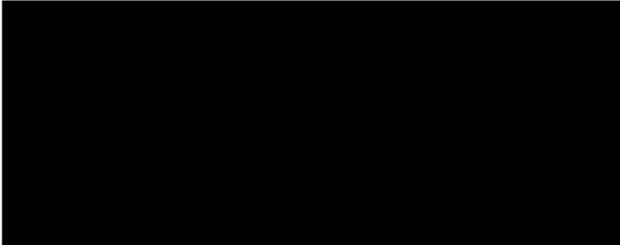




U.S. Citizenship  
and Immigration  
Services



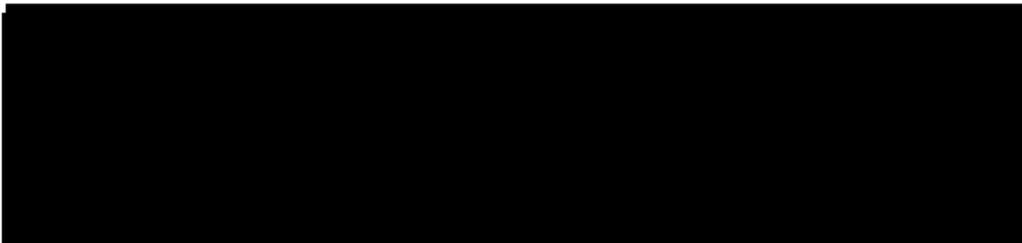
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DATE: **DEC 20 2012** Office: CALIFORNIA SERVICE CENTER FILE:

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 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 of the California 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 seeks to employ the beneficiary 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 is a Montana corporation established on December 29, 2004. It is engaged in the retail sale of manufactured livestock feed. The petitioner claims to be the subsidiary of parent [REDACTED] located in Alberta, Canada. It has applied for a visa for the beneficiary to work for twenty-four years on a part-time basis as director of its existing U.S. office.<sup>1</sup>

On January 3, 2012, the service center director denied the petition, finding the petitioner failed to establish it would employ the beneficiary in a 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. On appeal, counsel for the petitioner asserts that the evidence of record establishes that the beneficiary will spend the majority of his time performing executive duties for the petitioning company. Counsel submits a brief and new evidence 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 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.

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<sup>1</sup> On various documents submitted for the record, the petitioner also identified the beneficiary's job title as "executive director" and "marketing director." The AAO further notes that pursuant to 8 C.F.R. § 214.2(l)(7)(i)(A)(2), an individual petition shall be valid for the period of established need for the beneficiary's services, not to exceed three years. The regulation at 8 C.F.R. § 214.2(l)(12)(ii) provides for exceptions to the L-1 limitation on period of stay for aliens who commute to the United States to engage in part-time employment and those who do not reside continually in the United States. However, such provisions do not extend the maximum validity period for the petition approval beyond three years.

- (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.

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.

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.

## II. The Issue on Appeal

The director denied the instant petition because she found the petitioner failed to establish it would employ the beneficiary in a managerial or executive capacity in the United States.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description must clearly describe the duties to be performed 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. To meet these definitions, the petitioner must first show that the beneficiary performs the high level responsibilities specified in the definitions. Second, the petitioner must prove the beneficiary will primarily perform these specified responsibilities and will 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).

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner described the beneficiary's job duties in the U.S. position as follows:

[The beneficiary] will travel to the existing office in Montana approximately once per week for two days, totaling 16 working hours per trip. While in Montana, [the beneficiary] will spend part of each day in the office supervising the two United States employees who work full-time out of that office. He will also spend part of each trip visiting his farm and ranch customers, where he will solicit feed orders and confirm proper usage of [the petitioner's] products for specific species by the customers.

On the L Classification Supplement to Form I-129, the petitioner further stated that the beneficiary "will provide directions to U.S. office sales staff," "take orders from U.S. customers," and "provide nutritional support and livestock production support."

The service center found the petition as originally submitted insufficient to establish eligibility and issued a Request for Evidence (RFE) on July 28, 2011. The RFE requested, *inter alia*, a more detailed, specific description of the beneficiary's proposed duties in the United States. It also instructed the petitioner to identify the percentage of time required to perform the duties of the managerial or executive position.

In response, the petitioner provided the following description of the beneficiary's duties in the United States:

Current duties include traveling to swine, poultry and beef producers to take feed orders, discuss proper usage of our products, introduce new feed technologies and promote new

innovative products which [the petitioner] produces. Other duties include providing leadership, advise & vision to the branch manager & warehouse coordinator at [REDACTED] [The beneficiary] alternates with [REDACTED] to accomplish the tasks/goals set out for Montana. All local accounting, legal and financing is directed by [REDACTED] & [the beneficiary]. All funding for future expansion will be provided by [the foreign entity] from Canada and these decisions are also made by [the beneficiary] & [REDACTED]. Delegation of duties is regularly made to staff by [the beneficiary] along with hiring decisions.

Despite the specific request, the petitioner did not provide a list of job duties identifying which are managerial or executive, nor did it provide the percentage of time required for each duty. 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). Further, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). This information was critical, as the several of the beneficiary's stated responsibilities, such as visiting customers' farms, taking purchase orders and providing nutritional and livestock support, do not fall within the statutory definitions of managerial or executive capacity. See section 101(a)(44) of the Act. 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).

On appeal, the petitioner produces an affidavit from the beneficiary in which he states that 65% of his duties are executive and 35% of his duties involve day-to-day functions. Neither the beneficiary nor the petitioner explains how these percentages were calculated. Conclusory assertions regarding the beneficiary's employment capacity are not considered sufficient. *Id.*; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). Further, the petitioner was put on notice of the need for a percentage breakdown of the beneficiary's duties and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested breakdown of the beneficiary's job duties and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

In addition, the petitioner must clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. It may not claim to employ the beneficiary as a hybrid "executive/manager" and rely on partial sections of each of the two statutory definitions.

On appeal, counsel asserts that the beneficiary will be employed in an executive 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-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 its brief submitted on appeal, the petitioner references the beneficiary's authority with regard to numerous matters, including staffing levels, equipment purchases, and marketing strategies. The petitioner states: "With respect to all of his executive duties, [the beneficiary] receives little supervision or direction from any other person within the Company." These statements regarding the beneficiary's authority may be true; however, to determine whether the beneficiary will be operating primarily in a managerial or executive capacity, the AAO looks to the beneficiary's actual duties. The duties themselves 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). 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. *Id.* The petitioner submitted numerous documents that show the beneficiary's level of authority and control over both the foreign entity and the petitioner. However, these documents shed no light on how the beneficiary would actually spend his estimated 16 hours per week in the United States.

In describing the beneficiary's job duties on the Form I-129, the petitioner stated the beneficiary will visit customers, answer customer questions, provide recommendations, and solicit orders. As noted above, each of these tasks involves performing the day-to-day operations of the company and is not executive or managerial in nature. The petitioner does not indicate the percentage of time the beneficiary will spend performing these tasks.<sup>2</sup>

To qualify as an executive or manager, the statute does not require the beneficiary to be employed on a full-time basis. It must be established, however, that the majority portion of the beneficiary's time in the United States is spent on executive or managerial duties. 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).

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<sup>2</sup> According to the petitioner, the beneficiary is already heavily involved in managing the petitioner remotely from Canada. It is therefore logical that the beneficiary would spend a significant amount of his time in the United States performing tasks that cannot be performed remotely. The ground-level activities cited by the petitioner, such as visiting clients, are not high-level functions considered managerial or executive under the Act.

In addition to visiting customers, answering customer questions, providing recommendations, and soliciting orders, the petitioner indicates that the beneficiary will spend part of each day in the United States supervising the petitioner's two full-time employees: a branch manager/sales associate, and an administrative assistant.

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

Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term professional shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "professional" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by the subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee works in a professional capacity as that term is defined above.

The petitioner does not claim that either of the beneficiary's subordinates are professionals or supervisors. Both employees emphasize that the petitioner has trained them in numerous areas since their employment. However, the petitioner provided no evidence to suggest that either position requires a certain level of prior education. In her affidavit submitted on appeal, the petitioner's administrative assistant states that she received her cosmetology license and owned a salon prior to working for the petitioner. Similarly, although the branch manager/sales associate emphasizes his specialized knowledge of the petitioner's product, the record contains no evidence of the need for a certain level of education in order to enter his position. The petitioner has therefore failed to show that the beneficiary's subordinates are professionals.

Similarly, the petitioner does not claim or provide evidence that either of his subordinates are themselves supervisors. The petitioner has only two other employees, both of whom the petitioner claims the beneficiary will manage. Given these circumstances, any time allocated to the first-line supervision of non-professional employees will not be considered time spent performing qualifying managerial duties.

Even if the petitioner had established *arguendo* that the petitioner's two employees were themselves supervisors or professionals, the petitioner has not provided sufficient information about the amount of time he would spend supervising them. In his affidavit, the branch manager/salesman states that he meets with the

beneficiary approximately twice per month and talks with him over the phone several times per week. The petitioner provided no other details about the extent of the interactions between the beneficiary and the petitioner's employees. It is therefore impossible to determine that the beneficiary would spend his time in the United States *primarily* in a managerial capacity.

Section 101(a)(44)(C) of the Act requires the AAO to "take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function." The AAO has long interpreted the statute to prohibit discrimination against small or medium-size businesses. However, the AAO has also consistently 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.

Reading section 101(a)(44) of the Act in its entirety, the "reasonable needs" of the petitioner may justify a beneficiary who allocates 51 percent of his time to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir. 2008).

In his affidavit, the beneficiary states: "[The petitioner] is a small company [*sic*] only two full-time employees. As such, I am required to assist those employees with sales, production, and other day-to-day operations, but my primary responsibility is employee management and executive duties, such as marketing and product development." As previously stated, conclusory assertions regarding the beneficiary's employment capacity are not considered sufficient. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). The small size of the petitioner's operation does not relieve it from the burden of meeting the statutory requirements. Simply stating that the beneficiary's primary duties are managerial and executive is not sufficient. 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)).

The petitioner's claims that the beneficiary will be employed in a qualify capacity are not supported by the record, as it failed to adequately detail the beneficiary's proposed job duties and what percentage of time he will spend on each. It is incumbent upon the petitioner to provide a consistent, detailed account of the beneficiary's proposed duties. Without the requested details, the AAO cannot determine that the beneficiary would spend the majority of his time performing managerial or executive duties. Again, this failure of documentation is important because several of the beneficiary's daily tasks, such as visiting customers, soliciting orders and providing nutritional and livestock production support, do not fall directly under traditional executive or managerial duties as defined in the statute. For this reason, the AAO cannot determine that the beneficiary will primarily perform managerial duties. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). Accordingly, the appeal will be dismissed.

### **III. Conclusion**

The petition will be denied and the appeal dismissed for the above-stated reasons. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.