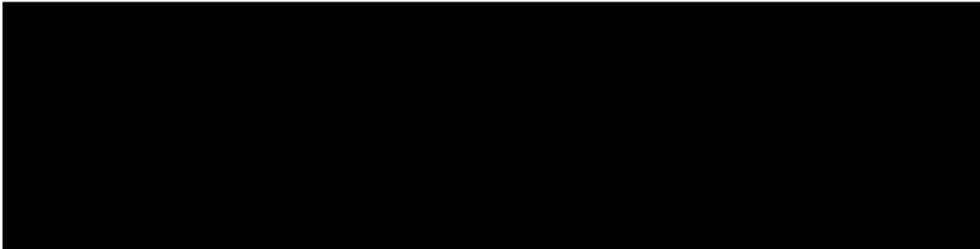




U.S. Citizenship  
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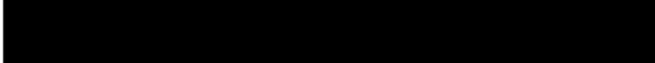


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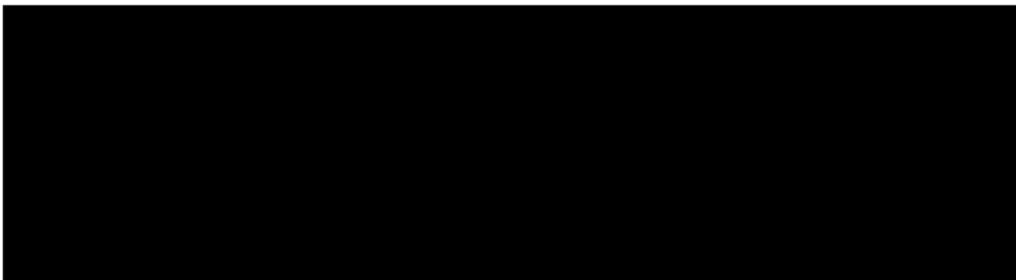
Office: VERMONT SERVICE CENTER

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 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, a Florida corporation established on July 7, 2009, engages in the business of "home accessories and gift stores." It is a subsidiary [REDACTED] (the "foreign entity"), based in Belize City, Belize. The petitioner seeks to employ the beneficiary as the president and chief executive officer (CEO) for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed 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 disputes the director's decision and submits a brief in support of the appeal. Counsel's assertions will be discussed below.

### **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.

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.

8 C.F.R. § 214.2(l)(1)(ii)(H) defines the term "doing business" as the "regular, systematic and continuous provision of goods and/or services by a qualifying organization . . . ."

Finally, 8 C.F.R. § 214.2(l)(1)(ii)(F) defines a "new office" as "an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary *for less than one year* (emphasis added)."

## 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 a primarily managerial or executive capacity.

*Facts and Procedural History*

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on October 28, 2011. According to Form I-129, the petitioner engages in the business of "home accessories and gift stores." In a letter dated October 10, 2011 submitted with the initial petition, counsel for the petitioner described the petitioner's current U.S. operations as consisting of "one store located at the Bayside Marketplace in the Downtown Miami area." In the same letter, counsel described the beneficiary's proposed duties as president and CEO as follows:

1. Direct and manage all operations of the U.S. subsidiary;
2. Full decision making power to hire/fire employees;
3. Establish goals and policies for the company;
4. Negotiate leases for future stores;
5. Negotiate and finalize contracts with suppliers;
6. Develop and implement sales and marketing strategies;
7. Analyze and elaborate financial projections;
8. Prepare budgets;
9. Implement systems and methods for work optimization; and
10. Submit reports to parent company in Belize.

On Form I-129, the petitioner indicated that it was established in 2009 and currently has one employee. The petitioner submitted its articles of incorporation, confirming that it was established in the State of Florida on July 7, 2009. The petitioner also submitted its state and federal quarterly returns confirming that as of June 30, 2011, it employed one employee. Previously, for the quarter ending on March 31, 2011, the petitioner employed three employees.

The petitioner submitted copies of invoices dated April 15, 2010 and November 10, 2010, as well as its bank statements from January 2011 through June 2011, reflecting that it has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States throughout these months.

The petitioner submitted a copy of its present lease, reflecting that it is currently occupying a space of 438 square feet located at the Bayside Marketplace Shopping Center.

The petitioner submitted a copy of its 2010 Form 1120, U.S. Corporation Income Tax Return, on which the petitioner described its business activity as a retailer of products and reported gross receipts or sales of \$20,830.12.

The director issued a request for evidence ("RFE") on November 9, 2011, in which he instructed the petitioner to submit, *inter alia*: (1) a more detailed description of the beneficiary's duties in the United States, including a description of the managerial duties to be performed; (2) a short answer regarding how many subordinate employees will be under the beneficiary's management, the job duties of the employees managed, and how much time spent by the beneficiary will be allotted to executive/managerial duties; (3) an organizational chart depicting where the beneficiary's position fits into the organization; and (4) additional evidence that the U.S. petitioner has been engaged in the regular, systematic, and continuous provision of goods and services.

Counsel for the petitioner submitted a letter dated January 13, 2012 in response to the director's RFE. With respect to the beneficiary's duties, counsel asserted that the beneficiary will spend 100% of her time in executive/managerial duties. Counsel further provided the following list of job duties for the beneficiary:

1. CEO will be responsible for communicating and informing the Parent Company of any changes relating to the company's future and present goals;
2. CEO will create policies and carry out specific actions that are necessary to further the company's objectives;
3. The CEO will also be in charge of team building. That is, putting together a management team and works to the benefit of the company. This includes hiring, ensuring that individuals get along and find solutions to any problems that may occur. If necessary, the CEO will also be in charge of firing;
4. CEO will supervise the management team, plan the company's future, and make final decision to keep the company profitable;
5. Evaluate all employees and hold weekly meetings to evaluate sales performance, strategies to increase sales, and loss prevention;
6. CEO will work to create an efficient and positive environment for all employees;
7. CEO will set a budget for the company, plan and evaluate all projects and determine their value to the company;
8. Negotiate leases for future stores;
9. Negotiate and finalize contracts with suppliers;
10. Develop and implement sales and marketing strategies; and
11. Analyze and elaborate financial projections.

Regarding how many subordinate employees will be under the beneficiary's management and their job duties, counsel stated:

The CEO will immediately hire a second sales associate for the "Bayside" store. The plan is to open a second store at the International Mall and hire a store manager/supervisor, and one or two sales associates. Therefore, within 6 months of taking over the U.S. subsidiary, the CEO will be supervising one store manager and at least three sales associates. Within one year, the plan is to open a third store at another mall in South Florida. Once the three stores are in full operation, the CEO will hire and supervise a regional manager.

The sales associates will be in charge of sales, inventory, and customer service . . . .

The petitioner submitted its quarterly tax returns reflecting that it employed one employee as of the end of June 2011 and September 2011.

The petitioner submitted copies of its bank statements for the last three months prior to filing, as well as numerous invoices, sales records, and receipts from July 2011 through December 2011, all confirming that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States throughout these months.

The director denied the petition on January 31, 2012, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. The director concluded that the petitioner's descriptions of the beneficiary's job duties were too vague to establish how the beneficiary will carry out the duties or the percentage of time dedicated to each duty. The director observed that, at the time of filing, the U.S. business had one employee, a sales associate, on its payroll, and that the beneficiary would be acting, in effect, as a first line supervisor of a non-professional employee. The director observed that since this was not a new office petition, the petitioner's plans to hire additional staff and open additional stores in the future were insufficient to establish eligibility at the time of filing.

Counsel for the petitioner filed the instant appeal, Form I-290B, Notice of Appeal or Motion, on February 29, 2012. On appeal, counsel asserts that the previously provided job duties for the beneficiary were sufficiently detailed to establish that the beneficiary will be employed in a managerial capacity as defined in Section 101(a)(44)(A) of the Act. Counsel states that the director "correctly points out that at the time of filing Petitioner had one employee; however, it should be noted that during the first year of operations, the petitioner had three employees, including a Store Manager, until the first quarter of 2011." Counsel explains that the petitioner was "forced to temporarily downsize the personnel" due to the "sluggish economy and a decline in sales." Counsel then asserts:

Even though the company is not establishing a new office, the company sees the need to re-structure itself. Because of the circumstances, the company is basically starting all over again with their plan, this time with a President/CEO to head and manage the whole operation. The company already tried operating with a store manager and two sales associates and it did not work . . .

Taking into consideration the reasonable needs of the organization, it is understandable that the company wanted to conserve resources and maintain only one employee until an executive/manager could step in and take charge and re-start the operations. Even though this is not a "new office," it should be treated as such for the purposes of understanding the current stage of the investment/organization.

#### *Discussion*

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

As a preliminary issue, the AAO concludes that the petitioner cannot be treated as a new office for any purpose. The evidence in the record – including the petitioner's bank accounts, sales receipts, invoices, and sales records – clearly establishes that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States since at least April 2010. Therefore, the record shows that the beneficiary has been doing business, as defined by the regulations, in the United States for over one year at the time of filing. See 8 C.F.R. § 214.2(l)(1)(ii)(H) (defining "doing business" as the "regular, systematic, and continuous provision of goods and/or services"); 8 C.F.R. § 214.2(l)(1)(ii)(F) (defining a "new office" as "an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary *for less than one year* (emphasis added)").

In determining whether the petitioner has been doing business in the United States, the United States Citizenship and Immigration Services (USCIS) may only take into consideration whether the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services. 8 C.F.R. § 214.2(l)(1)(ii)(H). Whether or not the petitioner has been profitable or desires to re-structure itself are irrelevant to the assessment of whether it qualifies as a new office. Counsel cites to no authority to support his assertion that the petitioner should be treated as a new office even though it is not, based upon the petitioner's particular circumstances and the reasonable needs of the organization.

The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO acknowledges counsel's assertions that section 101(a)(44)(C) of the Act requires USCIS to take into account the reasonable needs of the organization when staffing levels are considered. However, counsel misinterprets and misapplies section 101(a)(44)(C) to the particular facts in this case. Section 101(a)(44)(C) of the Act states that the reasonable needs of the organization must be considered for the purpose of "determining whether an individual is acting in a managerial or executive capacity." Section 101(a)(44)(C) does not state nor support the proposition that the reasonable needs of the organization must or may be considered for any other purpose, such as determining whether the organization qualifies for new office treatment.

Therefore, as the petitioner has been doing business for at least one year prior to the filing of the instant petition, the petitioner does not, and cannot, qualify as a new office and be afforded the more lenient treatment for new offices.<sup>1</sup> As stated by the director, the petitioner must have established eligibility at the time of filing. USCIS may not consider the petitioner's future plans to hire additional employees and open other retail stores or any other factors that were not in existence at the time of filing. USCIS may only consider the petitioner's organizational structure, staffing, and other factors as they existed at the time of filing.

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).

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<sup>1</sup> In general, the one-year "new office" provision is an accommodation for newly established enterprises, provided for by USCIS regulation, that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first 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 low level 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 that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

As the director correctly observed and as counsel concedes, at the time of filing, the petitioner employed only one employee, a sales associate, at one retail location. When considered with the nature of the petitioner's business as a single retail location selling home accessories and gifts, the petitioner failed to establish that its operations are sufficiently complex to support the beneficiary in a primarily managerial or executive capacity.

Furthermore, the petitioner's description of the beneficiary's proposed job duties is not credible. For instance, the petitioner claims that the beneficiary will dedicate 100% of her time to managerial or executive duties. However, a careful analysis of the beneficiary's proposed job duties reflects that the beneficiary will be carrying out non-qualifying duties such as negotiating contracts with suppliers, which is a routine function necessary to carrying out the petitioner's daily operations. Furthermore, the petitioner claims that the beneficiary will be responsible for developing and implementing sales and marketing strategies, and analyzing financial projections. However, without any employees to perform the lower-level, non-qualifying duties of purchasing, marketing, and accounting, the petitioner failed to establish who, if not the beneficiary, would be performing these non-qualifying duties. As stated above, the petitioner's only employee at the time of filing was a sales associate, whose job duties were limited to "sales, inventory, and customer service." It appears that the beneficiary herself will be performing non-qualifying duties related to purchasing, marketing, and accounting. In addition, the beneficiary's listed duty of "supervise the management team" is not credible or relevant to the petitioner's actual organizational structure, as the petitioner had no management team in place at the time of filing.

Moreover, many of the beneficiary's listed job duties were too vague to establish the true nature of the beneficiary's employment. In the instant matter, counsel described the beneficiary's proposed duties in vague and overly broad terms, noting her duties to "create policies and carry out specific actions that are necessary to further the company's objectives," "work to create an efficient and positive environment for all," "plan and evaluate all projects and determine their value to the company," and "elaborate financial projections." 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). Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Id.* The lack of specificity raises questions as to the beneficiary's actual proposed responsibilities.

Overall, the position description is insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive in nature. The AAO does not doubt that the beneficiary will have the appropriate level of authority over the petitioner's business as its president and CEO. However, 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 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 unreliable and vague job description provided for the beneficiary, considered with the fact that the petitioner consists of a single retail store that employed only one sales associate at the time of filing, prohibits the determination that the petitioner would employ the beneficiary in a primarily managerial or executive position. Accordingly, the appeal will be dismissed.

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.