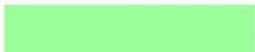


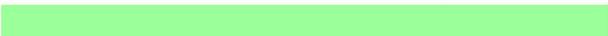
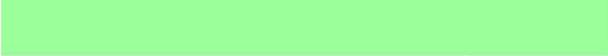


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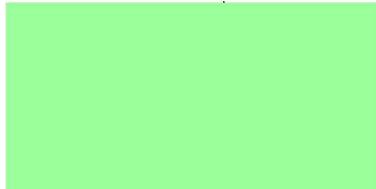


DATE: **APR 18 2013** Office: CALIFORNIA SERVICE CENTER FILE: 

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,

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 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 Missouri limited liability company established in 2008, engages in farming consulting. It claims to be a subsidiary of [REDACTED] located in Loeriesfontein, South Africa. The petitioner seeks to employ the beneficiary as its CEO/President for a period of five years.¹

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed 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 beneficiary will be employed in a managerial capacity.

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.

¹ The petitioner requests to extend the beneficiary's status for a total of five years, from September 22, 2010 to October 20, 2015. However, pursuant to 8 C.F.R. § 214.2(l)(15)(ii), an extension of stay may only be authorized in increments of up to two years.

- (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.

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 to be addressed is whether the petitioner established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker. On Form I-129, the petitioner indicated that it currently has 2 employees in the United States.

In a letter accompanying the initial petition, the petitioner listed the beneficiary's job duties in the United States as the following:

1. Direct and coordinate an organization's financial and budget activities to fund operations, maximize investments, and increase efficiency for American and South African operations (80%);
2. Analyze operations to evaluate performance of the company in meeting objectives, and determine areas of potential cost reduction, program improvement, or policy change (80%);
3. Direct, plan, and implement policies, objectives, and activities of the business to ensure continuing operations vis a vi [sic] global operations, to maximize returns on investments, and to increase productivity (80%);
4. Prepare budgets, including those for funding and implementation of programs (80%);
5. Negotiate or approve contracts and agreements with clients, suppliers, distributors, federal and state agencies, and other organizational entities (80%);
6. Work with managers in US and South Africa and assign or delegate responsibilities to them and implement corrective action plans to solve organizational problems (80%);
7. Direct and coordinate activities between the US Company and South African company to provide information and promote international interests and harmony (70%);
8. Present information and background of global organizations to potential clients to promote services, exchange ideas, and accomplish objectives (20%); and
9. Represent company and promote their objectives at official functions, or delegates staff to do so (20%).

In another letter accompanying the initial petition, the petitioner described its staffing structure. The petitioner affirmed that it has only two employees: the beneficiary and [REDACTED]. The petitioner asserted that the beneficiary, as CEO, will "oversee all areas of the business and focus on key decision-making and the structuring of contracts with suppliers and high yield patrons" and directly supervises [REDACTED] who is responsible for the day-to-day operations of the company. The petitioner described [REDACTED] primary responsibility as "overseeing and supervising the clients' employees in helping make recommendations to the client (farmer) during the life of the contract." The petitioner also asserted that it utilizes the services of [REDACTED] for "admin/bookkeeping and accounting," and uses "contract labor from time to time on various projects." In the same letter, the petitioner listed the following job duties for [REDACTED]

1. Record information such as production figures, farm management practices, and parent stock data, and prepare financial and operational reports;
2. Produce crops and livestock and confer with buyers to arrange for the sale of crops;
3. Contract with farmers or independent owners for raising of crops, or for management of crop production;
4. Evaluate financial statements and make budget proposals;
5. Analyze soil to determine types and quantities of fertilizer required for maximum production;
6. Purchase machinery, equipment, and supplies such as tractors, seed, fertilizer, and chemicals;

7. Maintain and operate machinery and perform physical work;
8. Direct and coordinate worker activities such as planting, cultivating, irrigation, chemical application, harvesting, and grading;
9. Perform post-harvest activities;
10. Inspect orchards and fields to determine maturity dates of crops, or to estimate potential crop damage from weather;
11. Hire, train, and supervise client's farm workers or supervise a temporary farm labor contractor;
12. Maintain, repair, and overhaul farm machinery and vehicles, such as tractors, harvesters, and irrigation systems; and
13. Examine and listen to equipment, read inspection reports, and confer with customers to locate and diagnose malfunctions.

The director issued a request for evidence ("RFE"), instructing the petitioner to submit, *inter alia*, a more detailed description of the beneficiary's job duties in the United States, identifying the percentage of time required to perform the duties of the managerial or executive position in the United States as well as in South Africa.

In response, the petitioner clarified that the beneficiary is employed in a primarily executive, not managerial, capacity. The petitioner clarified that the beneficiary spends 20% of his time directing the South African branch, and the rest of his time focusing on the U.S. branch. The petitioner provided a new list of job duties for the beneficiary in the United States that was essentially identical to the previously provided list, except for adding the duty of "review reports submitted by staff members to recommend approval or to suggest changes (80%)" and deleting the previously listed duties of "[d]irect and coordinate activities between the US Company and South African company to provide information and promote international interests and harmony (70%)" and "[p]resent information and background of global organizations to potential clients to promote services, exchange ideas, and accomplish objectives (20%)."

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. The director determined that the petitioner's descriptions of the beneficiary's duties in the United States were insufficient to describe what the beneficiary does on a day-to-day basis. The director further determined that, based upon the petitioner's organizational structure, it appeared that the beneficiary was primarily engaged in non-qualifying, day-to-day operational duties rather than the management of the business.

On appeal, counsel asserts that the beneficiary is employed in a managerial capacity. Counsel asserts that the beneficiary will "personally manage the overall organization, as well as essential components and functions of the organization, while service in the position of CEO/President." Counsel asserts the following:

[The beneficiary] will have the responsibility of managing and overseeing the entire operation of the company, and for ensuring the successful deployment of the affiliate company's business operations in the United States. He will direct all business operations, financial activities, and staff, and will formulate business policies that will guide the company.

He will be responsible for handling budget preparations and program and policy implementation, a significant component of a company such as [the petitioner] that wishes to successfully expand in a new market. In performing these duties, [the beneficiary] will effectively manage the organization by increasing efficiency, maximizing revenues, and developing new opportunities for the company's expansion. By performing these and other duties, [the beneficiary] will effectively manage the company as well as its major components.

...

In his position as CEO/President for [the petitioner], [the beneficiary] will be responsible for supervising and directing the activities of other supervisory and professional employees. [The beneficiary] will supervise and control the work of a Consultant Director, who will in turn be responsible for managing subordinate employees. [The beneficiary] will directly supervise these subordinate professionals and will be responsible for regularly monitoring their progress. These duties clearly demonstrate that [the beneficiary] will be employed in a supervisory position over other supervisory and professional employees. Alternatively, [the beneficiary's] responsibility for supervising the company's essential functions of business development, administration, and budgets further demonstrates the managerial nature of the position.

Counsel also asserts that the beneficiary has "complete supervisory authority" over business functions and personnel, and that he exercises discretion over "the operations, activities, and functions of the company." Counsel asserts that the beneficiary will develop policies and objectives to establish routines and functional guidelines for the operations of the company, and will be responsible for developing and implementing the company's business plan and plans for further expansion. Counsel concludes that the beneficiary will be "instrumental in managing the company's complex operations, maximizing returns, and increasing sales," and that these duties "clearly demonstrate the scope of his discretionary authority over the company's operations, activities, and functions. Counsel submits no other explanations or supporting evidence to support the appeal.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed in the United States in a primarily managerial or 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.*

With the initial filing, the petitioner described the beneficiary's position in very broad terms, such as his responsibilities to "[d]irect and coordinate an organization's financial and budget activities," "[a]nalyze operations to evaluate performance of the company," "[d]irect, plan, and implement policies, objectives, and activities of the business," and "[d]irect and coordinate activities between the US Company and South African company." These duties are too broad and vague to give an understanding of what the beneficiary does on a

day-to-day basis.² 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 sufficient detail or explanation of the beneficiary's activities in the course of his 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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

As such, the director reasonably requested the petitioner to submit a more detailed description of the beneficiary's job duties. In response, however, the petitioner largely resubmitted the same description as previously provided. On appeal, counsel provided an even more broad and vague description of the beneficiary's job duties, such as "managing and overseeing the entire operation of the company," "direct all business operations, financial activities, and staff, and will formulate business policies that will guide the company," "effectively manage the company as well as its major components," "supervising and directing the activities of other supervisory and professional employees," and "supervising the company's essential functions of business development, administration, and budgets further demonstrates the managerial nature of the position." In addition to being vague, these duties merely paraphrase the statutory definition of managerial capacity. See section 101(a)(44)(A) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof.

Overall, the duties generally described by the petitioner could generally fall under the definitions of managerial or executive capacity. However, the lack of specificity raises questions as to the beneficiary's actual responsibilities. Based on the position descriptions, the petitioner failed to meet its burden of proof in establishing the true nature of the beneficiary's job duties.

The definitions of executive and managerial capacity 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 prove 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). While performing some non-qualifying, operational duties does not, in and of itself, disqualify the beneficiary from being considered primarily employed in a managerial or executive capacity, the petitioner is nevertheless required to establish that the beneficiary spends the majority of his time performing qualifying duties.

In the instant matter, the petitioner not only failed to accurately describe the beneficiary's duties, but the petitioner also failed to specify what percentage of the beneficiary's time is spent performing non-qualifying versus qualifying duties. The percentages of time the petitioner provided for the beneficiary – including six separately listed duties, each of which the petitioner claimed takes up 80% of the beneficiary's time – fail to provide any meaningful indication of how the beneficiary spends his time. As such, the petitioner failed to establish that the beneficiary *primarily* performs managerial or executive duties.

² In contrast, the petitioner's position description for [REDACTED] was specific as to her day-to-day activities.

An employee who “primarily” performs the tasks necessary to produce a product or to provide services is not considered to be “primarily” employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int’l.*, 19 I&N Dec. 593, 604 (Comm’r 1988).

Overall, based upon the vague job descriptions provided for the beneficiary and the petitioner’s failure to credibly identify the percentage of time the beneficiary spends performing qualifying duties, the petitioner failed to meet its burden of proof in establishing that it will employ the beneficiary in a primarily managerial or executive position. Accordingly, the appeal will be dismissed.

The petition will be denied and the appeal dismissed. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.