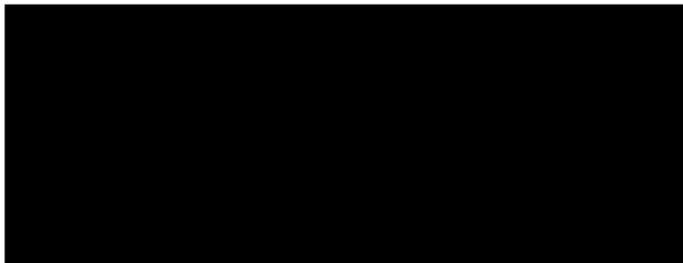




U.S. Citizenship  
and Immigration  
Services



D7

DATE: **DEC 31 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:

SELF-REPRESENTED

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, United Kingdom entity, states that it is a distributor for ecological health and beauty products. It seeks to transfer the beneficiary to its U.S. affiliate, [REDACTED] limited liability company established in 2008. The petitioner is seeking a three year approval for the beneficiary's L-1A status so that she may serve in the position of Chief Executive Officer for its U.S. affiliate.<sup>1</sup>

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

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the evidence of record establishes that the beneficiary will function in a qualifying managerial or executive position. The petitioner submits a brief and additional evidence in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the 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.

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<sup>1</sup> The petitioner indicates that its U.S. affiliate, [REDACTED] previously filed an L-1A classification petition on behalf of the beneficiary. The record reflects that the petition was approved by the Vermont Service Center for a one year period commencing on January 1, 2009, but the approval of the petition was subsequently revoked.

- (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 sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in the United States in a primarily managerial or executive 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.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on August 17, 2011. The petitioner indicated that it is a distributor for ecological health and beauty products with no U.S. employees and a gross annual income of \$45,001. On the Form I-129, the petitioner explained that as Chief Executive Officer, the beneficiary would be responsible for "the overall management of the company." Specifically, the beneficiary's duties were to include the following:

1. The management and training of the entity's employees and sub-contractors
2. Responsibility for co-ordinating and managing projects
3. Control, review and making decisions over the company's finance and budget
4. Management of marketing and promotions
5. The negotiation and approval of contracts and developing pivotal business relationship and new opportunities and
6. Dealing with issues as they arise on a daily basis.

In a letter dated August 15, 2011, the petitioner provided a multi-page explanation of the beneficiary's proposed duties to include: overall management and direction of the company; project and personnel management; managing and reviewing the finances and budget; negotiation and approval of contracts; marketing and company promotions; and dealing with other issues as they arise. Each job duty included approximately a one paragraph description.

The petitioner also included an organizational chart and evidence of payments issued to the two current contracted employees in the United States. The organizational chart showed a multi-tiered organizational structure. Reporting to the beneficiary were the following: (1) an open position for operations; (2) a position for marketing shown to be filled through a contract with Nurture Network, (3) a sales agent hired on a contract basis, and (4) an e-marketing position filled through a contract with [REDACTED]. Reporting to the open position for operations was a business operations administrator hired on a contract basis. Four proposed packing positions were shown reporting to the business operations administrator. Reporting to the sales position were three staff shown to be on a contract basis and six proposed additional positions for independent sales contractors.

The petitioner included a State of Georgia Employee's Withholding Allowance Certificate and a 2010 IRS Form W-4, Employee's Withholding Allowance Certificate for the sales position and three additional contract sales staff. An IRS Form W-4 was submitted for an unidentified employee and no information was submitted for the business office administrator. The petitioner submitted a contract for website design with [REDACTED] but did not submit any other contracts for services as specified on the organizational chart. The petitioner's evidence also included copies of e-mail correspondence between the beneficiary and the business office administrator and sales agent discussing work product and deliverables.

The petitioner submitted a business plan for the U.S. company. The business plan did not address the company's current and future staffing needs. An addendum to the business plans states that within the first two weeks of "the beneficiary's presence" in the United States, the company plans to employ the sales agent and office administrator on a full-time and permanent basis. The company further plans to employ a full-time packer within the first month of the beneficiary's employment. Furthermore, according to the business plan, the U.S. company plans to engage two sub-contracted sales consultants and a packer, commission a website, pay for additional advertising, and engage additional staff over the course of the next eight months.

The director issued a request for additional evidence ("RFE") on August 29, 2011 in which he instructed the petitioner to submit, *inter alia*, the following: (1) a list of all United States employees with names, titles, position descriptions of the beneficiary's subordinates; and (2) a description of how the beneficiary's duties will be managerial or executive in nature.

The petitioner responded in a letter dated November 22, 2011. The petitioner described the beneficiary's managerial authority as follows:

[The beneficiary] will be responsible for spearheading the direction of the company and ensuring that the plans devised for its development and growth are effectively implemented. . . . Her managerial undertakings will include identifying, developing and directing the implementation of business strategy, exercising discernment and flexibility in deciding which plans require more focus or a change in direction.

The petitioner provided the same list of job duties as provided with the initial submission with a slightly more detailed explanation as to the nature of her "personnel and project management" responsibilities. Specifically, the petitioner stated that the beneficiary has "project management and authority over sub-contracted parties." The petitioner stated that the beneficiary oversees the work of the office administrator, sales executive, and three sales consultants, and stated that the sales consultants report directly to the sales executive and office administrator.

The petitioner provided a short description of the sales executive's and contracted sales staff's job duties. The sales executive is responsible for promoting and selling the company products within various forums, expanding the client base, and training and overseeing the activities of the contracted sales staff. The contracted sales consultants are responsible for selling the petitioner's products. The petitioner also provided a position description for the proposed packer position to include dispatching goods, packaging and labeling items.

The director denied the petition on December 6, 2011. The director found that the petitioner has not established that the beneficiary will be employed either in a managerial or in an executive capacity. The director noted that the petitioner has not established that the beneficiary will be involved in the supervision and control of other professional, supervisory, or managerial employees who will relieve the beneficiary from performing the services of the organization. Specifically, the director found that the tax returns showed zero

wages paid in 2010 and there was a bank statement showing wages paid to one contractor. The director concluded that it is unclear as to who is conducting the general duties of sales and services for the United States entity. Furthermore, the director found that the beneficiary's duties were vague and did not clearly indicate what the beneficiary would be doing in the context of the current staffing arrangement.

On appeal, the petitioner asserts that the beneficiary's position is primarily managerial or executive in nature. The petitioner contends that the record clearly established that the U.S. company contracted for the services of a sales executive and office administrative personnel to perform the sales of the organization. Furthermore, the petitioner states that the beneficiary's duties as submitted in the initial description and in response to the RFE are specific and managerial in nature. Finally, the petitioner states that in the event the petition cannot be approved for a three year period, it should be approved for one year as a "new office."

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.

Despite the petitioner's assertions, the petitioner may not be granted a "new office" L-1A visa approval. The petitioner clearly marked "No" on the Form I-129 where asked to indicate if the beneficiary is coming to the United States to open or be employed in a new office. While the growth of the U.S. company was undoubtedly negatively impacted by the denial of the beneficiary's L-1A visa application and subsequent revocation of the previously approved new office petition in 2009, the petitioner nevertheless claimed that it has been doing business in the United States during the year preceding the filing of the petition.

The AAO acknowledges that the director, in the Request for Evidence issued on August 29, 2011, cited to the regulatory definition of "new office" at 8 C.F.R. § 214.2(l)(1)(ii)(F) and stated:

The record indicates that the petitioning United States entity has been doing business for at least one year as of the date of filing. Based on the foregoing your United States entity is considered a 'new office' for immigration purposes and the validity is restricted to one year.

While this statement appears to be self-contradictory, the record reflects that the director ultimately adjudicated the petition as an established office, consistent with the director's finding that "the petitioning United States entity has been doing business for at least one year as of the date of filing," and consistent with the petitioner's own claim that the beneficiary is not coming to the United States to open or be employed in a new office. The notice of decision dated December 6, 2011 makes no reference to the regulatory definition of "new office" or to the evidentiary requirements for new office petitions at 8 C.F.R. § 214.2(l)(3)(v).

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 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 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 petitioner's initial description of the beneficiary's job duties is vague. Duties such as "overall management and direction of the company," "project and personnel management," and "dealing with other issues as they arise," do not provide a clear understanding of what the beneficiary will be doing on a daily basis. While the petitioner provided a lengthy explanation of each duty, the explanations do not provide any specific tasks that the beneficiary will perform in the context of the company's health and beauty products business. Duties such as "Project and personnel management," are further described with general terminology such as the "co-ordination, planning, and the application of the company's projects and services." Here, among other duties, there is no clear application to the specific needs of a wholesale/retail cosmetics supplier. 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).

Furthermore, whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as negotiation and approval of contracts, developing business relationships, and developing and implementing a marketing plan, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

In response to the RFE, the petitioner provided the same set of duties as provided with the initial petition, but expanded on the duty entitled "Project and Personnel Management." The petitioner stated that the beneficiary holds authority over sub-contracted parties to include an Office Administrator/Administrative Assistant, Sales Executive, and Sales Consultants. The petitioner specified that the Sales Consultants were hired from October 2010 to December 2010 for the "pre-Christmas peak season." While this additional information provides some insight as to what personnel may be available to relieve the beneficiary of non-qualifying duties, it does not overcome the deficiencies in the job description provided in the initial submission.

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). Therefore, although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

The petitioner claims that the beneficiary will oversee a team of sales employees. As shown on the petitioner's organizational chart submitted with the initial petition, the beneficiary currently oversees a sales executive and one office administrative personnel. Reporting to the sales executive are three sales staff. On appeal, the petitioner clarifies that the contracted sales staff reporting to the beneficiary were only seasonal employees hired from October to December 2010, and were not employed as of the date of filing the 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). The petitioner has not shown that the beneficiary oversees subordinate managerial or supervisory personnel. The beneficiary appears to be a first-line supervisor of non-professional administrative and sales personnel.

The petitioner's organizational chart shows that additional company employees will be hired in the future to report to the current managerial staff. The future hiring of employees will not be considered in this petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r. 1971).

Although the petitioner claims in the initial petition, organizational chart, and in response to the RFE, that it has contractual employees in the areas of finance, marketing, and packaging services, the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. The petitioner provided a single contract commissioning a website. Pursuant to the petitioner's business plan, the website is one of many marketing, financial, and operational duties planned for the first year of operations after the beneficiary's arrival in the United States. Additionally, the petitioner has not explained how the services of the contracted employees would obviate the need for the beneficiary to primarily conduct the U.S. company's business. Without documentary evidence to support its statements, the

petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998).

The petitioner submitted the requested job descriptions for the employees under the beneficiary's supervision in response to the RFE as well as on appeal. Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. Due to the failure of the petitioner to document that the subordinate staff is supervisory or managerial in nature, the petitioner must show that the subordinate positions are professional level positions. The job descriptions submitted by the petitioner, however, do not establish that any of the employees working for the beneficiary are professional-level employees.<sup>2</sup>

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 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 subordinates are supervisors, managers, or professionals. Instead, the record indicates that the beneficiary's subordinates perform the actual day-to-day tasks of operating the cosmetic sales and distribution business. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to

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<sup>2</sup> In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* 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 "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).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not established that a bachelor's degree is required for any of the positions subordinate to the beneficiary's.

a supervisory position that is higher than a first-line supervisor of non-professional employees. 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.

The proposed position of the beneficiary is chief executive officer of a wholesale/retail cosmetics business consisting of zero permanent employees other than the beneficiary. The petitioner has not demonstrated that the beneficiary, as a personnel manager, will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. *See* section 101(a)(44)(A)(ii) of the Act. Furthermore, the petitioner has not established that it employs a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial duties. Regardless of the beneficiary's position title, the record is not persuasive that the beneficiary will function at a senior level within an organizational hierarchy. Even though the enterprise is in a preliminary stage of development, the petitioner is not relieved from meeting the statutory requirements. For this reason, the petition may not be approved and the appeal will be dismissed.

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.