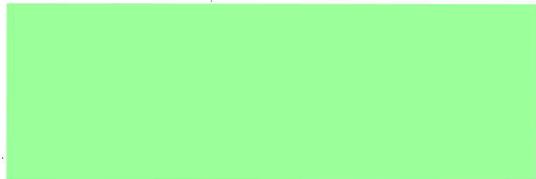


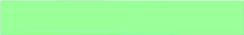
(b)(6)

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



DATE: **APR 08 2013** OFFICE: VERMONT SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker under 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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

4 Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. 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 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 Florida corporation, intends to engage in the sale, import and export of clothing, and claims to be a wholly-owned subsidiary of [REDACTED] located in Brazil. The petitioner seeks to employ the beneficiary as its general manager for a one-year period to open a new office in the United States.

The director denied the petition, concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner contends that the petitioner supplied extensive documentation which clearly established that the beneficiary would be operating in a primarily managerial or executive capacity. Counsel further asserts that the beneficiary will be acting in a primarily managerial or executive capacity by the end of the first year of operations based on the business plan provided.

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.
- (v) If the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to 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 involved 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 (1)(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.

The primary issue in this matter is whether the beneficiary will be employed by the United States 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.

With the initial petition, counsel for the petitioner submitted a letter dated December 28, 2011, stating that the U.S. petitioner was created to provide the foreign entity with international support for commercializing textiles products, such as clothing, accessories, cosmetics, shoes and design. Counsel further stated that the petitioner wished to employ the beneficiary as its general manager, and claimed that the beneficiary's duties would be as follows:

The Beneficiary, in the position of General Manager, will be responsible for overseeing the whole operation of development of the commercialization of textiles products, clothing, and accessories. He will ensure that the Petitioner's database meets the Parent Company's accounting practices and policies, as well as, develop strategies to contribute to the Petitioner's first operational plans. The beneficiary is a trustworthy employee dedicated to the Parent Company as well as to the U.S. subsidiary. The beneficiary will have a wide

discretionary power to approve price negotiation and agreements with strategic business partners to maximize the company's revenue and presence in the American marketplace. He will survey strategies for the company's business tools to achieve strategic sales, acquisition of new clients and business relationships and marketing goals.

Additionally, the Beneficiary will exercise full control over the company's operations and will have wide discretionary authority in the growth and development of corporate management practices and policies. The beneficiary will be responsible for, but not limited to:

- Decisions, direction and budgets;
- Sourcing and negotiating future distribution partnerships;
- Improving and maintaining direct relationship with customers;
- Formulating and maintaining direct relationship with customers;
- Formulating and implementing administrative and financial policies and procedures;
- Evaluating the performance of the company and staff and to determine areas of cost reduction and program improvement;
- Engaging in long-range planning and identifying business opportunities in the U.S.;
- Cash management;
- Hiring and training professionals to work in the company and establishing their duties and responsibilities;
- Analyzing financial information, such as price, future trends, and investment risks, making investment decisions, estimating forecast of business and preparing plans of action;
- Maintaining and reviewing account records; and
- Directing efficacy of export and distribution activities of company's products and directing dissemination of technical support service in accordance with corporate marketing strategy.

Counsel for the petitioner also submitted a list of these duties in chart form, demonstrating that the amount of time the beneficiary would devote to each of the above-stated tasks would vary as the first year of operations progressed.

Regarding the beneficiary's qualifications for the position, counsel stated that the beneficiary had served as the executive director for the parent company since its inception, and that he has more than 10 years of professional training and work experience in management.

Finally, counsel's letter included a proposed organizational chart for the first year of operations which indicates that the beneficiary will supervise a secretary, controller, purchase manager, purchase representatives and subcontractors. Counsel provided educational requirements and brief position

descriptions for the proposed positions, noting that the purchasing manager and controller positions would require bachelor's degrees.

The director found the initial evidence insufficient to establish eligibility, and consequently issued a request for additional evidence (RFE) on April 26, 2012. The request specifically asked the petitioner to submit documentation outlining the proposed organizational hierarchy of the entity, the business plans for the petitioner, and additional evidence demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. In a response dated July 16, 2012, counsel for the petitioner submitted the requested evidence.

Counsel stated that the beneficiary would oversee one subordinate manager and four other employees during the first year of operations. Counsel also related some of the technical skills required to perform the duties of the proffered position, such as time management, coordination, and management of financial resources. Counsel submitted a copy of the petitioner's business plan and a copy of the proposed organizational chart for the petitioner, which demonstrated that one employee, the petitioner's secretary, was currently on staff. The remaining proposed positions included a purchasing manager and three purchasing representatives. Finally, counsel submitted a letter from the petitioner.

In this undated letter, the petitioner restated the proposed duties and percentages previously submitted, and contended that the beneficiary "will direct the implementation of the Petitioner's first operational year and will direct the dissemination of marketing sales support service in accordance with corporate marketing strategy, as well as, engage in long-range planning and identifying business opportunities in the U.S., among other managerial duties." The petitioner further stated that the beneficiary "is the key person in the U.S. entity because he is the one who has the know-how and is responsible for leading and coordinating the finance and sales of [the] Petitioner's products and services."

The director denied the petition on August 23, 2012, finding that the evidence in the record failed to establish that the beneficiary would be functioning in a primarily managerial or executive capacity. Specifically, the director concluded that the beneficiary would be performing the day-to-day tasks of the organization. The director further concluded that the petitioner failed to establish that it would reach the point where it could employ the beneficiary in a primarily managerial or executive capacity by the end of the first year of operations, noting that the beneficiary would only have one subordinate manager under his supervision once hired.

On appeal, counsel for the petitioner restates the beneficiary's qualifications and lists the duties and tasks previously outlined in the letters submitted with the petition and in response to the request for evidence. Counsel asserts that these duties are clearly managerial in nature, and submits additional evidence, such as a newly-executed lease, an unaudited profit and loss statement for the first three quarters of 2012, and an updated organizational chart, in support of the beneficiary's eligibility. Counsel concludes by asserting that at

the end of the first year of operations, the beneficiary will clearly be functioning in a primarily managerial or executive capacity.

Upon review, counsel's assertions are not persuasive. Whether the beneficiary will be a manager or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. In this case, the petitioner asserts that the beneficiary is a qualified manager or executive by virtue of his position title, experience abroad, and associated duties. However, the description of duties provided is vague and fails to specify the exact nature of the claimed executive duties. 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).

The description of the beneficiary's proposed duties, provided in the various letters and the business plan, is nonspecific and seems to merely paraphrase the regulatory definitions of managerial and executive capacity. For example, the business plan states that the beneficiary will ultimately be responsible for the entire operations of the United States company, and further stated that "he will administrate all areas of business, including the company's operations, purchasing, sales and marketing departments as they are developed." The business plan also stated that the purchase manager, who would work under the beneficiary's direct supervision, would be responsible for sales and purchases. However, other than the purchase manager, there is no other professional or managerial employee delegated on the organizational chart to assist the beneficiary and relieve him from performing other non-qualifying duties other than purchasing.

In addition, the statements regarding the beneficiary's duties throughout the record remain vague. For example, the identification of duties such as "formulating and implementing polices," decisions, directions and budgets," and "analyzing financial information" do little to clarify what the beneficiary will do on an average workday. The actual duties themselves reveal the true nature of the employment. *Id.* In reviewing the beneficiary's stated duties in the context of the totality of the evidence, it appears that the majority of his time will be devoted to the operation of the business.

For example, the business plan submitted in response to the RFE indicates that the purchase department will be responsible for both sales and purchases; however, the brief position descriptions provided for the purchasing manager and purchasing representative positions at the time of filing did not include any sales tasks. Accordingly, it remains unclear who will actually perform the company's sales. Further, as noted above, the petitioner stated that the beneficiary would administer the company's operations, purchasing, sales and marketing departments, but its organizational chart identifies the purchasing department as the only department to be staffed during the first year of operations. In addition, the initial organizational chart included a controller and unidentified subcontractors, but these proposed workers were inexplicably absent from the organizational chart submitted in response to the RFE. Further, while the beneficiary's position description indicates that he will direct the "efficacy of export and distribution activities of company's

products," the petitioner has not indicated who will be responsible for the non-managerial export and distribution activities. Overall, it is evident that the beneficiary would have staff to relieve him of purchasing activities and secretarial duties; however, the record does not establish that he would be relieved from performing other operational and administrative tasks related to product sales, marketing, distribution, export, inventory, warehousing and the company's day-to-day bookkeeping and financial activities.

It is further noted that a large number of invoices are submitted on appeal, which demonstrate that the petitioner has making substantial clothing sales to customers in Brazil. While the AAO notes that the petitioner relies on these invoices, as well as an unaudited financial statement which provides a snapshot of the petitioner's earnings and expenses from January 2012 to September 2012, the evidence raises some additional questions regarding the exact nature of the petitioner's business and the validity of these claims.

The petitioner claims in the record that it will be doing business as an import/export company. In the course of examining whether a petitioning company has been doing business as an import and export firm, it is reasonable to request that the company produce copies of documents that are required in the daily operation of the enterprise due to routine regulatory oversight, such as required customs forms that show the value, classification, and rate of duty for the imported/exported goods. Although customs brokers or agents are frequently utilized in this process, the ultimate consignee or consignor should have access to these forms since they are liable for all duties and taxes. Any company that is doing business through the regular, systematic, and continuous provision of goods through importation and exportation may reasonably be expected to submit copies of these forms to show that they are doing business as such a firm.

The AAO notes that the record contains no evidence of this nature, thereby raising questions regarding the legitimacy of the claims regarding the volume of sales conducted by the petitioner. Moreover, the record contains no evidence that a staff member has been or will be delegated to handle customs issues that undoubtedly will be a major factor in the business dealings of the petitioner, since all of the invoices currently submitted demonstrate business transactions with clients in South America.

While the petitioner may in fact have a secretary and two staff members in the purchasing department, it is unclear how this volume of sales can be performed without the assistance of the beneficiary. There is no staff member dedicated to the shipping and receiving tasks that undoubtedly require extensive preparation and packaging. Moreover, there is likewise no individual position identified on the organizational chart that will deal with the marketing duties required to expand the petitioner's business as claimed. Finally, it is noted that, despite the petitioner's contention that it currently has a staff of three in addition to the beneficiary, the profit and loss statement for 2012 submitted on appeal demonstrates only the payment of officer compensation, and not salaries or wages, in the expense column. Therefore, it is evident that the beneficiary is directly involved in the performance of non-qualifying, non-managerial duties, and for the reasons set forth above, it does not appear from the record as currently constituted that he will be relieved of performing such duties by the end of the first year of operations. An employee who primarily performs the tasks necessary to produce a product or

to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

At the time of filing, the petitioner contends that it is a new office with just a secretary on staff. Since the beneficiary and the secretary were therefore the only employees on staff for the first three quarters of 2012, it is evident that the beneficiary is most likely primarily responsible for the gross sales in excess of \$320,000. The petitioner's business plan indicates that at the end of the first year of operations, the petitioner intends to hire three purchasing representatives and a purchasing manager in addition to the secretary. However, the organizational chart and business plan do not designate any individuals who will be responsible for the marketing tasks emphasized in the record as duties for which the beneficiary will be responsible, nor is there any discussion of the import/export aspect of the business and who will handle the extensive customs documentation involved in exporting merchandise to Brazil. While the presence of a purchasing manager and purchasing representatives may ensure the acquisition of merchandise, there is no specific employee dedicated to the actual sale of this merchandise. Since sales, marketing, and customs duties, and undoubtedly relating tasks such as inventory management, will need to be performed in order for the petitioner to remain operational and competitive, and since no specific employees or potential employees have been designated to perform such duties, the petitioner's proposed business plan is insufficient to establish that the beneficiary will be relieved from performing day-to-day, non-qualifying duties by the end of the first year of operations.

For the reasons set forth above, the petitioner has failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity or that the U.S. company would support a managerial or executive position within one year of commencing operations. For this reason, the petition may not be approved.

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.