDACTED] issue and also mass mailing of our company brochure.”

The strategic plan also outlined the petitioner’s key strategies as follows:

- Extend links with key market players such as wholesalers, roasters as well as other exporters
- Seek new market segments for the coffee; explore other regions of the country
- Commission assessments of key markets; target roasters in larger cities/states, CA, NY, etc
- Start participating in trade shows and exhibitions
- Pursue strategic alliances with complementary players
- Strengthen web presence by making company website user friendly

On October 1, 2008, the director determined that the petitioner did not submit sufficient evidence to process the petition.

In response to the director’s request for evidence, the petitioner indicated that it is owned by three individuals who fill the positions of Chief Executive Officer/President (the beneficiary), General Manager and Chief Operations Officer.

The petitioner explained the duties of the beneficiary as follows:

- Policy making
- Executive Decision making
- Draw and sign contracts
- Negotiate pricing
- Choose buyers
- Educate on Kenyan Coffee

In addition, the petitioner described the duties of the General Manager as responsible for the “supervision of operations,” “allocation of duties,” “receivables/payables,” and, leases and tax preparation. The petitioner also described the duties of the chief operations officer as responsible for, “sample preparation and mailing to prospective clients;” “clearing coffee with authorities;” “shipping arrangements from Port to warehouse to clients;” “negotiating rates with service vendors;” “marketing and sales;” “market research/generating new leads;” and, “setting up meetings/travel.” According to the organizational chart, the chief executive officer, the general manager and the chief operations officer are all on the same level of authority.

The petitioner also stated that the offices are located in an apartment and submitted a residential lease agreement.

The director denied the petition on February 5, 2009 on the ground that insufficient evidence was submitted to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company.

On appeal, counsel for the petitioner stated that the “beneficiary directs and manages all supervisors, professionals and other managerial employees of Petitioner company.” Counsel also states that the “beneficiary has and continues building relationships with United States (U.S.) companies and contractors in order to facilitate the presence of [the petitioner] in the US,” and “he has leased [redacted] as well as [redacted] to house his coffee products.” Furthermore, counsel contends that the beneficiary’s “expertise and knowledge of the coffee industry precipitates that he meet with clients to host coffee tasting, educate buyers on manufacturing and processing procedures, and preview all marketing efforts.” Counsel also states that the “majority of the beneficiary’s time is spent in marketing and soliciting new business, not doing administrative, ministerial, and/or services tasks (day-to-day functions).” Moreover, counsel states that “as the company continues to grow in the U.S., the Beneficiary will move into other office space and hire other administrative and clerical employees, similar to the staff that is employed at the [redacted].”

Counsel's assertions are not persuasive. Upon review of the petition and evidence, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. 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(1)(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 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).

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. An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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 International*, 19 I & N Dec. at 604.

Here, while the beneficiary evidently exercises discretion over the day-to-day operations of the business, the petitioner’s description of his proposed duties suggest that the beneficiary’s actual duties include a number of non-managerial and non-executive duties.

The beneficiary's proposed job description is vague, and states that the beneficiary will be responsible for “policy making,” “executive decision making,” “draw and sign contracts,” “negotiate pricing,” “choose buyers,” and “educate on [redacted].” 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).

In addition, the job duties required of the beneficiary include non-qualifying duties such as: "negotiate pricing," "draw and sign contracts," and be responsible for the marketing and public relations. Since the petitioner has not explained that the U.S. company has hired any employees in marketing, public relations or financial development, it appears that the beneficiary will be providing the services of market research and operations rather than directing such activities through subordinate employees. Again, 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. 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 petitioner further states that the beneficiary will spend his time in developing a "personal relationship with the customer and will often be involved with the details of contract negotiation." Without additional clarification from the petitioner regarding the managerial or executive duties involved, the AAO cannot distinguish this vague responsibility from routine administrative tasks. If the beneficiary is in fact researching the distributors and vendors, and negotiating the contracts, or simply ordering inventory from suppliers, these duties have not been shown to be managerial or executive in nature. 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)).

In the instant matter, the job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will perform or how his time will be divided among managerial and non-managerial duties. In addition, the petitioner has not provided a breakdown of the percentage of time the beneficiary will spend on various duties, and the petitioner has not articulated whether each duty is managerial or executive. Thus, the AAO must attempt to glean the nature of the beneficiary's proposed duties from the vague descriptions submitted.

In addition, on appeal, counsel for the petitioner states that the beneficiary "directs and manages all supervisors, professionals and other managerial employees of [REDACTED]" and "directs, manages, and supervises all employees" of the company in [REDACTED]. However, according to the organizational chart submitted by the petitioner, the three individuals employed by the petitioner are on the same level of authority. The beneficiary does not supervise any individuals. In addition, the petitioner did not submit any documentation to support the claim that the beneficiary supervises individuals from the company in [REDACTED]. 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).

In addition, on appeal, counsel states that the petitioner has "leased warehouses in Lakewood, Colorado as well as Sean Leandro, California"; however, the petitioner did not submit any lease agreements evidencing that the petitioner has leased the warehouses. In addition, the petitioner submitted a business plan that indicated that it sold a total of \$196,380 in coffee in May 2008 and June 2008. Although the business plan states two contract numbers/invoices for these sales, the petitioner did not submit the actual invoices with the petition. The petitioner also stated in the business plan that the petitioner started doing business with two coffee roasters, The Great American Coffee Co. and Kaladi Brothers but the petitioner failed to present any documentation evidencing a working agreement between the petitioner and these two companies.

Furthermore, the petitioner's office is a residential apartment. It is not clear how the petitioner can run a company with three employees in an apartment. The petitioner has not explained how this is adequate space to hold three employees to run a business. 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)).

In addition, counsel contends that the Service must take into account that the U.S. company was in an early stage of development. The regulations at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, for the reasons discussed herein, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Counsel correctly observes that a company's size alone, may not be the determining factor in denying a visa to a multinational manager or executive. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. Again, there is no provision in CIS regulations that allows for an extension of this one-year period.

Furthermore, 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.*

At the time of filing, the petitioner employed three individuals, a Chief Executive Officer /President (the beneficiary), General Manager (the beneficiary's spouse) and Chief Operations Officer. All three employees are on the same level and are all engaged in the operational and administrative tasks in running the business since they do not supervise any employees that can run the day-to-day tasks. Based on the evidence submitted, it appears that the beneficiary will be performing many of the various operational tasks inherent in operating the company by importing and distributing coffee, such as acquiring products, negotiating contracts, customer service and public relations. It appears that the chief operating officer will also be in charge of several of these tasks and it is not clear what will be the division of work between the two executives. Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Furthermore, on appeal, counsel asserts that the position offered to the beneficiary is executive in capacity. 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 managerial 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.* A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). As the beneficiary supervises one general manager and one sales associate/cashier, the U.S. company has not established a complex organizational structure which would elevate the beneficiary beyond a first-line supervisor. In the instant matter, the petitioner has not established evidence that the beneficiary is serving in an executive capacity with the U.S. entity.

As discussed above, the beneficiary's job description was not sufficient to establish that he would be employed in a primarily managerial or executive capacity, and the petitioner has not identified sufficient employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business.

The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate his position to that of an executive or manager as contemplated by the governing statute and regulations.

The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium size businesses. However, the AAO has also long required the petitioner to establish that the beneficiary's position consists of primarily managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing operational and administrative tasks. It is the petitioner's obligation to establish through independent documentary evidence that the day-to-day non-managerial and non-executive tasks of the petitioning entity are performed by someone other than the beneficiary, although, as correctly noted by counsel, these employees need not be professionals. Here, the petitioner has not met this burden.

Beyond the findings in the previous decision, the remaining issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the petitioning entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner's description of the stock distribution of the companies does not meet exactly the definitions constituting a qualifying relationship between the United States and the foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The supporting documentation indicated that the foreign company is owned by the beneficiary and the beneficiary's spouse, each owning 50%. The ownership of the U.S. petitioning company is the beneficiary (30%), the beneficiary's spouse (20%) and [REDACTED] (50%). Thus, no individual owns more than 50 percent of the foreign entity and the U.S. company. The ownership of the foreign entity and the U.S. company is not considered a qualifying relationship. For this additional reason, the petition will be denied.

Beyond the decision of the director, the petition indicates that the beneficiary and his spouse each own 50 percent of the foreign entity. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In this matter, the petitioner has not furnished evidence that the beneficiary's services are for a temporary period and that the beneficiary will be transferred abroad upon completion of the assignment. In addition, the fact that both owners of the original foreign corporation reside in the United States raises the question of whether the parent organization is still doing business so that a qualifying relationship exists pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). For these additional reasons, the appeal must be dismissed and the petition denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.