

(b)(6)



**U.S. Citizenship
and Immigration
Services**

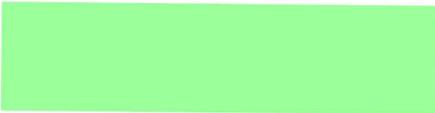


DATE: **APR 30 2013** Office: VERMONT SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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, Vermont 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 extend the beneficiary's status 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 is a Florida corporation established in 2011 engaged in the import and export of candies and confectionaries. It is a subsidiary of [REDACTED] located in the Venezuela. The beneficiary was previously granted one year as an L-1A nonimmigrant intracompany transferee in order to open a "new office" in the United States as the company's General Manager.

The director denied the petition concluding that the petitioner had submitted insufficient evidence to demonstrate that the beneficiary has been, and would be, primarily employed in an executive or managerial capacity. The director also found that the record was not sufficient to show that the petitioner's organization could support the beneficiary's claimed executive or managerial position. The director reasoned that the petitioner had not shown that beneficiary's subordinates were supervisors, managers or professionals as required of a personnel manager. The director concluded that based on the totality of the circumstances that it was likely that the beneficiary was primarily engaged in performing non-qualifying, day-to-day operational duties.

On appeal, counsel asserts that the director made an erroneous conclusion of law and maintains that the record amply supports that the beneficiary qualifies as a matter of law. Counsel contends that the beneficiary is relieved from performing day-to-day operational duties by the Administrative General Manager. Further, counsel asserts that the beneficiary is a personnel manager as defined by the Act since he was transferred for the specific purpose of performing managerial duties; supervises and controls the aforementioned Administrative General Manager; has full authority with respect to personnel actions; and functions within the most senior level of the organization. Lastly, counsel further asserts that the beneficiary may also qualify as a function manager, as defined by law.

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(I)(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 (I)(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.

Further, the regulation at 8 C.F.R. 214.2(l)(14)(ii) states that a petitioner seeking an extension of a one year "new office" petition accompany their Form I-129 petition with the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (I)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (I)(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.

II. The Issue on Appeal:

The issue to be addressed on appeal is whether the petitioner has established that the beneficiary has been, and would be, primarily employed in the United States in an executive or managerial capacity as required by 8 C.F.R. § 214.2(l)(3).

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.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the petitioner primarily performs executive or managerial duties with the U.S. employer as required by the Act.

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). In support of the I-129 Petition for a Nonimmigrant Worker, the petitioner submitted the following duties for the beneficiary, including a breakdown of hours spent per week on each duty:

- Direct and coordinate activities between both companies- 8 hours

(b)(6)

- Formulating & administering company policies & developing long range goals- 6 hours
- Controlling all financial aspects of the corporation- 6 hours
- Oversee negotiations and conducts legal contracts- 6 hours
- Make decisions regarding marketing efforts- 6 hours
- Direct and coordinate functions with administrative manager- 8 hours

In the same support letter, the petitioner further elaborated on the beneficiary's duties describing them as follows:

- He will continue to direct and coordinate the activities of [the petitioner] in coordination with [the foreign employer]. He will continue to do this 20% of the time.
- He will continue to be responsible for formulating and administering company policies as well as continue developing long range goals of the company in accordance with [foreign employer] objectives. He will do this 15% of the time.
- He will continue to review analysis of activities, costs, and operations and will forecast data to determine the progress achieved by the company towards stated goals and objectives. In his sole discretion, he will continue controlling all of the financial aspects of the corporation, including receiving and disbursing funds, and acquiring debt. He is only responsible to negotiate all banking [sic] all credit matters. Also, he is responsible for negotiating contracts with corporate suppliers and corporate customers. Please find enclosed letters form [sic] [redacted] exclusive [redacted] representing [redacted] and [redacted] Brands and [redacted] that confirms [the beneficiary] negotiations [sic] with them. He will do this 15% of the time.
- The beneficiary will be in charge of obtaining new distribution agreements. He will continue oversee negotiations of substantial contracts and will conduct legal negotiations on behalf of the corporation. He will continue conferring with [the foreign employer] to approve new investments in the United States. This will take 15% of his time.
- The beneficiary will continue to make decisions as to the areas in which to concentrate marketing efforts and as to which methods to utilize to expand client base on the research and analysis of market trends and economic conditions. This will take 15% of the time.
- More specifically, the beneficiary will continue directing and coordinating the design, installation, purchasing, sales, new product development, customer service, and marketing operations through an administrative manager. This will take 20% of his time.

The director found the evidence submitted in support of the I-129 Petition for a Nonimmigrant Worker insufficient to establish that the beneficiary's duties were primarily that of an executive or manager and requested a more detailed description, including executive or managerial decisions made, or executive or managerial responsibilities performed, by the beneficiary. In response, the petitioner provided largely the

same duties for the beneficiary listed above in a support letter from the petitioner's Administrative Manager, and asserted that the beneficiary was completely relieved from performing any non-qualifying operational duties by said Administrative Manager.

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. Portions of the duty description are so overly vague that they provide little or no probative value as to the beneficiary's actual day-to-day activities, such as directing and coordinating activities; formulating and administering company policies; developing long range goals in accordance with foreign employer objectives; reviewing company operations and assuring compliance with foreign employer goals and objectives; controlling all financial aspects of the company; making decisions on the concentration of marketing efforts; and directing and coordinating the design, installation, purchasing, sales, new product development, customer service, and marketing operations. With respect to each of the aforementioned vague tasks, the petitioner has not provided sufficient detail or supporting evidence to support that the beneficiary performs these duties, such as specific duties or activities coordinated; specific policies formulated and administered; long range goals developed; specific foreign employer goals and objectives; specific marketing efforts undertaken or in planning; or new products designed, installed, or developed. Although the petitioner provides some detail regarding potential distribution agreements it is negotiating with certain distributors, the lack of sufficient detail regarding the beneficiary's other managerial duties casts doubt on whether the beneficiary could spend a majority of his time negotiating with distributors. In sum, the lack of specificity, and supporting documentation, surrounding the beneficiary's offered duties calls into question their credibility. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. On appeal, counsel appears to have done little other than reiterate the record as already submitted and the statutory language, and provides no further level of detail requested by the director. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). 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. *Id.* Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Further, 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).

The totality of the evidence on the record does not support a conclusion that the beneficiary is primarily performing managerial tasks as asserted by counsel. As noted above, the beneficiary's duties are so overly vague that it is not possible to conclude that the beneficiary is spending a majority of his time on managerial duties as defined by the Act. Additionally, the petitioner has submitted a massive amount of invoices paid by the petitioner, including all manner of day-to-day operational costs such as wireless bills, waste disposal

bills, small scale supply purchases, and lease payments. The vast majority of these day-to-day operational invoices are shown as being directly addressed to the beneficiary and/or paid using the beneficiary's business debit card, suggesting the beneficiary is primarily responsible for the petitioner's day-to-day operations. However, in direct contradiction, the petitioner claims that the beneficiary spends none of his time on operational duties and that he is completely relieved from performing any non-qualifying duties by the beneficiary's sole managerial subordinate, the Administrative Manager. But, the Administrative Manager's name is left largely unmentioned in the copious daily expense documentation submitted on the record, casting doubt on whether she is actually handling all non-qualifying duties as claimed. Further, the Administrative Manager's duty description is similarly vague and lacking in detail as the beneficiary's duty description. For instance, the Administrative Manager duty description mentions vague responsibilities, including managing administrative functions; overseeing staff regarding financial management; coordinating work with other departments; resolving issues with suppliers, providers and customers; and managing, educating, training and supervising assigned personnel. However, no specifics, details, or supporting documentation are provided regarding these vague responsibilities to give them credibility, such as financial matters handled, disputes resolved, or training provided to employees. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Additionally, the petitioner appears to have no departments of employees to coordinate, as offered in the Administrative Manager's job duty description. Lastly, as noted, evidence on the record suggests that the beneficiary is providing non-qualifying day-to-day operational duties casting serious doubt on the petitioner's claim that the Administrative Manager performs *all* non-qualifying duties for the organization. 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. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Moreover, the petitioner asserts that the beneficiary qualifies as a personnel manager since the beneficiary is offered as managing the aforementioned Administrative Manager, a subordinate manager or supervisor. Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3). The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Here, the petitioner has not established that the beneficiary will direct subordinate managers, supervisors, or professionals. *See* § 101(a)(44)(A)(ii) and Section 101(a)(44)(B) of the Act. The petitioner has provided little evidence to support that the Administrative Manager is acting as a manager beyond state tax documentation showing salary paid to the Administrative Manager, certain payroll checks written to said employee; and an organizational chart reflecting her reporting to the beneficiary and having four subordinates. As noted, the beneficiary has provided a vague description of the Administrative Manager's duties, and little detail or supporting documentation to lend credibility to this claimed manager's role. In fact, a great deal of the expense documentation submitted on the record suggests that the Administrative Manager is not performing her claimed duties but that these are being performed by the beneficiary. As such, the petitioner has not provided sufficient evidence to conclude that the Administrative Manager is acting as a manager, and therefore, that the beneficiary manages other supervisory or managerial employees. Further, the Administrative Manager has not been shown to be a professional consistent with the Act. The Administrative Manager has not been established with sufficient evidence as holding a baccalaureate degree, the minimum requirement of a professional consistent with case law. The Administrative Manager is only shown to hold a degree titled a "Superior University Technician in Advertising and Marketing," and it is not made clear on the record whether the aforementioned educational achievement is the equivalent of a baccalaureate degree in an advanced field of study. Further, it is not established that the Administrative Manager's position requires knowledge or learning of an advanced type in a given field gained by a prolonged course of specialized instruction and study. It is not sufficient to only state that a position requires a baccalaureate degree, as the petitioner has, to establish the position as being in a professional capacity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Indeed, the Administrative Manager's role handling all manner of day-to-day operational duties suggests it is not a professional position requiring advanced knowledge. The Administrative Manager is offered as having four subordinate employee: an Administrative Assistant, Machinist, Marketing & Logistics Assistant, and Sales Representative. No specific evidence on the educational credentials of these four other employees has been provided on the record, as such, it cannot be determined whether these employees are professionals as defined by law. In fact, the duty descriptions of these subordinate employees do not suggest that advanced knowledge is required. As such, the petitioner has not established that the beneficiary will have managerial, supervisory, or professional subordinates necessary to qualify him as a personnel manager.

Additionally, counsel asserts that the beneficiary "may" operate as a function manager consistent with the Act. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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 Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm’r 1988)). In this matter, the petitioner has not provided any of the evidence noted above to establish a beneficiary as a function manager. In fact, as noted, the record suggests that the beneficiary is likely primarily performing operational duties due to the vague duty description and contradictory evidence showing the beneficiary performing day-to-day operational tasks. As such, the beneficiary has not been shown to be a function manager as defined by law.

In conclusion, the petitioner has not provided sufficient evidence to conclude that the preponderance of the evidence that the beneficiary acts primarily in a managerial or executive role. As such, the appeal must be dismissed.

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.