



U.S. Citizenship  
and Immigration  
Services



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DATE: **DEC 05 2012** Office: VERMONT 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:

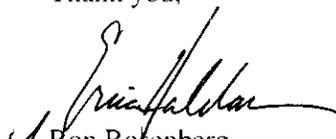


INSTRUCTIONS:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the nonimmigrant visa petition. 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 classify the beneficiary as an 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 New York limited liability company, states that it is a global manufacturer and distributor of apparel. It claims to be an affiliate of [REDACTED], located in Hong Kong. The petitioner seeks an initial approval for the beneficiary for a period of three years so that he may serve as the company's Executive Vice President.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director misapplied applicable law and came to erroneous conclusions of fact in denying the petition. Counsel asserts that the record supports a finding that the beneficiary will be employed in an executive capacity. Counsel submits a brief in support of the appeal.

### **I. The Law**

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.
- (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.

## II. The Issue on Appeal

The sole issue to be addressed is whether the petitioner established that the beneficiary will be employed in the United States in an executive capacity. The petitioner does not claim that the beneficiary will be employed in a managerial capacity.

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 Form I-129, Petition for a Nonimmigrant Worker, on March 25, 2010. The petitioner states that it is a global manufacturer and distributor of apparel with three employees and gross sales of \$4 million for 2009.

The petitioner stated the beneficiary will be working as the Executive Vice President. The petitioner provided a description of the beneficiary's duties in a letter dated September 21, 2009. In a letter dated February 18, 2010, the petitioner stated that the beneficiary's duties would be as follows:

- 1. Management and direction of U.S. operations and sales expansion;
- 2. Formulation of [the petitioner's] goals, business plans, & policies in the United States;
- 3. Development of strategic initiatives and appropriate operational, marketing and sales strategies and concepts for the U.S. market;
- 4. Formulation and management of all employment and staffing policies, needs and decisions with full latitude on the hiring/discharge of employees;
- 5. Management of major U.S. client relationships; and
- 6. Management and supervision of [the petitioner's] design, marketing, and sales initiatives, projects and staff to develop a broad range of new seasonal outerwear items according to U.S. market preferences and customers' requirements.

The petitioner submitted an organizational chart showing the beneficiary as Executive Vice President reporting to the President. Reporting to the beneficiary were the following named employees: external legal counsel, an external accountant, a logistics employee, and two saleswomen. The chart also shows an accounting department, New York sales manager, and a men's salesman, all listed as "to be assigned." The

chart also depicts two buying offices reporting to the beneficiary, as well as the China office with 10 employees and two factories also reporting to the beneficiary. Reporting to the logistics employee, accounting department, and two saleswomen are what appear to be various vendors whose role and number of employees are unclear.

The director issued a request for additional evidence ("RFE") on March 31, 2010 in which he instructed the petitioner to submit, *inter alia*, the following: (1) a list of the United States employees identifying each employee by name and position title; and (2) a more detailed description of the beneficiary's duties in the United States, including whom the beneficiary directs and the percentage of time the beneficiary will spend on each of the listed duties.

In a letter dated June 11, 2010, the petitioner provided a breakdown of time for the beneficiary's duties on a weekly basis, including: three hours to expansion of U.S. product lines; two hours each to production, pricing, marketing, sales, export & distribution; one and a half hours to financial sourcing; one hour to budgeting; two and a half hours to risk management; two hours to negotiation; five hours to client sourcing; two hours to establish and implement policies, objective, and activities in the United States; two hours to confer with the company president/board; and one half-hour to non-managerial/executive functions.

The petitioner also stated that the beneficiary would be performing the same duties that he currently performs as Executive Vice President for United States sales and operations with the foreign employer. The duties included directing and coordinating the expansion of the company's product and service lines for the U.S. marketing; directing and coordinating the manufacturing, pricing, marketing, sales and distribution staff; directing and coordinating the U.S. budget and risk management activities; negotiating and approving contracts with Chinese contract manufacturers; and formulating and managing all employment and staffing policies.

In the same letter, the petitioner listed the beneficiary's subordinates and provided position descriptions for each. The petitioner clarified that the beneficiary supervised 13 staff member in Shanghai and three staff members in New York. The New York staff consisted of an administrative assistant and two contract sales staff who work on commission only. The petitioner explained that the company is also "in touch" with three buying offices which "have large clientele databases" and "generate large volumes of sales."

The petitioner indicated that the administrative assistant is responsible for meeting and greeting clients and visitors, setting and coordinating meetings, creating and modifying documents, performing general office duties and basic tasks on QuickBooks, keeping inventory records, and invoicing clients.

The director denied the petition on June 29, 2010 concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. In denying the petition, the director determined that the record does not establish any managerial staff to be controlled by the beneficiary in an executive capacity. The director also noted that the petitioner failed to show that the beneficiary functions at a senior level within the organizational hierarchy other than in position title.

On appeal, counsel asserts that the evidence establishes that the beneficiary's role is in an executive capacity pursuant to section 101(a)(44)(A) of the Act and that the denial is based on a misapplication of law. Counsel concludes that the beneficiary meets the four-part definition of executive capacity under 8 U.S.C.

§ 1101(a)(44)(A). Specifically, counsel states that the director inappropriately relied on the staffing levels of the company for a determination of executive capacity and did not take into account the reasonable needs of the petitioner in light of its overall purpose and stage or development. Counsel relies on unpublished AAO decisions and U.S. district court decisions in support of the appeal.

Upon review, and for the reasons discussed below, the petitioner has not established that the beneficiary would be employed in the United States in a primarily executive capacity.

In counsel's brief dated August 25, 2010, he refers to multiple unpublished AAO decisions. In one particular decision, the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee of the petitioning company. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel further cites to *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. First, the AAO notes that counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Mars Jewelers, Inc.*, where the district court found in favor of the plaintiff. Furthermore, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

In *Mars Jewelers, Inc.*, the courts emphasized that the former INS should not place undue emphasis on the size of a petitioner's business operations in its review of an alien's claimed managerial or executive capacity. The AAO has long interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. However, the AAO has required the petitioner to establish that the beneficiary's position consists of *primarily managerial or executive duties and that the petitioner will have sufficient personnel to relieve the beneficiary from performing operational and/or administrative tasks.* We emphasize that our holding is based on the conclusion that the beneficiary will not be primarily performing executive duties; our decision does not rest on the size of the petitioning entity.

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(I)(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 each 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, or part of 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"). Here, the petitioner has failed to show that the beneficiary's actual day-to-day duties will be primarily executive in nature.

The petitioner's description of the beneficiary's job duties, both initially and in response to the RFE, does not provide specifics on what the beneficiary will actually be doing on a day-to-day basis. The beneficiary is to "direct and coordinate" the following: expansion of the company's product and service line, the company's activities and staff, the company's U.S. financial, budget and risk management activities." Furthermore, the beneficiary is to "direct, plan and implement policies" and activities of U.S. sales and operations. While such responsibilities generally suggest that the beneficiary is responsible for oversight of the company, what the beneficiary organizes and controls provides little insight into how he would actually allocate his tasks on a day-to-day basis. 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 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).

Further, the petitioner's response to the director's request for a breakdown of the number of hours devoted to each of the beneficiary's job duties on a weekly basis failed to clarify the nature of his proposed position. For example, the petitioner stated that the beneficiary will allocate 10 hours per week to "sales," two hours per week each to "production," "pricing," "marketing" and "contract negotiation" and four hours per week to "export and distribution." This breakdown, which accounts for more than half of the beneficiary's time, fails to explain any qualifying executive functions the beneficiary performs related to these broad areas of responsibility, and was minimally responsive to the director's request for additional evidence with respect to the beneficiary's U.S. position. The AAO cannot determine based on the record what specific duties the beneficiary will perform with respect to any of these areas of responsibility within the scope of the U.S. company's organization.

Additionally, there does not appear to be any employees located in the United States to perform the shipping and warehouse functions required of the petitioner's import business. On the petitioner's initial organizational chart, there is a position for "Logistics" held by [REDACTED]. Under the logistics position, there appear to be two contract services for "Lets Go Inc. packing services" and "Warehouse and Transloading LA Warehouse Services." It is unclear whether the "Warehouse and Transloading LA Warehouse Services" is the petitioner's own claimed employees or whether this is a separate corporation. If the petitioner is claiming that the logistics function is performed by these two organizations, the petitioner failed to provide a copy of the contract or any other evidence describing how the work is performed. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Furthermore, in response to the RFE, the petitioner claims that [REDACTED] serves as an administrative assistant rather than a logistics manager. Her duties, submitted in response to the RFE, do not include any import or shipping management tasks, or responsibility for overseeing such functions. Therefore, it appears that the beneficiary would be the only employee on staff to perform the logistics management for goods sold

and imported to U.S. retailers and wholesalers. 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'r 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.

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-day 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.*

The petitioner has not established that the beneficiary's position is elevated within a complex organizational hierarchy. In response to the RFE, the petitioner submits an organization chart showing three employees other than the beneficiary in the U.S. organizational structure. Of those employees, only one employee is a salaried full-time employee and two employees work an unidentified number of hours on commission. The organizational chart also shows independent contractors reporting to the beneficiary that are not part of the direct company structure. The petitioner has not explained how one administrative assistant, two commissioned sales people and other independent contractors would relieve the beneficiary from involvement in the day-to-day operations of the company, such that he would be free to spend the majority of his time focused on the broad goals and policies of the organization. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position.

Here, the record does not demonstrate that there is a subordinate level of managerial employees under the beneficiary's direction in the United States. Although the petitioner claims that the beneficiary oversees a multi-tiered staff in his position at the foreign employer in China, the petitioner has not shown how this management structure would relieve the beneficiary of performing aspects of the petitioner's logistics, administrative, and financial needs that would require the presence of a U.S.-based employee. 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. at 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). The record shows that the majority of the foreign

employees are designers or merchandisers. While they perform duties necessary for the manufacturing of the company product, the record does not show how they would participate in the day-to-day import, marketing, sales, distribution, financial and administrative operations of the U.S. company.

Finally, although the petitioner claims that it has contracted services in the areas of accounting and logistics the petitioner has not presented evidence to document the existence of these contracts nor identified the particular nature of the services provided by the companies. Additionally, the record does not establish that the beneficiary would exercises the appropriate degree of control over the claimed subordinate contracted staff in order to consider them part of the organizational hierarchy for executive purposes.

An employee will not be considered to be a part of the petitioner's organizational hierarchy, because he or she is arbitrarily placed on an organizational chart, or even because he or she performs daily work activities and assignments. As counsel correctly notes on appeal, the actual physical work location of the employees is not a determining factor. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. *See generally Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (cited in *Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at \*16 (E.D. Tex. Jan. 11, 2007)). Here, the petitioner failed to demonstrate that the beneficiary or petitioner exercises a significant degree of control or authority over the claimed subordinates.

In the present matter, the AAO cannot conclude that the staffing composition the petitioner had at the time of filing warranted the employment of the beneficiary in a managerial or executive capacity. This determination is not to be confused with the petitioner's need for an employee who would head its organization. It is reasonable to conclude that any organization, regardless of its size, will require at least one employee who would assume a leadership role that would entail a high degree of decision-making authority and supervisory oversight. However, it is not uncommon for an employee in an organization with limited staffing to meet his or her responsibilities as the organization's leader by simultaneously performing qualifying and non-qualifying tasks based on the needs of a particular entity. Therefore, the fact that an individual manages a business does not necessarily establish that the proposed employment fits the definition of managerial or executive capacity within the meaning of section 101(a)(44)(B) of the Act. While the AAO acknowledges the varying needs from one entity to another, a petitioner's needs do not serve to override the petitioner's legal burden of having to establish that the beneficiary would primarily perform duties of a qualifying managerial or executive nature. Any petitioner that is not ready and able to employ the beneficiary in a qualifying capacity at the time the Form I-129 is filed would not merit the immigration benefit sought in the present matter.

While the petitioner's organizational chart shows open positions for additional staff, The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Based on the evidence and information furnished in the present matter, the AAO cannot conclude that the petitioner met its burden of establishing that it was able to employ the beneficiary in a qualifying managerial or executive capacity at the time of filing the petition. For this reason, the petition may not be approved.

The petitioner has not submitted evidence on appeal to overcome the director's determination that the beneficiary will not be employed in an executive capacity. Accordingly, the appeal will be dismissed.

### III. Conclusion

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 not sustained that burden.

**ORDER:** The appeal is dismissed.