



U.S. Citizenship
and Immigration
Services

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87.

DATE: **NOV 01 2012** Office: VERMONT SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

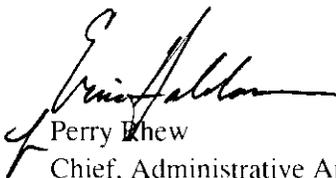
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INSTRUCTIONS:

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 petitioner has appealed the denial of a nonimmigrant petition seeking to classify 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 Director, Vermont Service Center, denied the visa petition on July 26, 2011, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this petition seeking to extend the beneficiary's employment 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 New York corporation established on April 9, 2010, engages in retail sales, wholesale and export of clothing. The petitioner claims to be a branch office of [REDACTED] located in Haifa, Israel, claiming that [REDACTED] owns 100% of the shares of both companies. The beneficiary was previously granted L-1A status for a one-year period in order to open a new office in the United States. The petitioner seeks to extend the beneficiary's employment as its President for three additional years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would 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. On appeal, counsel asserts that the beneficiary is employed in a primarily managerial or executive capacity. Counsel submits a brief and additional evidence to support the appeal.

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)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by 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.

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.

II. The Issue on Appeal

The sole address by the director is whether the petitioner established that the U.S. company will employ the beneficiary in a primarily managerial or executive capacity.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker on May 11, 2011. The petitioner indicated its intent to continue employing the beneficiary as its President. The petitioner reported on Form I-129 that it had 6 employees at the time of filing. The petitioner submitted an organizational chart of its current personnel depicting six total employees: a president, two shift leaders, a director of vendor relations, and two sales employees. The petitioner did not identify any employees by name.

In a letter dated May 5, 2011 accompanying the petition, the petitioner stated that the U.S. company operates a retail store in New York City, and exports brand name goods to its sister company in Israel. The petitioner described the beneficiary's duties as follows:

[The beneficiary's] duties as President of [REDACTED] are to handle the expansion of the business in the USA including: oversee the development and expansion of business in the United States; plan long and short term goals; prepare and review budgets and financial forecasts and present same to Board of Directors; liaison with parent company and subsidiaries; oversee all insurance matters and legal issues; make final decisions on all personnel and subcontractor matters including hiring, firing, evaluations, promotions and terms of employment; represent parent company and subsidiaries to Israel authorities in the USA and to US government authorities; order marketing reports and oversee development of potential markets; approve agreements with clients; approve pricing and term agreements; and oversee day to day operations.¹

¹ The AAO notes that the name of the petitioning company is [REDACTED] and not [REDACTED] Inc." as stated in the petitioner's letter. The petitioner did not provide documentation that it is doing business as [REDACTED] which appears to be a separate legal entity rather than a fictitious name.

The petitioner submitted, *inter alia*, a copy of its Form NYS-45, Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return, for the fourth quarter of 2010. The petitioner reported no employees for the first and second months, and one employee in the third month (December).²

The petitioner also submitted a copy of its IRS Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2010, in which the petitioner reported one employee who received wages, tips, or other compensations.

The director issued a request for additional evidence ("RFE") on June 23, 2011, advising the petitioner that it failed to sufficiently describe the beneficiary's duties to demonstrate that she is employed in a qualifying capacity. The director instructed the petitioner to provide, *inter alia*, the following: (1) a comprehensive description of the beneficiary's duties including a breakdown of the number of hours devoted to her job duties on a weekly basis; (2) a more detailed description of the staff of the U.S. office, including the number of employees, their job titles, and the duties with the percentage of time dedicated to each duty to be performed; (3) an organizational chart, highlighting the beneficiary's position in the organization as well as depicting where the position of Business Development and Logistics Manager fits into the organization; and (4) copies of IRS Forms 941, Employer's Quarterly Federal Tax Return, for 2010 and the first quarter of 2011.

In a response dated July 13, 2011, counsel for the petitioner asserted that the beneficiary's duties "are all managerial" and that the beneficiary "performs no non-managerial duties." Counsel provided the following list and breakdown of the beneficiary's duties:

- oversee the development and expansion of business in the United States – 100%
- plan long and short term goals - prepare and review budgets and financial forecasts and present same to Board of Directors – 40%
- liaison with parent company – 10%
- oversee all insurance matters and legal issues – 5%
- make final decision on all personnel and subcontractor matters including hiring, firing, evaluations, promotions and terms of employment – 10%
- represent parent company and subsidiaries to Israel authorities in the USA and to US government authorities – 5%
- order marketing reports and oversee development of potential markets – 5%
- approve agreements with whole sellers and buyers, approve pricing and term agreements – 10%
- meet with staff to discuss performance issues and evaluations -15%
- oversee day to day operations – 100%.

The petitioner asserted that the beneficiary directly supervises three managers and a secretary/bookkeeper, and indirectly supervises two sales staff. The petitioner provided position descriptions for its shift supervisors, sales clerks, business development and logistics manager, and secretary/bookkeeper. The petitioner submitted an amended organizational chart depicting seven total employees: the President (the

² Although the petitioner reported only one employee for the entire quarter, the petitioner listed three names under Part C, Employee wage and withholding information: [REDACTED]

[REDACTED] The total amount of wages paid for the quarter was \$1,291.

beneficiary), a secretary/bookkeeper, two shift leaders, a Director of Vendor Relations, and two sales employees.

The petitioner submitted a copy of its IRS Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2011 (ending in March), in which the petitioner reported four employees who received wages, tips, or other compensation.

The director denied the petition on July 26, 2011, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. In denying the petition, the director observed that it was not clear who would consistently provide the goods and services of the United States operation to its customers/clients, and it seemed likely that the beneficiary will perform or help perform these duties in light of the petitioner's current staffing arrangements.

The petitioner subsequently filed an appeal. On appeal, counsel for the petitioner asserts that the petitioner is not only a single retail store, but it also has a wholesale operation and exports goods to its sister company in Israel. Counsel asserts that, at the time of filing, the petitioner had six employees, including a secretary/bookkeeper, two shift leaders, two sales personnel, and a Business Development/Logistics Manager (Director Vendor Relations). Counsel asserts that these employees relieve the beneficiary from performing any non-qualifying duties. Counsel asserts that the beneficiary herself is not involved in the daily operations except in a supervisory capacity by overseeing the work, directly or indirectly, of the employees. Counsel asserts that the size of the petitioner's store, alone, should not be a determining factor, and that the AAO must take into account the reasonable needs of the petitioner in light of its overall purpose and stage of development where staffing levels are considered.

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. Therefore, the director properly denied the petition.

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 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 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 section 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 described the beneficiary's job duties in only broad and vague terms, and, as noted above, indicated that she performs the described duties for [REDACTED] rather than for the petitioning company. For example, the petitioner initially stated that the beneficiary will "oversee the development and

expansion of business in the United States,” “oversee day to day operations,” “oversee all insurance matters and legal matters” and “plan long and short term goals.” This vague and conclusory description fails to provide any meaningful insight into what the beneficiary primarily does on a day-to-day basis. 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 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 addition, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Id.*, at 1108.

In the RFE, the director advised the petitioner that it did not sufficiently describe the beneficiary's duties, and that the description provided did not appear to be primarily executive or managerial in nature. Nevertheless, in response to the RFE, the petitioner largely reiterated the same, previously-provided description of the beneficiary's job duties, assigned percentages of time to each duty, and added one duty that the beneficiary will “meet with staff to discuss performance issues and evaluations.” The petitioner failed to provide any additional details or explanations of the beneficiary's daily duties, as requested by the director. As discussed above, the job duties the petitioner described for the beneficiary are too broad and conclusory to give any meaningful insight into the beneficiary's daily job duties.

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.

In the instant matter, the petitioner failed to provide consistent evidence of its total staffing at the time of filing. The petitioner has consistently asserted that it employed six employees, *not* including the beneficiary, at the time of filing. However, the petitioner reported only four employees on its IRS Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2011 (ending in March). The petitioner's initial organizational chart listed six total personnel, *including* the beneficiary's position of President. Furthermore, although the petitioner claimed to have opened for business in New York City in November 2010, the petitioner reported only one employee on its IRS Form 941, Employer's Quarterly Federal Tax Return, for the fourth quarter of 2010. The petitioner also reported only one employee on its Form NYS-45, Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return, for the fourth quarter of 2010. The petitioner has not offered an explanation for the inconsistencies regarding its staffing.

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.

Furthermore, the record is devoid of objective evidence of wages paid to the petitioner's claimed seven employees, such as copies of employee pay stubs, payroll records, and W-2 forms for its claimed seven employees. In the absence of such evidence, particularly in light of the conflicting documents regarding the petitioner's total number of employees, the petitioner has failed to establish that it employs seven employees

as claimed. Consequently, the petitioner failed to establish that the beneficiary has a sufficient subordinate staff to relieve the beneficiary from performing non-qualifying duties. While the AAO acknowledges the possibility that the petitioner hired additional staff during the second quarter of 2011 and prior to the filing of the petition, it is the petitioner's burden to submit evidence of wages paid to all claimed employees in support of its request for an extension of a petition involving a new office. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D).

The totality of the record reflects that the beneficiary's claimed job duties are not entirely credible. The petitioner claims that the beneficiary performs no non-qualifying duties, and that its other workers perform all of the petitioner's non-qualifying tasks. However, the petitioner states that it exports brand name goods to its sister company in Israel and has failed to explain who, if not the beneficiary, performs the functions related to its export business. None of the position descriptions for the beneficiary's subordinate employees expressly list any export related functions. Notably, the petitioner indicated that it intends to hire an import/export clerk in the future.

In addition, the petitioner added the position of Secretary/Bookkeeper in its amended organizational chart submitted in response to the RFE. This position was not listed in the initial organizational chart. The petitioner previously described the Secretary/Bookkeeper's duties as preparing the general ledger, producing financial statements and preparing reports/summaries for managers, preparing bank deposits, and paying invoices. The petitioner failed to explain who, if not the beneficiary, was performing the duties now handled by the Secretary/Bookkeeper, or other administrative and clerical office functions, at the time the petition was filed.

Finally, while the petitioner has consistently indicated that it employs two "shift leaders" who each oversee one sales person, the record does not support the petitioner's claim that the shift leaders spend more than half of their time to "watch[ing] sales staff perform duties." The submitted photographs reflect that the petitioner operates a fairly large retail store and it is evident that one sales person could not reasonably assist customers with purchases and inquiries, arrange displays, and operate a cash register single-handedly during each shift.

The petitioner's 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 petitioner's store and wholesale export operation. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to 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.

For the reasons discussed above, the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. 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* *Matter of Church Scientology Intn’l.*, 19 I&N Dec. 593, 604 (Comm’r 1988).

On appeal, counsel cites several unpublished AAO decisions to support his claim that the beneficiary qualifies as a function manager or executive. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Lastly, on appeal, counsel correctly observes that the AAO must consider the reasonable needs of the organization if staffing levels are considered as a factor. However, to establish that the reasonable needs of the organization justify the beneficiary’s job duties, the petitioner must first specifically articulate what its reasonable needs are, and why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, counsel has not explained the reasonable needs of the petitioner and how those needs justify the beneficiary’s performance of non-managerial or non-executive duties. In fact, the petitioner has repeatedly asserted that the beneficiary performs no non-qualifying duties, in contradiction with the weight of the evidence. 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).

For the foregoing reasons, the petitioner has not established that it will employ the beneficiary in a primarily managerial or executive capacity under the extended petition, 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, that burden has not been met.

ORDER: *The appeal is dismissed.*