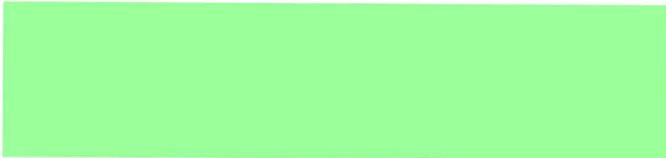


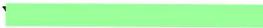
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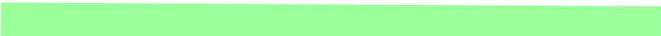
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

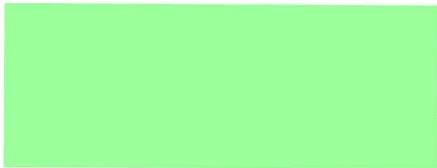


DATE: **APR 11 2013** Office: CALIFORNIA SERVICE CENTER FILE: 

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

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

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 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 Nevada limited liability company, engages in the business of custom vinyl motorcycle seat fabrication. It is an affiliate of [REDACTED] located in Queensland, Australia.<sup>1</sup> The beneficiary was previously granted L-1A status for a one-year period in order to open a new office in the United States and the petitioner now seeks to extend his status in the position of chief executive officer for three additional years.

The director denied the petition, concluding that the petitioner failed to establish that it has a qualifying relationship with the foreign entity, and 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 an executive capacity and submits a brief and additional evidence 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.

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<sup>1</sup> The petitioner indicated on Form I-129 that it is a subsidiary of the foreign entity. However, in supporting documentation accompanying the initial petition, the petitioner clarified that it is an affiliate of the foreign entity based upon the beneficiary's 100% ownership of both entities.

- (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)(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 Issues on Appeal**

### ***A. Employment in a Managerial or Executive Capacity***

The primary issue to be addressed is whether the petitioner established that the U.S. company will employ the beneficiary in a primarily executive capacity.<sup>2</sup>

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on June 20, 2012. On Form I-129, the petitioner claimed that it has three employees in the United States.

In a letter from [REDACTED], Store Manager of the U.S. company since February 2011, [REDACTED] described the beneficiary's job duties as CEO as to implement strategy relating to identifying product and customer markets, develop strategic alliances with suppliers and buyers, develop company policies and procedures, and develop and monitor logistics of operations in Australia and the United States. [REDACTED] explained that the U.S. company currently employs 2 employees (besides himself), and one sub-contractor, [REDACTED] described his own job duties as to "oversee all aspects of the store and business as well as work, hands-on, on the floor." [REDACTED] then listed the following job duties for the beneficiary in the United States:

- Direct and coordinate the organization's financial and budget activities to fund operations, maximize investments, and increase efficiency (10 hours/week);
- Confer with employees to discuss issues, coordinate activities, and resolve issues (5 hours/week);
- Analyze operations to evaluate performance of the company and its employees in meeting objectives, and to determine areas of potential cost reduction, program improvement, or policy change (7 hours/week);
- Direct, plan, and implement policies, objectives, and activities of the company to ensure continuing operations, to maximize returns on investments, and to increase productivity (5 hours/week);
- Prepare budgets, including those for funding and implementation of programs (5 hours/week);
- Direct and coordinate activities of the company relating to production, pricing, sales, and distribution of products (6 hours/week);
- Negotiate and approve contracts and agreements with suppliers, distributors, and clients (7 hours/week);
- Review reports submitted by employees (1 hour/week);
- Meet with Store Manager and Sales/Marketing employee and assign or delegate responsibilities to them (4 hours/week); and
- Direct human resources activities, including the approval of human resource plans and activities, and the selection of employees (3 hours/week).

The petitioner submitted an organizational chart for the U.S. entity, showing the beneficiary at the top as owner and CEO. Directly beneath him is [REDACTED] Store Manager/Upholsterer, who oversees [REDACTED] a Sales/Marketing/Upholsterer, and [REDACTED] Motorcycle Builder/Contractor. The

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<sup>2</sup> As the petitioner only asserts that the beneficiary will be employed in an executive capacity, the AAO will only analyze the beneficiary's employment in an executive capacity. The AAO will not analyze the beneficiary's employment in a managerial capacity.

petitioner also submitted its contract with [REDACTED] dated January 1, 2012, establishing that he is a contractor engaged to build custom motorcycles on behalf of the petitioner.

The petitioner submitted pages 1-6 of its business plan, which describes, in part, the U.S. entity's sales and marketing process as consisting of strategic alliances with [REDACTED] its own retail store location, internet sales which allows customers the option of "choos[ing] the custom vinyl fabrics and request custom design by interacting directly with the custom technician," and other markets. The submitted portion of the business plan did not include a complete list of the U.S. company's employees.

The petitioner submitted the U.S. company's proposed floor plan of its premises, dated December 2010. The floor plan indicated that there was a dispatch room wherein one employee, [REDACTED] would work; a sewing and cutting room wherein one employee skilled in sewing would work; a show room and front counter wherein one employee would work as a greeter; and an owner's office, wherein the beneficiary would presumably work. The floor plan stated: "3 Employee's will be hired I have found one so far- to start when it is passed-[sic]." The petitioner also submitted photographs of its premises consisting of a retail front, sewing room, cutting room, and office.

The director issued a request for additional evidence ("RFE"), in which she requested, *inter alia*, additional evidence to establish that the beneficiary will be performing the duties of a manager or executive with the U.S. company. The director advised that such evidence may include, but is not limited to, the following: (1) a more detailed description of the beneficiary's duties in the United States, including the percentage of time required to perform the duties of the managerial or executive position; (2) a more detailed copy of the U.S. organizational chart, listing all employees in the beneficiary's immediate division by name, job title, summary of duties, education level, and salary; and (3) a copy of the U.S. company's state quarterly wage report for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> quarter of 2011 that were accepted by the State of Nevada, which should include the names, salary, and number of weeks worked for all employees under the beneficiary's direction. The director noted that if the employees listed on the organizational chart are not listed on the state quarterly wage reports, the petitioner should explain why not.

In response to the director's request for additional evidence of the beneficiary's employment in an executive capacity in the United States, counsel for the petitioner referred back to the previously submitted letter from [REDACTED] and the U.S. organizational chart. Counsel provided no new evidence.

The director denied the petition, 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 observed that the petitioner failed to provide the requested state quarterly wage reports or evidence of payroll records for the U.S. employees subordinate to the beneficiary listed on the organizational chart, or any other evidence to document the actual wages or the number of hours worked by the employees of the U.S. company. The director concluded that, based upon the evidence and organizational structure provided, the beneficiary is assisting with the day-to-day, non-supervisory operations of the business, and therefore is precluded from being considered employed in a "primarily" executive or managerial capacity.

The petitioner filed an appeal on Form I-290B, Notice of Appeal or Motion. On appeal, counsel for the petitioner claims that the instant petition, which is a subsequent petition to [REDACTED] denied in March 2012, was "doomed from inception" and that the adjudicating officer "merely rubber stamped a Request for Evidence and Denial." Counsel cites to the April 23, 2004 Interoffice Memorandum issued by

Associate Director of Operations, [REDACTED], claiming that the previous approval for the beneficiary's L-1A status should be given deference and the instant petition be approved, absent "material error," substantial change of circumstances, or new adverse information.

With respect to the specific grounds for denial discussed in the director's decision, counsel again references the previously submitted letter from [REDACTED] asserting that this letter provided a sufficient description of the beneficiary's duties and an estimate of time spent on his duties. Counsel refutes the director's conclusion that the beneficiary primarily performs day-to-day non-supervisory duties, asserting that the beneficiary's duties are executive in nature and directly deal with the management of employee's policy decisions, procedure decisions, and responsibilities for increasing logistics between the foreign and U.S. companies. Counsel also emphasizes the fact that the U.S. company employs two subordinate employees and utilizes a sub-contractor relationship with a "world championship motorcycle designer," [REDACTED]

On appeal, the petitioner submits for the first time the U.S. company's Forms NUCS-4072, Employer's Quarterly Contribution and Wage Report, filed with the State of Nevada, for quarter 4 of 2011 (ending on December 31, 2011) and quarter 1 of 2012 (ending on March 31, 2012). Both Forms NUCS-4072 show that the petitioner employed three employees during each quarter, including [REDACTED] and [REDACTED] whom counsel explains was the former upholster before [REDACTED]. All other evidence submitted on appeal consists of copies of previously submitted documents.

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary would be employed 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. *Id.*

At the time of filing the petition, the petitioner (via the letter from [REDACTED]) described the beneficiary's job duties in broad and vague terms, such as "[d]irect and coordinate the organization's financial and budget activities to fund operations, maximize investments, and increase efficiency"; "[a]nalyze operations to evaluate performance of the company and its employees in meeting objectives, and to determine areas of potential cost reduction, program improvement, or policy change;" "[d]irect, plan, and implement policies, objectives, and activities of the company to ensure continuing operations"; and "[d]irect and coordinate activities of the company relating to production, pricing, sales, and distribution of products." The petitioner's description failed to provide sufficient 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). Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Id.*

In addition, several of the beneficiary's job duties are duplicative of each other. For example, the petitioner claimed that the beneficiary spends 10 hours/week directing and coordinating the organization's financial and budget activities, and another 5 hours/week preparing budgets. The petitioner claimed that the beneficiary spends 5 hours/week conferring with employees to discuss/resolve issues and coordinate activities, and another 4 hours/week meeting with the store manager and sales/marketing employee and assign or delegate

responsibilities to them. The petitioner also claimed that the beneficiary spends 5 hours/week directing, planning, and implementing policies, objectives, and activities of the company, and another 6 hours/week directing and coordinating activities of the company relating to production, pricing, sales, and distribution of products. The vague and duplicative nature of the petitioner's description left the record unclear what actual duties the beneficiary would perform on a day-to-day basis.

As such, the director reasonably issued a RFE requesting the petitioner to provide a more detailed description of the beneficiary's duties. In response to the RFE, however, the petitioner failed to provide any new details or explanation regarding the beneficiary's daily activities. The 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 upon the petitioner's job description of the beneficiary's duties, the petitioner failed to establish what actual duties the beneficiary would perform on a day-to-day basis, and consequently, that he is employed in a primarily executive capacity.

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 a sufficient description and corroborating evidence of its staffing structure. With the initial petition, the petitioner provided only an organizational chart listing the names and titles of the U.S. company's employees. Except for briefly describing the store manager's duties as to "oversee all aspects of the store and business as well as work, hands-on, on the floor," the petitioner offered no explanation of the actual job duties performed by each employee. The petitioner also provided no corroborating evidence, other than the contract with the sub-contractor, to confirm the petitioner's claimed employment of [REDACTED] as the store manager/upholsterer, and [REDACTED] as the sales/marketing representative and upholsterer.

As such, the director reasonably issued a RFE requesting the petitioner to provide a more detailed copy of the U.S. organizational chart, listing all employees in the beneficiary's immediate division by name, job title, summary of duties, education level, and salary, as well as copies of the U.S. company's state quarterly wage report for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> quarter of 2011 that were accepted by the State of Nevada, which should include the names, salary, and number of weeks worked for all employees under the beneficiary's direction. In response to the RFE, however, the petitioner failed to provide any new explanation or evidence regarding the petitioner's U.S. staff. Again, the 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).

On appeal, the petitioner submits for the first time copies of the U.S. entity's Forms NUCS-4072 for quarter 4 of 2011 (ending on December 31, 2011) and quarter 1 of 2012 (ending on March 31, 2012). However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it for the first time on appeal. The appeal will be adjudicated based on the record of proceeding before the director, which did not include the Forms NUCS-4072.

Based upon a review of the record, the petitioner claims to employ three total employees, including the beneficiary, as well as a subcontractor who is not engaged in the petitioner's primary business of manufacturing custom motorcycle seats.<sup>3</sup> The petitioner submitted only an organizational chart depicting the U.S. staff as the beneficiary, the owner and CEO, [REDACTED], the store manager and upholsterer, and [REDACTED] the sales/marketing representative and upholsterer. The petitioner submitted no objective evidence to prove its employment of [REDACTED] although such information was requested in the RFE. The petitioner also submitted no detailed explanation regarding its claimed U.S. employees, including information about their job duties, salary, and number of weeks worked, although this information was requested in the RFE.

Notably, the petitioner's floor plan and photographs of its premises indicate that there are employees who work in sewing, cutting, and greeting customers. However, it is not apparent which employee(s) would be performing the duties associated with sewing, cutting, and greeting customers, and how much time the employee(s) dedicate to these particular duties.<sup>4</sup> In addition, the petitioner's business plan indicates that it receives business through internet sales, and that its website allows customers the option to "request custom design by interacting directly with the custom technician." Again, it is not apparent which of its employee(s) process internet sales and is/are the "custom technician" referenced in the business plan, and how much time the employee(s) dedicate to these particular duties. Overall, the record is insufficient to establish what the actual job duties and roles of the beneficiary and his subordinates are, which employee(s) perform the day-to-day operations of the business, and whether the petitioner has sufficient staffing to relieve the beneficiary from primarily performing non-qualifying duties. 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); *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988).

The regulations provide strict evidentiary requirements for the extension of a "new office" petition and require the petitioner to submit evidence establishing its organizational structure, staffing levels, and wages paid to employees. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not fully complied with the above regulations, and has failed to demonstrate that it has reached the point that it can employ the beneficiary in a predominantly executive position. Accordingly, the appeal will be dismissed.

On appeal, counsel discusses its previously submitted petition asserts that the adjudicating officer "merely rubber stamped a Request for Evidence and Denial" with respect to the instant petition. In essence, counsel implies that the director failed to consider the record of proceedings from its previously submitted petition in the adjudication of the instant petition. In addition, counsel asserts that the previous approval for the beneficiary's L-1A status should be given deference.

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<sup>3</sup> According to the subcontractor contract with [REDACTED] builds custom motorcycles on behalf of the petitioner.

<sup>4</sup> The AAO observes that the foreign entity employs a seamstress, in addition to two upholsterers.

The AAO acknowledges that USCIS previously approved a nonimmigrant petition filed on behalf of the beneficiary. In matters relating to an extension of nonimmigrant visa petition validity involving the same petitioner, beneficiary, and underlying facts, USCIS will generally give some deference to a prior determination of eligibility. However, the mere fact that USCIS, by mistake or oversight, approved a visa petition on one occasion does not create an automatic entitlement to the approval of a subsequent petition for renewal of that visa. *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 148 (1st Cir 2007); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 597 (Comm. 1988). In addition, the director did not err in failing to consider the prior record of proceeding. Each nonimmigrant petition filing is a separate proceeding with a separate record and a separate burden of proof. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

In the present matter, the director reviewed the instant record of proceeding and concluded that the petitioner was ineligible for an extension of the nonimmigrant visa petition's validity based upon the evidence in the record. In both the request for evidence and the final denial, the director clearly articulated the objective statutory and regulatory requirements and applied them to the case at hand. If the previous petition was approved based on the same minimal evidence of the beneficiary's eligibility, the approval would constitute gross error on the part of the director.

#### **B. Qualifying Relationship**

The second issue to be addressed is whether the petitioner established that it has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

Upon review, the director's determination with respect to this issue will be withdrawn. The evidence submitted supports a finding that the U.S. and foreign entities are affiliates based on 100% ownership by the beneficiary. On appeal, counsel provides additional evidence and a sufficient explanation to overcome the director's concerns regarding the discrepancies in the foreign entity's business name and activities.

### **III. Conclusion**

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.