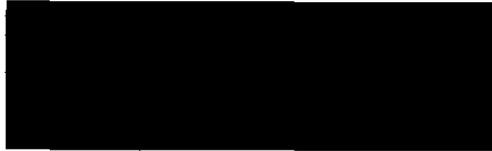




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DATE: **JUN 14 2012** Office: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:   
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the  
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



**INSTRUCTIONS:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a 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, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an 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 Delaware limited liability company, states that it intends to operate a freight forwarding, logistics, import and export company. It claims to be an affiliate of [REDACTED] a Chinese company. The petitioner seeks to employ the beneficiary as the vice president of its new office in the United States for a period of one year.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary has been employed by the foreign entity 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 asserts that the director failed to give adequate consideration to the petitioner's claim that the beneficiary is employed as executive, and instead focused on whether she would be employed in a managerial capacity. Counsel contends that the beneficiary is "in charge of two divisions in China" and is "directly involved with creating policies and procedures in her divisions." Counsel asserts that the director provided an inadequate basis for finding the beneficiary's duties to be non-executive in nature.

## 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 regulation at 8 C.F.R. § 214.2(l)(3)(v) also provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involves executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
  - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
  - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
  - (3) The organizational structure of the foreign entity.

## **II. Discussion**

The sole issue addressed by the director is whether the petitioner established that the beneficiary is employed by the foreign entity 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.

#### A. Facts and Procedural History

The petitioner filed the Petition for a Nonimmigrant Worker (Form I-129), on March 16, 2010. In a letter dated March 18, 2010, the petitioner indicated that the foreign entity is one of China's premier freight forwarding companies with approximately 100 employees, a large container yard, a modern crane for container handling, warehouse, trucks and branch offices. The petitioner stated that the foreign entity provides its freight forwarding customers with sea transportation, inland transportation, combined transportation of imported or exported products, and services as a non-vessel operating common carrier. In addition, the foreign entity provides services such as cargo canvassing, booking, warehousing, transferring, container loading and devanning, freight incidental expense clearance, customs clearance, inspection, insurance, distribution logistics, truck transportation and consultation services.

The petitioner indicated that the beneficiary has served as the foreign entity's Vice President, Import and Export since March 2007 and "focuses on trading (import or export) and logistics." The petitioner described her duties as the following:

Import/Export

- Supervise the overall operation of importing and exporting
- Determine the direction of business development, survey the development trend for international markets; establish the categories for suitable industries
- Recruit qualified employees for each industry and supervise training of new employees
- Preside over the company's overall management of daily work
- Establish policies and supervise in-depth implementation
- Develop operational and financial convergence process of importing and exporting
- Oversee working capital and cost control

Logistics

- Promote [the company's] freight forwarding and multimodal freight transportation services between Hong Kong, mainland China and other countries based on professional integrative service
- Build and maintain relationships with existing and potential clients in north areas and provinces
- Build and publicize enterprise culture and image of [the company]
- Research, analyze and establish marketing information to include reports and proposals
- Oversee the management of the administration and financial affairs of the representative office
- Establish and implement the annual plan for representative office, to include annual report, annual financial budget
- Monitor expenses to ensure consistent with approved budget
- Plan and implement improvements to internal and external logistics systems and processes.

The director issued a request for additional evidence on March 30, 2010. The director instructed the petitioner to submit a more detailed description of the beneficiary's duties, and advised that it should be specific in describing the tasks she performs. The director also requested a copy of the foreign entity's line and block organizational chart describing its managerial hierarchy and staffing levels, and specified that the chart should include the names of all executives, managers, supervisors and the number of employees within each department. The director requested that the petitioner identify each of the beneficiary's subordinate employees by name and job title, and provide a brief description of job duties, educational level, annual salaries/wages for all employees working under the beneficiary's supervision.

In a response dated April 22, 2010, counsel for the petitioner stated: "the beneficiary is an executive and in her capacity as Vice President does not directly supervise other employees." Counsel cited to the regulatory definition of "executive capacity" at 8 C.F.R. § 214.2(l)(1)(ii)(C). In a separate letter, the petitioner stated that "the beneficiary does not supervise or manage employees, but rather a function."

The petitioner submitted an organizational chart for the foreign entity with the names of employees provided in Chinese only. The chart depicts a general manager and two vice general managers, one of which is identified as the beneficiary, per a handwritten notation. Under the other vice general manager, the chart identifies [REDACTED] eight departments (finance, accounting, marketing, depot, tracking, operation, customer service and customer affairs) and three branch offices located [REDACTED]. According to the petitioner's business plan, [REDACTED] is the foreign entity's international trading business and is engaged in the import and export of textiles, wooden products, lighting products and fruit juice products.

In a separate statement, the petitioner provided the following description of the beneficiary's duties as vice president, import/export:

1. Analyzes all aspects of company logistics, determining the most efficient means and most cost effective means of transporting products. (30%)
2. Create policies and procedures for logistic activity. (10%)
3. Plan and implement internal and external logistics systems and processes. (10%)
4. Direct and coordinate Division's financial and budget activities to include overseeing working capital and cost control; Analyze the financial impact of proposed logistic changes (20%)
5. Review of financial statements, activity reports, and performance data to measure Division's productivity and goal attainment and determine areas needing action or improvement. (10%)
6. Research, analyze and establish marketing information to include reports, proposals, etc. (10%)
7. Build and maintain relationships with existing and potential clients; build and market [the company's] products and services. (10%)

The director denied the petition on May 6, 2010, concluding that the petitioner failed to establish that the foreign entity employs the beneficiary in a qualifying managerial or executive capacity. In denying the petition, the director observed that several of the duties attributed to the beneficiary are not duties that are typically considered managerial or executive in nature, but rather suggest that the beneficiary performs tasks necessary to produce a product or provide a service. The director further emphasized that the foreign entity's organizational chart does not identify any personnel working in a logistics, import or export department, which raises questions regarding the beneficiary's responsibility for "supervising the overall operation of importing and exporting."

In addition, the director acknowledged the petitioner's claim that the beneficiary manages a function of the organization, but found insufficient evidence to establish that the beneficiary is relieved from performing the day-to-day operations of the departments that are claimed to be under her supervision.

On appeal, counsel for the petitioner asserts that the beneficiary is employed as an executive who is in charge of the foreign entity's import/export and logistics divisions. Counsel asserts that "she was directly involved with creating policies and procedures in her divisions, as well as reviewing whether her divisions met goals – and altering existing or creating new strategies for meeting goals." Counsel states that the beneficiary "had a large amount of discretion in making her decisions," including responsibility for "policy creation; determining financial

and practical efficiency and making the necessary changes to comply therewith; direction of finance activities; and planning and implementing logistics systems."

Counsel further asserts that the beneficiary "is not as involved in the direct supervision of lower or professional employees, because her primary purpose is the direction of a major component or function of the organization." Counsel contends that the director provided no basis for dismissing the beneficiary's duties as non-qualifying, noting that responsibilities such as surveying market trends are "critical to enable decision-making and establishing goals."

### B. Analysis

Upon review, and for the reasons discussed herein, the petitioner has not established that the foreign entity has employed the beneficiary in a qualifying managerial or executive capacity.

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 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 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 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).

The petitioner's initial description of the beneficiary's duties included a total of 15 responsibilities, seven of which relate to the beneficiary's oversight of the foreign entity's import/export activities. The majority of these duties are described in broad and non-specific terms that suggest the beneficiary's level of authority, but provide little insight into the nature of her day-to-day duties. For example, the petitioner indicated that the beneficiary's duties include: "supervise the overall operation of importing and exporting," "determine the direction of business development," "preside over the company's overall management of daily work," and "establish policies and supervise in-depth implementation." The petitioner did not define any specific tasks associated with these general responsibilities. 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); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

Despite the petitioner's assertion that the beneficiary does not supervise any employees, the beneficiary's initial position description indicated that she recruits and supervises the training of new employees, while her responsibility for "overall management of daily work" also implies the presence of lower-level workers under her supervision. Further complicating the analysis of this issue is the lack of any import/export department in the foreign entity's organizational chart. As counsel claims on appeal that the beneficiary is "in charge of two divisions," including import/export, it is reasonable for the petitioner to establish the existence and structure of this division in order to clarify exactly what is involved in supervising "the overall operations of importing and exporting."

To the extent that the foreign entity's general organizational chart reveals any information about the structure of the company, it appears that the foreign entity's other vice president/vice general manager, rather than the beneficiary, oversees all divisions of the company. 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)). 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's initial description of the beneficiary's position also included eight duties related to her oversight of the company's logistics division. Again, the foreign entity's organizational chart does not identify a logistics division or any other division reporting to the beneficiary. Nevertheless, the petitioner indicated that the beneficiary's role with respect to this division is to promote the company's freight forwarding and freight transportation services, build and maintain customer relationships, publicize the company's image, research and analyze marketing information, monitor expenses, plan and implement improvements to logistics systems, and oversee the management of administration and financial affairs of the representative office. The petitioner did not delineate what specific tasks the beneficiary performs to promote the company's services, build customer relationships, publicize the company's image, or research marketing activities. Without further explanation, the AAO cannot conclude that these are managerial or executive duties, as opposed to day-to-day marketing, market research and promotional tasks.

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. The petitioner failed to document what proportion of the beneficiary's duties would be qualifying managerial or executive functions and what proportion would be non-qualifying. This failure of documentation is important because several of the beneficiary's daily tasks, as noted above, do not fall under traditional managerial or executive duties as defined in the statute. For this reason, the director was unable to determine whether the beneficiary is primarily performing the duties of a manager or executive. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

In response to the director's request for additional evidence pertaining to the beneficiary's role with the foreign entity, the petitioner submitted a shorter, revised position description that is considerably different and less detailed from the description provided at the time of filing the petition. While the petitioner maintained that the beneficiary "plans, directs or coordinates the operations of the import/export division and logistics division," the revised position description indicates that the beneficiary allocates all or most of her time to the logistics division, and excludes the previously stated responsibilities for supervising import and export operations. The petitioner provided no explanation for its exclusion of these previously stated duties, and simply indicated that 100% of the beneficiary's time is allocated to the logistics division. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities.

The AAO is not in a position to determine which version of the beneficiary's job description more accurately reflects her actual role and responsibilities with the foreign entity and neither description is sufficiently detailed. 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 her 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).

In response to the RFE, the petitioner indicated that the beneficiary devotes 30 percent of her time to analyzing all aspects of company logistics, 10 percent of her time researching and analyzing market information, and 10 percent of her time building and maintaining client relationships and marketing the company's services. The AAO concurs with the director that the petitioner has not adequately described the tasks required to perform these duties and therefore has not established that they are primarily managerial or executive in nature. Again, the petitioner has opted to forego providing the requested detailed illustration of the foreign entity's structure, and the information that it did provide fails to confirm the existence or composition of the logistics and import/export divisions the beneficiary is claimed to oversee. 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).

Overall, while several of the general responsibilities described by the petitioner may fall under the definitions of managerial or executive capacity, the lack of specificity and the lack of consistency between the two position descriptions provided raises questions as to the beneficiary's actual proposed responsibilities. The provided position descriptions alone are 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 a beneficiary's claimed managerial or executive capacity, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees (if any), 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). The petitioner has not claimed that the beneficiary supervises any subordinate employees, but did state in its letter dated April 22, 2010 that the beneficiary "manages a function."

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 detailed description of 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). 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. Furthermore, in the case of a function manager, where no subordinates are directly supervised, other factors USCIS may consider include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

Here, the petitioner has indicated that the beneficiary coordinates the operation of the import/export division and the logistics division. The petitioner has not clearly described the managerial or executive duties the beneficiary performs with respect to these functions, or the proportion of the beneficiary's time allocated to these functions. Because the petitioner did not provide the requested detailed organizational chart for the foreign entity, the AAO cannot determine the depth of the foreign entity's organizational structure or whether the beneficiary may indirectly supervise employees within the scope of the import and export and logistics functions. Rather, the chart submitted suggested that the foreign entity's other vice president oversees all lower level departments. In the case of a function manager, USCIS recognizes that other employees carry out the functions of the organization, even though those employees may not be directly under the function manager's supervision. It is the petitioner's obligation to establish that the day-to-day non-managerial tasks of the function managed are performed by someone other than the beneficiary. Given the vague and inconsistent position descriptions and lack of requested information regarding the foreign entity's structure, the AAO cannot conclude that the beneficiary performs primarily managerial duties related to the import/export and logistics divisions.

For the same reasons, the petitioner has not established that the beneficiary has been employed in an executive capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of 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.*

While the petitioner indicates that the beneficiary establishes policies and processes for logistics and import/export operations, the petitioner also indicated that the beneficiary performs duties such as promoting the company's services, building client relationships, publicizing the company image, and performing market research and analysis, duties which have not been demonstrated to be executive in nature. Furthermore, as with a function manager, the petitioner must establish that the beneficiary is relieved from performing the day-to-day operations of the functions or divisions for which she holds oversight responsibilities, even if she does not directly supervise staff. The petitioner's failure to identify the existence or staffing of such divisions undermines its claim that the beneficiary exercises executive control over these functions.

In light of the above, the AAO concurs with the director's finding that the petitioner failed to establish that the beneficiary has been employed in a primarily managerial or executive capacity. The petitioner's claims fail primarily on an evidentiary basis, as the petitioner's response to the RFE did not adequately address the director's concerns. Accordingly, the appeal will be dismissed.

### **III. Conclusion**

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. 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 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

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.