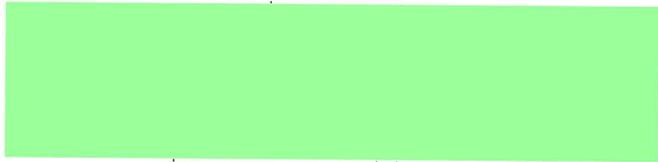




U.S. Citizenship
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Services

(b)(6)

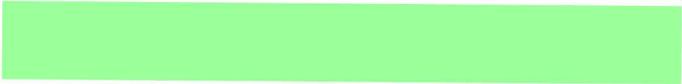


DATE: **APR 01 2013**

Office: VERMONT SERVICE CENTER

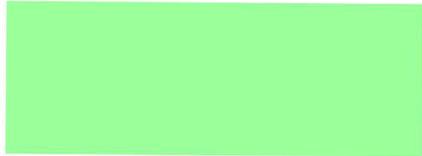
FILE: 

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:

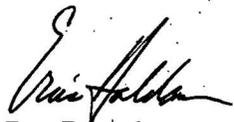


INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Ron Rosenberg

Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, 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 Texas corporation, states that it operates an import/export business for dairy products. It claims to be a subsidiary of [REDACTED] located in Mexico. The petitioner seeks initial approval for the beneficiary for a period of two years so that she may serve in the position of Chief Financial Officer.

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, counsel for the petitioner asserts that the director misapplied applicable law and came to erroneous conclusions of fact in denying the petition. Counsel submits a brief 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 the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate 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.

II. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in the United States in an executive capacity. The petitioner does not claim that the beneficiary will be employed in a managerial capacity.

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 February 6, 2012. The petitioner states that it operates a dairy import/export business with five employees and gross sales of \$4,187,788. The petitioner stated the beneficiary will be working as the Chief Financial Officer (CFO). As the CFO, the petitioner stated that the beneficiary will perform duties to include: establishing goals and policies for the organization; have full authority to hire, fire, and evaluate all accounting and finance employees; establish and monitor management procedures, information systems, budgets, and organizational processes; evaluate the impact of U.S. dairy products supply management regulations on the petitioner's present and future operations; and hold ultimate authority to negotiate and execute all U.S. company contracts.

The petitioner provided a specific list of the beneficiary's duties as follows: (1) responsible for presenting and reporting accurate and timely historical financial information to the Board of Directors; (2) decide how to best invest the company's money, taking into consideration risk and liquidity, as well as overseeing the capital structure of the company; (3) economic and strategic forecasting; (4) directing and overseeing all employees in the accounting and finance department; (5) directing and overseeing vendor relations; (6) meeting with other board members; and (7) formulate, coordinate, and direct all aspects of company financial planning and administration, including development of short- and long-term budgets.

The petitioner included an organizational chart showing the beneficiary in the proposed position of Vice President. Reporting to the beneficiary were the General Manager, Accounting/Financial Manager, Administrative Manager, and Warehouse Manager. Each of the managers except for the accounting/financial manager had employees reporting to them. The chart includes nine (9) named employees, not including the beneficiary.

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The director issued a request for additional evidence ("RFE") on February 17, 2012 in which he instructed the petitioner to submit, *inter alia*, the following: (1) the titles and job duties of the subordinates under the beneficiary's management; (2) the executive or managerial decisions to be made by the beneficiary on behalf of the petitioner; (3) a detailed description of the staff of the United States office to include number of employees, job titles, educational requirements, and duties including the percentage of time spent performing each; and (4) a copy of the IRS Form 941, Employer's Quarterly Federal Tax Return, for the second, third, and fourth quarters of 2011.

The petitioner responded in a letter from a board member describing the same job duties and responsibilities as submitted with the initial petition. The petitioner also responded with the requested information regarding the company employees in a separate letter. The petitioner provided the name, title, and job duties for each of its employees. Specifically, the petitioner listed the following positions: President, Chief Financial Officer, General Manager, Accounting/Financial Manager, Administrative Manager, Administrative Assistant, Warehousing/Logistics Manager, two Dispatch positions, and a Custodial Manager. The job descriptions provided did not include a percentage breakdown of time spent performing each duty. The petitioner also submitted its 2011 IRS Form 941, Employer's Quarterly Federal Tax Returns as requested. The returns reported three employees in the second quarter, five employees in the third quarter, and four employees in the fourth quarter.

The director denied the petition on May 11, 2012 concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. In denying the petition, the director determined that the beneficiary would be performing non-qualifying duties as there was insufficient evidence of employees to perform non-qualifying accounting and related finance-related duties. The director also noted that the petitioner did not show that the beneficiary would function at a senior level within the organizational hierarchy other than in position title. Finally, the director found that the petitioner failed to establish that the beneficiary would be involved in the supervision and control of the work of supervisory, professional, or managerial employees.

On appeal, counsel asserts that the evidence establishes that the beneficiary's role is in an executive capacity pursuant to section 101(a)(44)(A) of the Act and that the denial is based on a misapplication of law. Counsel concludes that the beneficiary meets the four-part definition of executive capacity under 8 U.S.C. § 1101(a)(44)(A). Specifically, counsel states that the director inappropriately relied on the number of employees supervised. Counsel also asserts that director misapplied the standards relevant to a managerial position and not that of an executive.

Upon review, and for the reasons discussed below, the petitioner has not established that the beneficiary would be employed in the United States in a primarily 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'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, or part of 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"). Here, the petitioner has failed to show that the beneficiary's actual day-to-day duties will be primarily executive in nature.

The petitioner's description of the beneficiary's job duties is vague and does not provide a description of what she will actually be doing on a day-to-day basis. According to the beneficiary's list of duties, she is responsible for tasks such as establishing the company goals and policies, evaluating and overseeing the company's organization structure; directing the financial and accounting staff, deciding how to invest the company's money, performing economic and strategic forecasting, and consulting with board members. While such responsibilities generally suggest that the beneficiary is responsible for oversight of the company, what the beneficiary organizes and controls provides little insight into how she would actually allocate her tasks 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 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

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 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 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.*

The petitioner has not established that the beneficiary's position is elevated within a complex organizational hierarchy. The organizational chart submitted with the initial petition shows the beneficiary as Vice President with a number of staff reporting to her outside of the financial and accounting employees. This organizational chart differs in title and responsibilities from the position listed on the Form I-129 and with the supporting letter submitted with the initial petition. These two documents show the beneficiary as the Chief Financial

Officer with only the financial staff reporting to her, and not the more elevated position as Vice President with numerous managers in different capacities reporting directly to her. The petitioner has not provided a position description for the vice president position or explained the discrepancy in the beneficiary's position title.

Further, the record contains inconsistent information regarding the number of employees working for the petitioner. The petitioner's organizational chart submitted at the time of filing includes nine named employees, other than the beneficiary. On the Form I-129, however, the petitioner stated that there were five employees as of the date of filing. However, the IRS Form 941, Employer's Quarterly Federal Tax Return for the quarter preceding the filing of the petition shows only four employees. There is no evidence in the record to establish which employees were actually working for the petitioner as of the date the petition was filed.

Based on the discrepancies in the record with respect to the beneficiary's position title and the size of the organization, the AAO is unable to determine the beneficiary's true role within the petitioner's organizational hierarchy. Without this information the record does not clearly demonstrate the beneficiary's area of responsibility or the availability of other employees to relieve her from performing non-qualifying duties associated with that area of responsibility. 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.

On appeal, counsel for the petitioner asserts that the director misapplied applicable law in evaluating the employees under the beneficiary's supervision. Specifically, counsel states that as an executive, the beneficiary is not required to supervise managerial or professional level employees. The petitioner, however, is required to show that the beneficiary will be performing a majority of her duties in an executive capacity. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

The petitioner states that it had over \$4 million dollars in gross sales in the year prior to filing. Without clear evidence that there is another financial or accounting employee under the beneficiary's direction it is likely that the beneficiary will be performing the non-qualifying accounting and bookkeeping duties herself. Furthermore, if the beneficiary's actual job title is vice president and her duties are not limited to the company's financial functions, it remains unclear which employees are available to relieve her from performing other operational and administrative tasks because the petitioner has not consistently documented its staffing levels as of the date of filing. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position.

Finally, counsel states on appeal that the parent company in Mexico has other accounting and finance employees to relieve the beneficiary from performing non-qualifying duties. The petitioner has neither

presented evidence to document the existence of these employees nor identified the services these individuals provide. Furthermore, the petitioner failed to provide evidence of the employees in response to the RFE when the director requested job titles and duties for all employees under the beneficiary's supervision. 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).

Based on the evidence and information furnished in the present matter, the AAO cannot conclude that the petitioner met its burden of establishing that it was able to employ the beneficiary in a qualifying managerial or executive capacity at the time of filing the petition.

The petitioner has not submitted evidence on appeal to overcome the director's determination that the beneficiary will not be employed in managerial or executive capacity. Accordingly, the appeal will be dismissed.

III. Additional Issues

Beyond the decision of the director, the petitioner has not submitted evidence that the beneficiary 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. See 8 C.F.R. § 214.2(l)(3)(iii). The petitioner states that the beneficiary has worked for the foreign entity from January 2010 to the present time. On the L Classification Supplement to the Form I-129, the petitioner states that the beneficiary is "currently residing in the U.S. pursuant to a validly-issued E-2 visa, as a derivative spouse" valid from March 1, 2007 to February 14, 2012. Section 1 Question 2 of the form shows that the petitioner's spouse was first admitted on November 12, 2009. Furthermore, the beneficiary's resume shows that she was an employee of [REDACTED] (the U.S. petitioner) in [REDACTED] Texas from January 2010 to "present," and does not name the foreign entity as her employer. There is no evidence to corroborate the petitioner's claim that the beneficiary was ever employed by the foreign entity. From the record, it appears that the beneficiary was actually residing in the United States and working for the United States petitioner from January 2010 to the time of filing.

In addition, the evidence is not persuasive that a qualifying relationship exists between the petitioner and a foreign entity as required by 8 C.F.R. § 214.2(l)(1)(ii)(G). In response to section 1, question 10, the L Classification Supplement to the Form I-129, the petitioner states that [REDACTED] owns and controls 100% of [REDACTED]. The petitioner's 2008 IRS Form 1120, U.S. Corporation Income Tax Return, at Schedule G Part II, however, shows that [REDACTED] owns 100% of the petitioner's voting stock.

Additionally, the articles of incorporation for the foreign entity show that the beneficiary and [REDACTED] each own 50% of the company shares. Assuming arguendo that [REDACTED] owns 100% of the petitioner's stock, the petitioner has not established that [REDACTED] has a majority ownership and controls both the foreign entity and the United States employer. For these additional reasons, the petition may not be approved.

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).

IV. 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.