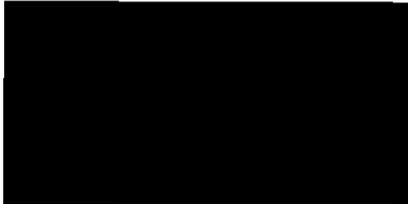


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



D7

DATE: **JUL 27 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,

Perry Rhew
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 corporation established in Florida, indicates that it is engaged in operating a [REDACTED] franchise. It claims to be an affiliate of the beneficiary's foreign employer, [REDACTED] located in Essex, United Kingdom. The petitioner seeks to employ the beneficiary as its President for a period of one year. 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 director's decision contains errors of law, as well as errors of fact, due to an alleged missing response to a request for evidence. The petitioner submits a brief 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 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 sole issue addressed by the director is whether the petitioner established that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

As a preliminary matter, the AAO notes the petitioner's claims that the United States entity should be considered a "new office" for immigration purposes. *The petitioner states:*

The beneficiary has been on E2 status and therefore it has not been part of the requirement that she employ a full managerial hierarchy. As the request that her status be changed to L-1A and that the duration of that status would be one year, the application is regarded as a start up business and should be treated as one and not as an existing business as the service seems to be doing.

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

The record indicates that the petitioning company was established as a corporation in Florida in 2005, and has been operating a [REDACTED] franchise since 2006. The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on June 19, 2009. The fact that the beneficiary has been working for the petitioning entity in a different nonimmigrant status has no bearing on whether the organization is considered a "new office" for L-1 purposes. Therefore, the petitioning company cannot be considered a "new office."

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 June 19, 2009. In an undated letter submitted with the Form I-129, the petitioner described the beneficiary's proposed duties as President as follows:

- Overall executive and Financial control
- All financial aspects including profitability
- All corporate development planning and implementation
- Setting and monitoring budgets and cash flows
- Developing and implementing the company's business plan and goals
- Setting and monitoring all corporate goals, policies, and procedures[.] Representing the company to financial and legal entities
- Delegation of responsibilities to management staff
- Undertaking regular staff performance review
- Establishing capital requirements
- Setting and implementing pricing policies
- Researching and implementing business opportunities
- Exercising discretion over day to day operations of the business
- Review of financial reports to determine corporate progress

The petitioner stated on the Form I-129 that it employs six workers. The petitioner provided an organizational chart indicating that the beneficiary, as President/CEO, will directly supervise a General Manager, who in turn will supervise a Supervisor. The Supervisor will in turn supervise two full-time employees and one part-time employee. The petitioner provided a job description for the General Manager and the Supervisor.

The petitioner submitted copies of its IRS Forms 941, Employer's Quarterly Federal Tax Return for the first quarter of 2009 and the last two quarters of 2008. The petitioner reported wages paid to three employees in the third quarter of 2008 and wages paid to two employees in the fourth quarter of 2008 and first quarter of 2009.

The director issued a request for additional evidence on July 17, 2009. The director instructed the petitioner to submit, *inter alia*: (1) a comprehensive description of the beneficiary's duties; (2) a list of all United States employees and complete position descriptions for all proposed employees in the United States; (3) copies of

the petitioner's federal income taxes; (4) a copy of Form 941, Employer's Quarterly Federal Tax Return for the second quarter of 2009; (5) a copy of all Forms W-2 and 1099 issued by the petitioner in 2008; and (6) additional photographs of the interior and exterior of the company's business premises.

The response to the request for evidence was due on October 24, 2009 but the service center received no additional documentation prior to that date. On November 3, 2009, the service center received a letter from the petitioner claiming that the additional evidence was sent and received by the service on August 18, 2009. The petitioner included a confirmation page showing a delivery confirmation to in Saint Albans, Vermont on August 18, 2009. The petitioner did not provide a copy of the material allegedly included in the delivery.

The director denied the petition on January 8, 2010, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director acknowledged the letter received on November 3, 2009, but also noted the petitioner's failure to submit the requested evidence.

In denying the petition, the director noted the inconsistencies between the claimed six employees on the Form I-129 and the two employees listed on the Form 941, Employer's Quarterly Federal Tax Return, for the quarter prior to filing. The director further commented on the petitioner's failure to submit the 2008 Form W-2, Wage and Tax statements as requested. The director emphasized that the description of the beneficiary's duties were too general and nonspecific, and generally paraphrased the statutory definitions of managerial and executive capacity. The director further determined that the evidence was insufficient to establish that the beneficiary's subordinate employees would be managers or professionals, notwithstanding their job titles and educational credentials. In this regard, the director noted that, as "it is not clear who is actually providing the goods and services of the United States operation to its customers/clients, it seems likely that the beneficiary will perform or help perform those duties."

The director concluded that, while the beneficiary's proposed job title is President, the petitioner failed to establish that she would be engaged in primarily managerial or executive duties, or that she would be relieved from performing the non-managerial, day-to-day operations involved in producing a product or providing a service.

On appeal, the petitioner submits a letter stating the service misplaced the documentation submitted in response to the request for evidence and the denial is based on this lack of evidence. Specifically, the petitioner states that the lost evidence includes photographs of the location and a list of job duties and time spent performing each duty.

The petitioner concedes that at the time the petition was filed, there were only two employees other than the beneficiary and that only part-time staff were employed in 2008. The petitioner further states that the location is appropriate for the operation, the beneficiary's educational background has no bearing on whether she is employed in a managerial capacity and that there is no need for sales people, but "merely people to serve smoothies to the public who enter the premises to purchase a smoothie."

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 managerial or executive capacity.

As a preliminary matter, the record does not support a finding that the service center lost the petitioner's response to the request for evidence. While the petitioner asserts that "the denial is based on that alleged lack of evidence," the petitioner fails to provide any evidence in support of the appeal demonstrating that a response to the request for evidence was sent and received by the service center. Furthermore, the petitioner does not even provide a copy of the materials that were allegedly sent to the service center. The petitioner merely claims in a letter that "certain information was not passed to the service that actually was passed to them in the reply to the request for evidence made by the service."

The petitioner bears the burden of proof to show that evidence was timely sent to the service and what evidence was actually submitted. 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)).

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 either in an executive or managerial capacity. *Id.*

The petitioner described the beneficiary's proposed position in very broad terms, including such duties as "[o]verall executive and [f]inancial control," "[a]ll corporate development planning and implementation," "setting and monitoring all corporate goals," "researching and implementing business opportunities," and "[e]xercising discretion over day to day operations of the business." These duties merely paraphrase the statutory definition of executive capacity. See section 101(a)(44)(B) of the Act. 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.).

The petitioner further states that the beneficiary will undertake "regular staff performance review[s]," develop and "implement the company's business plan," delegate "responsibilities to management staff," and "establish capital requirements." The petitioner does not specifically identify the staff to be reviewed, or describe the pricing policies or business plan to be developed and implemented. The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description which appears to include inflated job duties does not establish that the beneficiary will actually perform primarily managerial or executive duties on a day-to-day basis within the context of the petitioner's retail business. 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).

Additionally, the petitioner failed to provide a breakdown of how the beneficiary's time would be allocated among her various responsibilities. 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).

The AAO cannot accept an ambiguous position description and speculate as to the related managerial or executive duties to be performed. 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. at 1108. The petitioner failed to provide any detail or explanation of the beneficiary's activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Id.*

While several of the duties generally described by the petitioner could fall under the definitions of managerial or executive capacity, the lack of specificity raises questions as to the beneficiary's actual proposed duties. The position description alone is insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity. Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

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).

The petitioner indicates that it is operating a smoothie franchise and that the beneficiary will be charged with supervising a staff comprised of managers, first-line supervisors, professionals and laborers. The petitioner has failed to clearly document the number and type of employees working for the petitioning company as of the date of filing. The petitioner claimed on the Form I-129 that it had six workers, but on appeal concedes there were only two employees other than the beneficiary at the time the petition was filed. 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 submitted Form 941, Employer's Quarterly Federal Tax Return, showing two employees as of the quarter before filing; however, the Form 941 does not specify the names or titles of the two employees receiving wages. 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 failed to provide the Form W-2s as requested, nor did the petitioner clarify which positions were filled as of the date of filing the petition. 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).

Due to the fact that the record does not clarify the names or titles of the employees at the time of filing, the AAO cannot 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. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Similarly, a determination cannot be made as to whether the beneficiary manages supervisory or managerial employees. Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.

The petitioner claims to operate a [REDACTED] franchise with two part-time employees as of the date of filing. The petitioner states that the number of employees had changed at the time of the request for evidence. The petitioner, however, 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).

Upon review of the totality of the evidence, the petitioner's smoothie franchise appears to be minimally staffed with mostly part-time workers as of the time of filing, and the petitioner has not established that this staffing arrangement would be adequate to relieve the beneficiary from performing administrative and operational duties associated with operating the retail business. As discussed above, notwithstanding the job titles assigned to the beneficiary's subordinates, it appears that most or all of the employees would be required to spend their working hours engaged in the day-to-day operations of the business in order for the store to remain operational during the suggested hours of business 7 am to 9 pm Monday through Friday; 10 am to 8 pm Saturday, and 10 am to 7 pm Sundays as stated in the Franchise Agreement.

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. The reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

While the petitioner has not argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support such a claim. 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. 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(l)(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. The petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to document that the beneficiary's duties will be primarily managerial. As explained above, the record indicates that the beneficiary will primarily be a first-line supervisor of non-professional employees and will perform non-qualifying operational or administrative tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing her duties, the AAO cannot determine what proportion of her duties will be managerial, nor can it deduce whether the beneficiary will primarily perform 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).

Based on the foregoing, the petitioner has not established that the petitioner will be employed in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the record reflects that the beneficiary and her spouse are the owner/operators of the parent company. However, the record does not establish that the parent company is still doing business abroad. The fact that both owners of the foreign corporation reside in the United States raises the question of whether the affiliate organization is still doing business so that a qualifying relationship exists pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). For this additional reason, the appeal must be dismissed and the petition denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis). When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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

ORDER: The appeal is dismissed.