

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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: **SEP 27 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 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, 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 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 Washington corporation established in April 2009, states that it operates a Vietnamese restaurants and imports business. The petitioner claims to be a subsidiary of [REDACTED], located in Ho Chi Minh City, Vietnam. The petitioner seeks to employ the beneficiary in the position of president for three years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in a position that is primarily executive or managerial in nature.

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's decision contains several errors of law and fact. Counsel submits a brief and duplicate copies of previously submitted documentation in support of 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.

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 issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a position that is primarily executive or managerial in nature.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on November 9, 2010. The petitioner indicated on the Form I-129 that it operates a Vietnamese restaurants and imports business with 11

current employees. In support of the petition, the petitioner submitted a letter describing the duties of the beneficiary as follows:

We intend to transfer [the beneficiary] to the U.S. temporarily to serve as President of [the petitioner] so she can direct [the petitioner's] long term strategy business development in the U.S. through expansion of the [redacted] restaurant chain and the health supplement exports from Vietnam. Her proposed duties include forecasting and managing the short-term and long-term revenue and profit growth in the United States market. [The beneficiary] will also be responsible for: developing and implementing marketing and operating strategies; overseeing the new product identification process; as well as developing and managing relationships with customers, vendors, and manufacturers in the U.S. She also will manage and advise the Vice Presidents of the US Office.

The petitioner's initial evidence also included a business plan for the U.S. company. The business plan's "Executive Summary" states, in part:

The company's initially [sic] strategy is to develop Vietnamese Restaurants serving the ever growing popularity of [redacted]. This will allow the company to establish cash flow, infrastructure, and human resource to carry out its longer term plans. Once the initial retail operation is steady and profitable, the company's intermediate term strategy is to develop relationships with producers of vitamin supplements in the United States, procure contracts for purchase of relevant products and wholesale distribute the products to its parent company [the foreign entity] for resell [sic]. This will not only bring additional revenue to the company, it will add to the bottom line for the parent company in lowering its costs from having to purchase from a third party distributor. In addition, the long term strategy of the company is to develop multiple restaurant locations throughout the [redacted] and leverage the retail stores as purchasers, users, and possibly reseller of relevant consumable products from Vietnam.

The business plan included an organizational chart for the U.S. company illustrating that it employs the beneficiary as the chief executive officer and one chief operating officer who supervises a kitchen manager and several kitchen and serving staff for the restaurant currently in business.

The director issued a request for additional evidence ("RFE") on November 18, 2010, instructing the petitioner to submit, *inter alia*, the following: (1) a copy of the U.S. company's organizational chart clearly identifying the beneficiary's position and the employees she will supervise; (2) a more detailed description of the beneficiary's duties indicating exactly whom the beneficiary will direct, including their job title and position description, and the percentage of time spent performing each of the listed duties; and (3) a specific day-to-day description of the duties the beneficiary has performed over the last six months. The director also requested a list of all employees the petitioner has employed since it commenced operations in 2009.

In response to the RFE, the petitioner provided the following description of the beneficiary's duties for the U.S. company:

Duties in the U.S.

1. Research, development, implementation and management of strategic business expansion for [the petitioner], especially adding additional [redacted] restaurants. (30%)
2. Sales and Marketing analysis, planning and management. (20%)
3. Direct and oversee Vice-President (COO)'s management of day-to-day operations. Establish and implement policies and process controls in keeping with strategic plans. (20%)
4. Manage and review vendors, products, [and] storage. (15%)
5. Manage and train staff to ensure health regulations compliance, good customer service, as well as clean, inviting atmosphere. (10%)
6. Manage Payroll and ensure financial stability. (5%)

Executive Capacity

In the last six months, [the beneficiary] has focused primarily on her direction of [the foreign company's] subsidiary, [the petitioner]. She has spent a great deal of time researching and writing a business plan. The report outlines her market research analysis, financial projections and resulting business strategy for [the petitioner]. [The beneficiary] has started the initial groundwork to implement her strategies to expand the [redacted] chain and to also increase product imports to Vietnam. . . . The Vice-President implemented some of her strategies, which have already increased business by more than 5%.

The business plan evidences her goals and policies established over the last six months. Her discretionary decisions involved the direction of the business expansion, as well as which clients, locations, contracts and venues to pursue. She has also made discretionary, unilateral decisions about marketing. . . . She has authority to negotiate contracts. She also developed [the petitioner's] business plan and is implementing it with only minimal supervision of her fellow Board Members. . . .

The petitioner also provided a list of all employees at the U.S. company. The petitioner identified their job titles as chief operating officer, kitchen manager, cook (three positions), kitchen helper, and server (six positions).

The director denied the petition on December 21, 2010, concluding that the petitioner failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity. In denying the petition, the director found that petitioner provided a description of the beneficiary's duties that is too broad and nonspecific to convey any understanding of the beneficiary's actual day-to-day activities. The director further found that the majority of the beneficiary's proposed duties are comprised of marketing tasks and marketing tasks are tasks necessary to provide a service or produce a product. The director also observed that the petitioner has not shown that the beneficiary has been or will be primarily managing the organization, or a department, subdivision, function, or component of the organization, but that she has been and will be directly providing the services of the organization and supervising non-professional employees.

On appeal, counsel submits a brief that states:

With the creation of [the petitioner], [the beneficiary's] responsibilities expanded to include directing the management and expansion of the subsidiary, i.e. another major component of [the foreign company].

* * *

[The beneficiary's] assignment in the U.S. is to research, develop, and direct the strategic expansion of the current U.S. business, especially by expanding the [redacted] restaurant chain. She is further charged with expanding the health supplement import business in order to increase profits for the foreign parent company, which the record shows is an area of [the beneficiary's] expertise. The record further details her initial efforts over the last six months in starting this process in an effort to further illustrate the day-to-day discharge of these duties[.]

* * *

In addition to the extensive and detailed explanations of [the beneficiary's] duties, [the petitioner] submitted [the beneficiary's] [petitioner] business plan. This document was developed by [the beneficiary] and confirms and illustrates her direction of [the petitioner], as well as the sales and marketing research, analysis and strategy she developed for the company's expansion. The document further confirms [the beneficiary's] authority to set goals and policies for [the petitioner] in her executive capacity.

* * *

[The beneficiary], however, is not charged with performing marketing tasks. Instead, she is responsible for researching, developing and directing marketing strategy and policy for the entire U.S. and foreign operation, which subordinate Managers are to implement (i.e. the Import Product Sales and Marketing Manager in Vietnam and the Chief Operating Officer in the U.S.).

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed in a primarily executive or managerial 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'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.* Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (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 AAO does not doubt that the beneficiary will have the appropriate level of authority over the petitioner's business as its president. However, 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 operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns or 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").

On review, the petitioner's description of the beneficiary's duties fails to establish that the beneficiary will be engaged in a primarily managerial or executive position. The petitioner has not provided sufficient information detailing the beneficiary's duties at the U.S. company to demonstrate that these duties qualify her as an executive. Here, the petitioner characterized the beneficiary's role as president and initially identified her duties as, "forecasting and managing the short-term and long-term revenue and profit growth in the [U.S.]market," "develop and implement marketing and operating strategies," "oversee the new product identification process," "develop and manage relationships with customers, vendors, and manufacturers in the U.S.," and "manage and advise the Vice Presidents [*sic*] of the US Office." The petitioner failed to identify the specific duties the beneficiary would perform with respect to any of these areas of responsibility. 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).

When asked to submit a comprehensive description of the beneficiary's job duties, the petitioner submitted a new list of job duties with accompanying percentages of time the beneficiary spends performing those duties. In response to the RFE, the petitioner described the beneficiary's proposed duties in equally broad terms, noting that her duties will consist of "[r]esearch, development, implementation and management of strategic business expansion for [the petitioner] . . . 30%"; "[s]ales and marketing analysis, planning and management 20%"; and "[e]stablish and implement policies and process controls in keeping with strategic plans 20%." These general statements failed to offer any clarification to the petitioner's original position description and fell considerably short of satisfying the director's request for a "comprehensive description" of the beneficiary's proposed duties in the United States. 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. Although afforded a second opportunity to provide the deficient information, 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. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Further, the AAO agrees with the director that duties such as "manage and review vendors, products and storage," and "sales and marketing analysis, planning and management" are poorly defined without additional detailed explanations as to what the beneficiary does on a day-to-day basis. It is also unclear why the beneficiary would be training the restaurant staff in health regulations compliance, good customer service,

and cleanliness since those seem like first-line supervisory duties that would be performed by the chief operating officer or kitchen manager. These duties, which the petitioner states will account for nearly half of the beneficiary's time, cannot be classified as managerial or executive in nature as currently stated.

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.¹ 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 states that the beneficiary will supervise one chief operating officer who "[m]anage[s] the existing [REDACTED] Restaurant's day-to-day activities. Direct[s] and manage[s] the employees and kitchen. Support[s] employees as needed. Resolve[s] customer issues or problems." She will also supervise one kitchen manager who "make[s] sure all recipes are correct, review[s] and control[s] food process for high quality. Review[s] all food complaints from customers and correct them. Review[s] products when vendor deliver[s] to ensure high quality." Although the petitioner submitted brief job duties for each of the beneficiary's subordinates, the petitioner failed to provide the detailed descriptions of their duties and the amount of time they allocate to each duty in order to demonstrate that they will relieve the beneficiary from performing non-qualifying duties, such as administrative or clerical work, ordering food and supplies, and marketing the business, as well as performing non-qualifying duties related to the claimed expansion activities. Although specifically requested by the director, the petitioner's lack of detailed descriptions of the beneficiary's subordinates' job duties does not establish that the subordinates will relieve the beneficiary from performing non-qualifying duties. Any 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). Further, while the petitioner indicates that the chief operating officer supervises the serving staff and the kitchen manager supervises the kitchen staff, the evidence reflects that the petitioner's business is open for business seven days per week for a total of 68 hours. Although both of the beneficiary's proposed subordinates appear to be full-time employees,

¹ 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 a 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.

the petitioner has not established that either of them works every day or could fully relieve the beneficiary from performing any first-line supervisory duties.

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 position description that describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes 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.

In the instant matter, the petitioner indicates that the beneficiary is coming to the United States primarily to expand the petitioner's business into a chain of restaurants and emphasizes the business plan developed by the beneficiary as evidence that she will actually carry out this expansion. A close review of the business plan, however, reveals no concrete expansion plans. For example, the personnel plan for the next five years indicates incremental increases in pay for the existing restaurant's employees. Most of the information in the plan relates to the existing store and there is no information related to possible locations, expected opening dates, investment requirements, or financial objectives. Only the one-page “executive summary” at the beginning of the business plan mentions any plans for expansion. The petitioner also claims to be engaged in the import/export of health supplements and indicates that the beneficiary will also expand this area of the business. However, the business plan does not address any expansion plans in this area beyond a reference to it in the “executive summary.” The petitioner does not indicate who will “procure products for wholesale distribution” or indicate that it will hire any employees to perform duties associated with this area of the business. Accordingly, the petitioner's business plan does not support its claim that the beneficiary will primarily manage the expansion of the business or that she will otherwise primarily perform the duties of a function manager.

The statutory definition of the term “executive capacity” focuses on a person's elevated position within an organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to “direct the management” and “establish the goals and policies” of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they “direct” the enterprise as the owner or sole managerial employee. The beneficiary must also exercise “wide latitude in discretionary decision making” and receive only “general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.” *Id.* Again, while the petitioner indicates that the beneficiary is coming to the United States as an executive to oversee the expansion of the restaurant and health supplement import/export operations, neither the petitioner's business plan nor its inconsistent descriptions of her job duties support the petitioner's claims. The petitioner failed to

demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization and its expansion rather than on oversight of the day-to-day operations of its existing restaurant and its personnel.

The AAO notes that 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). In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). 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. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Here, the petitioner indicates that the beneficiary will have two subordinates, a chief operating officer and a kitchen manager. Although the petitioner submitted a brief description of job duties for both position, it is unclear how they will relieve the beneficiary from performing other non-qualifying administrative and operational duties. The restaurant appears to have sufficient personnel to carry out day-to-day cooking and serving and two first-line managers to oversee these routine functions.

The petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity or as a function manager. 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. 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.