



U.S. Citizenship  
and Immigration  
Services



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DATE: DEC 20 2012

Office: VERMONT SERVICE CENTER

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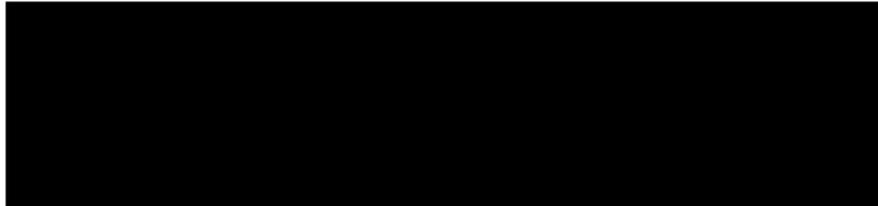
Petitioner:

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:

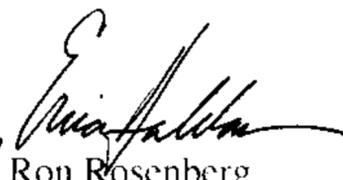


INSTRUCTIONS:

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 a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Florida limited liability company, states that it is a worldwide marketer of commodities. It claims to be an affiliate of Induservices de Venezuela SRL, the beneficiary's foreign employer in Venezuela. The petitioner is seeking approval for a one year period so that the beneficiary may serve as the Chief Operating Officer of the new office in the United States.

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 and that sufficient physical premises were secured to house the new office.

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 evidence of record establishes that the beneficiary will function in a qualifying managerial capacity and that sufficient physical premises were secured to house the new office. Counsel submits a brief and additional evidence in support of the appeal.

Upon review, the petitioner has established that it has secured sufficient physical premises to house the new office and the director's conclusion to the contrary will be withdrawn. The sole issue remaining on appeal is whether the beneficiary will be serving in a managerial or executive capacity within one year of commencement of the petitioner's operations.

### **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 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)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
  - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
  - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
  - (3) The organizational structure of the foreign entity.

## **II. The Issues on Appeal**

The sole issue to be addressed is whether the petitioner established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

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.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily

perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). The petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on May 23, 2011. The petitioner indicated that it operates an international agricultural commodities trading firm with one employee and a gross annual income of \$114 million. In a letter dated May 15, 2011, the petitioner stated that the beneficiary will be employed as the Chief Operating Officer (COO). As the COO, the petitioner explained that the beneficiary will be responsible for the following:

- Managing, directing, and coordinating all business activities, focusing on trading operations and the Finance Department;
- Negotiating and coordinating the buying, pricing, sales and transportation of all agricultural commodities;
- Reviewing financial statements, sales and activity reports, and other performance data to measure productivity and goal achievement and to determine areas needing cost reduction and improvement;
- Directing and coordinating the financial organization of the company and all budgets including cash flow operations, maximizing investments, and increasing efficiency;
- Responsible for all accounting and financial matters of the company; and
- Responsible for developing and implementing strategies across the organization.

The petitioner submitted a proposed organizational chart for the U.S. company which identified the beneficiary's position as lateral to the position of managing director. The chart indicates that the beneficiary and the managing director would jointly oversee an administration department comprised of an administrator ("Patagonia Americas"); an accounting department comprised of an external accounting firm, and a logistics department staffed by a coordinator (Ivan Troconis). The chart also identifies an opening for an executive secretary position.

The director issued a request for additional evidence ("RFE") on June 1, 2011 in which he instructed the petitioner to submit, *inter alia*, the following: (1) a more detailed description of the beneficiary's duties including a percentage breakdown of the number of hours devoted to each duty on a weekly basis; (2) a copy of the petitioner's organizational chart showing all proposed company employees including names, titles, and position descriptions; and (3) a detailed business plan.

In a response dated July 1, 2011, the petitioner provided the requested detailed position description for the beneficiary. The petitioner stated that the beneficiary will be responsible for certain executive and managerial duties. The petitioner explained that the executive duties will consist of directing the trading and finance functions of the organization; developing and implementing strategies, goals, and policies across the organization; exercising discretion for decisions relating to trading and finance matters; and receiving direction and supervision from the stockholders. The beneficiary's claimed managerial duties would consist of managing, directing, and coordinating the activities of the organization related to trading operations and the finance department; establishing the organizational hierarchy; hiring, firing, and promoting all employees; and exercising discretion over day-to-day operations.

The petitioner also provided the requested breakdown of percentage of time the beneficiary is to spend on each duty. Specifically, the petitioner stated the beneficiary's main duties and percentage of time performing each would be as follows: managing and directing trade activity - 15%; managing and supervising contact with clients regarding import and export of commodities - 15%; managing and directing negotiations with commodities' suppliers - 20%; managing contractual and financial risk with proper hedging and price risk mitigation - 7.5%. The record indicates that the remainder of the listed duties would occupy 3% of the beneficiary's time or less.

The business plan included a description of the petitioner's planned staffing and proposed organizational structure. The organizational chart showing the beneficiary reporting to the Managing Director. Reporting to the beneficiary were the following proposed positions: an executive assistant, an administrative position/office manager, an accounting/finance manager, and a logistics manager (proposed candidate: Ivan Troconis). The business plan further explained that the petitioner will require between six and eight employees in the first year to including the managing director, accounting/finance manager, bookkeeper, logistics manager, and executive assistant.

In a letter dated July 1, 2011, counsel for the petitioner stated that the beneficiary will be responsible for supervising the logistics manager, office manager, and accounting/finance manager. He provided the position descriptions for each of those employees. According to counsel, the logistics manager would be responsible for the "control and review of all documentation involved in the import and export of agricultural commodities." The office manager would be responsible for "the organization and coordination of office operations, procedures and resources." The accounting/finance manager would be responsible for "managing accounting, administrative and finance reporting activities." These duties included preparing monthly forecasts, managing cash flow, preparing balance sheets, preparing profit and loss statements, and managing customer accounts.

The director denied the petition on July 15, 2011. The director found that the petitioner had not established that the beneficiary will be employed either in a managerial or in an executive capacity. The director noted that a majority of the beneficiary's duties, as described in the record, were vague. Additionally, the director determined that the beneficiary would not be managing a supervisory, professional, or managerial staff and that based on the proposed organizational structure, the beneficiary would be assisting in the day-to-day non-supervisory duties of the business. Furthermore, the director determined that, while the petitioner indicated that the beneficiary will manage a function of the company, it did not establish that the essential function is not directly performed by the beneficiary.

On appeal, counsel asserts that the beneficiary's position is primarily managerial or executive in nature. Specifically, counsel states that the beneficiary functions at a high level within the organization and the beneficiary's duties are specific and managerial in nature. Furthermore, counsel concludes that the high volume of the petitioner's business and the beneficiary's proposed salary both support a conclusion that the organization will be able to support a managerial position within one year of operations. The petitioner submits the same position description for the beneficiary as submitted in response to the RFE. The petitioner also submits an opinion letter from a Professor of Seattle Pacific University concluding that the duties described by the petitioner are that of an executive capacity position.

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a primarily 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(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 in either an executive or a 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 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 a component 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").

The job duties provided by the petitioner in the letter dated May 15, 2011 were vague and did not provide a clear understanding of the beneficiary's actual responsibilities as Chief Operational Officer. Duties such as "managing, directing, and coordinating all business activities," "directing and coordinating the financial organization of the company," "responsible for all accounting and financial matters," and "responsible for developing and implementing strategies across the organization" do not give a clear indication of what tasks the beneficiary will be performing on a day-to-day basis. 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).

On appeal, the petitioner provides a more detailed description of the beneficiary's duties along with the percentage of time he would allocate to performing each. The petitioner states that the beneficiary will spend 25% of his time managing and directing trading activities; 20% of his time managing and directing negotiations with commodities suppliers; 7.5% of his time managing contractual and financial risk with hedging and price mitigation; 2% of his time managing and directing cash investments and asset management; and 1% of his time developing, managing, and directing financial strategies and banking relationships. These tasks amount to 55.5% of the beneficiary's time.

Even though the petitioner claims that the beneficiary directs and manages the trading and finance function, it does not claim to have anyone on its staff to actually perform the trading and finance work described above. While the petitioner's business plan show that it intends to hire both a logistics manager and accounting finance manager within one year of operations, the duties for those positions as provided by the petitioner involve lower-level bookkeeping and shipping tasks. In contrast, the beneficiary's duties such as "negotiating and coordinating the buying, pricing, sales, and transportation of commodities," as well as "coordinating cash flow" and "maximizing investments," relate more to the high-level financing and commodities trading work. In short, the petitioner does not appear to have, or plan to hire in the first year of operations, any commodities traders on staff to perform the core trading function to be managed by the beneficiary. If the beneficiary will

be performing the finance and trading function, the AAO notes that 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. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988). While such duties are undoubtedly essential to the operation of the business, the fact that the beneficiary will perform them does not elevate his position to that of a function manager.

From the petitioner's description of the beneficiary's and subordinate's duties, it appears that he will be the only employee available to engage directly in the commodities trading and bank financing work needed for the petitioner's United States operations. Alternatively, the beneficiary does not actually manage the trading and finance function as claimed by the petitioner. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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 job description that clearly explains the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). 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). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function because it has failed to establish that he will perform primarily managerial duties.

On appeal, counsel for the petitioner states that the beneficiary's duties are executive in nature. 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.*

In support of this assertion, the petitioner submits an independent evaluation determining that the petitioner's duties are executive in nature. The expert opinion does not establish that the decision was based on an incorrect application of law or USCIS policy. Instead, the letter states an opinion that is based on a review of scholastic documents outside of the record and not based on a review the immigration statute or the applicable

regulations. For example, the letter points to the beneficiary's direction of operations, finance, and personnel activities, but fails to show that the petitioner's organizational hierarchy will be sufficiently complex to support an executive level position by the end of one year of operations. The textbook or common understanding of business terms will not supersede the statutory definitions; the applicable definition of manager and executive are contained in the statute at sections 101(a)(44)(A) and (B) of the Act.

The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). Since the opinion offered here is not based on the critical statutory definitions, the opinion is not found to be persuasive.

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 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. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

In the present matter, the totality of the record does not support a conclusion that the beneficiary's will manage a function or manage subordinates who are supervisors, managers, or professionals. Instead, the record indicates that the beneficiary's subordinates will perform the actual day-to-day tasks of supporting the company's agricultural commodities trading activities. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial under the statutory definitions.

Based on the foregoing discussion, the petitioner has failed to establish that it will employ the beneficiary in a managerial or executive capacity and the appeal will be dismissed.

The petition will be denied and the appeal dismissed 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, the petitioner has not met that burden.

**ORDER:** The appeal is dismissed.