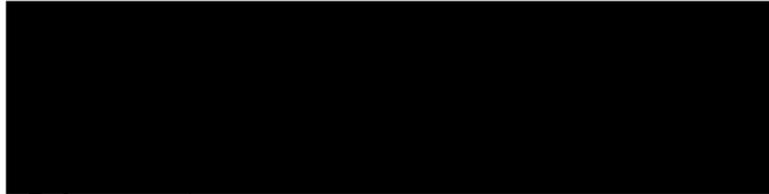


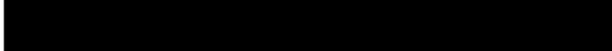


U.S. Citizenship
and Immigration
Services



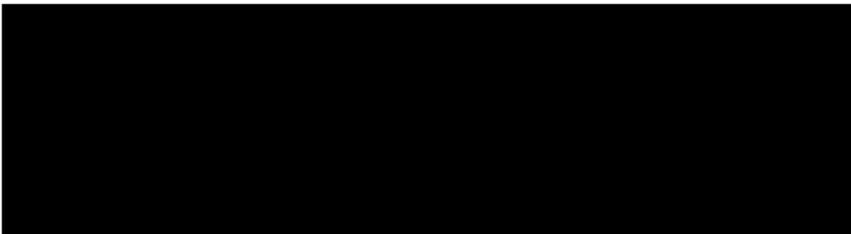
A7

DATE: DEC 24 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:

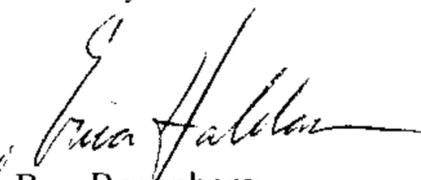


INSTRUCTIONS:

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 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 Georgia corporation established in April 2010, states it is engaged in consulting, management, development, and operations services in finance, information technology and environmental compliance. It claims to be a subsidiary of Mehul Construction located in India. The petitioner seeks to employ the beneficiary as Vice President for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that it would employ the beneficiary in a primary executive or managerial capacity. The director reasoned that the beneficiary's job duties were not primarily managerial or executive in nature, and further concluded that the beneficiary would only be acting as first line supervisor of non-managerial and non-professional employees.

On appeal, counsel contends that the beneficiary's subordinates are managers and professionals, stating that they are free to act independently, manage their functions within the business, and hire and fire any subordinates. Counsel further suggests that the petitioner's operations have not reached full fruition, that the business is still under development, and as such, additional employees other than the current three subordinates to the beneficiary will be hired during the term of the visa extension, thereby only expanding the beneficiary's managerial and executive duties.

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 record and USCIS records indicate the beneficiary was previously approved an L-1 visa for one year under the "new office" regulations on May 10, 2010, and that the petitioner is currently applying for a three year extension to this visa. The regulation at 8 C.F.R. 214.2(l)(14)(ii) states that a petitioner seeking an extension of a one year "new office" petition accompany their Form I-129 petition with the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

II. The Issues on Appeal:

A. Employment in the United States in a managerial or executive capacity

As stated, the director denied the petition finding that the petitioner failed to establish that the beneficiary would be primarily employed in the United States in an executive or managerial capacity.

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.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary will perform primarily executive or managerial duties under the extended petition as required by the Act.

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). On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner generally described the beneficiary's duties as performing "overall management and supervision of a team of managers who will manage accounting & finance, sales and marketing and IT and environmental departments in our office." Additionally, in response to the director's request for a more comprehensive description of the beneficiary's job duties in the Request for Evidence (RFE), the petitioner provided the following description that includes percentages of time spent on each task:

- Setting up and profitably operating the U.S. operations 15%;

- Overall accountability assigning resources, managing resources, task lists, milestones, task constraints, assigning resources, monitoring, resources utilization, personnel requirements, feasibility studies 15%;
- Recruitment of personnel 1%;
- Design and implement a marketing program directed towards achieving budgeted revenue 4%;
- Build customer base in U.S. 5%;
- Ensure profitability within specified time frames 5%;
- Ensure appropriate quality and customer service levels [sic] is provided through subordinate staff personnel to foster and enhance the company's image amongst customers 10%;
- Monitor business trends and economic cycles in order to anticipate change in business flow from customers and material availability 5%;
- Ensure use of proper finance and IT tools for efficient operations 5%;
- Obtain growth needed within 5 years 10%;
- Form and maintain existing/new business alliances within industry 5%;
- Advise board of directors and parent company on the development of policy matters through the analysis, development, and presentation of policy alternatives, including anticipated consequences of such alternatives and cost-benefit of such alternatives 20%.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. 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. In the record, the petitioner vaguely states that the petitioner: (1) will assign resources, manage resources, task lists, milestones, task constraints, assign resources, monitoring, resources utilization, and feasibility studies; (2) design and implement marketing programs; (3) ensure profitability; (4) ensure appropriate quality and customer service levels; (5) monitor business trends and economic cycles; and (6) ensure use of proper finance and IT tools. However, the petitioner provided no specifics as to how the beneficiary will carry out these general tasks and goals as a part of his daily duties. Further, portions of the duty description are overly vague and provide little or no probative value as to the beneficiary's day-to-day activities, such as references to monitoring profitability or building a customer base. The actual duties themselves will reveal the true nature of the employment. 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, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Further, the petitioner's evidence contains material discrepancies regarding the company's organizational structure that undermine its claims that the beneficiary will be employed in a managerial or executive capacity. The petitioner claims to have a total of four employees, including the beneficiary. The petitioner has claimed that the beneficiary has three managerial subordinates, specifically an Executive Strategy Manager, Senior Sales Associate and an Accounts Manager. On appeal, counsel suggests that the petitioner's subordinates are managers and professionals thereby qualifying the beneficiary as a personnel

manager under the regulations. 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). The term "profession" 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).

Here, the petitioner has not established that the beneficiary will direct subordinate managers, supervisors, or professionals. See § 101(a)(44)(A)(ii) and Section 101(a)(44)(B) of the Act. The petitioner has offered only three employees working for the petitioner, an Executive Strategy Manager, a Senior Sales Associate and an Accounts Manager. However, nothing has been presented on the record to establish that the claimed managers have subordinates of their own to establish them as supervisors or managers. Although the petitioner offers that the provided subordinates have professional and/or baccalaureate degrees, no documentary evidence is provided on the record to confirm the educational credentials of the offered subordinates, nor evidence to establish that the positions filled by these employees require such degrees. 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)).

On appeal, counsel suggests that the beneficiary's subordinates are managers since they act independently in managing their own departments, and since they are free to hire and fire employees within their functions. However, as stated, the petitioner has not shown the existence of subordinate employees reporting to the beneficiary's subordinates. The mere ability for the beneficiary's subordinates to hire and fire in the future is not sufficient to show that the beneficiary is currently a personnel manager. 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). Accordingly, the petitioner has not established that the beneficiary will be employed in a managerial capacity based on his supervision of subordinate professional, supervisory or managerial staff.

Further, petitioner's lack of non-managerial employees suggests that the beneficiary and his claimed subordinate managers must be primarily performing non-qualifying duties necessary to provide goods and services. The petitioner claims to have earned \$83,768 in gross receipts in 2010 according to its IRS Form 1120, U.S. Corporation Income Tax Return, projects to earn over \$800,000 in 2011, and provides six consulting contracts pursuant to which it will be primarily responsible for the back office operations of its customers' retail stores. As referenced, the beneficiary's is offered as having three managerial subordinates. However, only one of these subordinates is offered as actually performing the consulting and operations services, albeit only as a very small portion of his listed duties. The lack of subordinate employees to

actually provide the consulting and operations services suggests that the beneficiary and his subordinates would have to be primarily providing these services, and not primarily managing others as purported. The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Here, the petitioner has not met their burden of showing that the beneficiary will primarily perform managerial or executive duties as it has not identified employees to actually perform the company's alleged consulting services. Therefore, the provided organizational structure is not sufficiently supported by the record.

Counsel also suggested in response to the director's RFE that the petitioner qualifies as a function manager. 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 written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. 214.2(I)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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 Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir. 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)).

In the present matter, the petitioner has not shown the beneficiary to be a function manager. Counsel claimed that the beneficiary manages "several major functions" including project management, coordination of requirements gathering and business analysis, oversight of technology solution design and proposals, customer relations management, consulting, hiring, and marketing. Counsel further stated that the beneficiary manages the functions of "project management, customer relations, marketing support and sales support." However, a review of the beneficiary's job duties reflects no reference to most of these areas of responsibility. The petitioner has not identified any duties specifically as function manager duties, nor provided the percentage of time spent on such functional tasks. Also, and as noted by the director, no separate function within the organization for the beneficiary to manage has been shown to exist. In fact, the beneficiary is clearly shown in the organizational structure as overseeing the whole of the organization and not a distinct functional part. Further, as discussed, the record establishes that the beneficiary is only a first-line supervisor of non-professional and non-managerial employees, and likely primarily performing non-

qualifying duties. As such, the record does not support the petitioner's claim that the beneficiary acts as a function manager.

Counsel also states on appeal that the beneficiary is employed in an executive capacity pointing to consulting contracts the beneficiary purportedly negotiated for the petitioner. 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.* However, as discussed, the lack of subordinate employees to perform the consulting services of the petitioner suggests the beneficiary is actually a first-line supervisor of non-professional and non-managerial employees. Regardless, 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. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). While the beneficiary possesses authority to negotiate contracts on behalf of the company, the petitioner has not established that this is the beneficiary's primary responsibility or explained how this duty rises to the level of an executive-level duty.

Finally, although not discussed in the director's decision, the AAO notes that the evidence of record does not support the petitioner's claim that it operates as a consulting services company. According to the petitioner's Georgia Sales Tax Certificate of Registration, the company's business type is "Gasoline Stations with Convenience Stores." The petitioner also submitted 2011 financial projections from its external accountant which indicate that the company's anticipated "cost of sales" can be attributed entirely to the purchase of cigarettes and groceries. Further, all of the detailed purchase invoices in the record are for the petitioner's purchase of grocery and tobacco products. According to the petitioner's 2010 IRS Form 1120, U.S. Corporation Income Tax Return, the company is engaged in wholesale "merchandise sales." Finally, the petitioner submitted photographs of its business premises which show that the company's sign reads "Radhe USA Corporation, Wholesale & Distributor [*sic*]." While the petitioner has submitted copies of several consulting agreements indicating that it has been contracted to provide "back office operations, POS system training and solutions, staff training assistance and administration, placement services and Inventory Services," the petitioner has not provided evidence of any payments it has received pursuant to these contracts, and based on the evidence of record, the petitioner is clearly engaged in other lines of business.

These critical discrepancies regarding the nature of the business reasonably call into question the position descriptions provided for the beneficiary and his subordinates, and prevent the AAO from concluding that the beneficiary would be employed in a qualifying capacity under the extended petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any

attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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. *Id.* at 591.

Due to lack of specificity in the beneficiary's provided job duties, the lack of subordinates to relieve the beneficiary from performing operational tasks, and the petitioner's failure to provide credible and consistent evidence regarding the nature of its business activities, the petitioner has not established that it would employ the beneficiary in a managerial or 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, that burden has not been met.

ORDER: The appeal is dismissed.