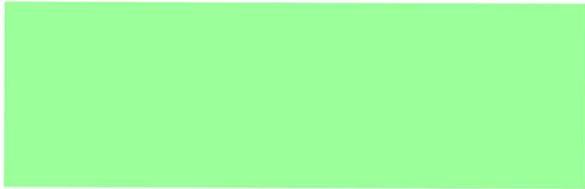


U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE: FEB 05 2013 Office: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, 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 seeks 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 is a Florida corporation established on September 10, 2008.¹ It engages in the business of dry cleaning services. The petitioner is an affiliate of [REDACTED] based in South Africa. The petitioner seeks to employ the beneficiary as President of its new office location for an initial period of one year.²

The director denied the petition, finding the petitioner failed to establish 1) that the beneficiary was employed for one out of the previous three years in a managerial or executive capacity by the foreign affiliate, and 2) that it will employ the beneficiary in a primarily managerial or executive capacity within one year.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded it to the AAO. On appeal, the petitioner submits a letter and additional supporting documents. It asserts that it has satisfied both requirements cited in the director's denial.

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.

¹ The petitioner submitted documentation showing it changed its name to [REDACTED] on November 16, 2011.

² The petitioner was previously granted an L1A visa for the beneficiary for a period of one year to open a new office for a yacht refurbishing business. The petitioner requested a renewal of the visa, but USCIS denied this request. The petitioner subsequently submitted the instant petition requesting an L1A visa so that the beneficiary can open a new office that provides dry cleaning services.

- (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.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) further provides that 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 (l)(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.

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.

III. Issues on Appeal

The director denied the petition based on the findings that the petitioner failed to show: 1) that the foreign affiliate employed the beneficiary for one out of the previous three years in a managerial or executive capacity, and 2) that it will employ the beneficiary in a primarily managerial or executive capacity within one year.

The foreign affiliate is a South African company founded in 1993. It is an established and successful company in the construction industry, offering site preparation and paving. The beneficiary worked for the foreign affiliate from 2001 to 2009, most recently in the position of President and COO.³ At the time of the petition's filing, the foreign affiliate employed twenty-eight people, including two Operations Managers and three Site Managers, all of whom purportedly report to the beneficiary.

³ The petitioner presented conflicting evidence regarding the issue of the beneficiary's most recent job title with the foreign affiliate. On different documents, he is alternatively referred to as "President and COO," "Contracts Manager," and "Director."

The director found that the job description for the beneficiary's position with the foreign affiliate was too vague and abstract to satisfy the petitioner's burden of proof. On appeal, the petitioner submits a more detailed description and contends that it has shown that the beneficiary was employed in a managerial or executive capacity.

The petitioner is a Florida corporation founded in 2008. It originally intended to engage in the business of yacht services and brokerage. This initial business was unsuccessful and in 2011, the petitioner decided to invest in and operate a one-price dry cleaning store. The petitioner submitted evidence establishing that it acquired the premises and equipment necessary to operate a dry cleaning store. It wishes to employ the petitioner as the President of its new office location.

The director found that the job description provided for the beneficiary's proposed position with the petitioner was similarly too vague and abstract to satisfy the petitioner's burden of proof. On appeal, the petitioner submits additional documents, including a more detailed description of the beneficiary's proposed duties, and contends that it has established the beneficiary will act in a primarily managerial or executive capacity within one year.

IV. Analysis

A. Executive or Managerial Capacity Abroad

The director's first reason for denying the instant petition was the finding that the petitioner failed to show that its foreign affiliate had employed the beneficiary in a managerial or executive capacity for one of the three years preceding the filing of its petition. Based on evidence submitted on appeal, the decision of the director on this issue alone is withdrawn.

On its Petition for a Nonimmigrant Worker, Form I-129, the petitioner summarized the beneficiary's duties while working for the foreign affiliate as follows:

From October of 2001 to August of 2009, the beneficiary served as President and COO of the foreign company, reporting directly to the Chairman and CEO, [REDACTED]. He was responsible for all aspects of the company's daily operations, overseeing two Operations Managers and three Site Managers. The company's laborers reported to the Site Managers. He was also responsible for the financial and marketing aspects of [REDACTED] operations, and has contributed to its growth and success since joining the company in 2001.

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). As found by the director, the above duties are insufficiently detailed to satisfy the petitioner's burden of proof.

On appeal, however, the petitioner submits a more detailed description of the job duties performed by the beneficiary in his position abroad. The updated description includes explanations of actions taken by the beneficiary in the following areas: business development, financial responsibilities, human resources, project management, corporate relations, marketing, and management. In particular, the petitioner described the methods used by the beneficiary for supervising subordinate supervisors. The updated list of job duties is sufficient to demonstrate that the beneficiary acted in a managerial and executive capacity while working for the foreign affiliate.

The finding of the director on the issue of the petitioner's employment in a managerial or executive capacity with the foreign affiliate is therefore withdrawn.

B. Executive or Managerial Capacity in the United States

The second reason the director denied the instant petition was the finding that the petitioner failed to show it would employ the beneficiary in a managerial or executive capacity within one year. The finding of the director on this issue is affirmed.

When examining the managerial or executive 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 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.* In addition, the definitions of executive and managerial capacity each have two parts. To meet these definitions, the petitioner must first show that the beneficiary performs the high level responsibilities specified in the definitions. Second, the petitioner must prove the beneficiary will *primarily* perform these specified responsibilities and will not spend a majority of his time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

On its Petition for a Nonimmigrant Worker, Form I-129, the petitioner submitted the following description of the beneficiary's proposed duties in the United States:

The beneficiary will serve as President, responsible for oversight of the day-to-day operations of the business. He will set the goals and policies of the company, and will be responsible for recruiting and hiring the required managers, supervisors and staff to provide the services that will be offered to our customers. He will oversee the budgeting, marketing and operations directly until a manager for these functions has been hired (anticipated within the next three months). As President, [the beneficiary] will be responsible for the following functions of the company: Financial Management, Marketing, Operations and Administration.

The director issued a Request for Evidence (RFE) asking for, *inter alia*, a complete job description including a breakdown of the number of hours devoted to each of the beneficiary's duties on a weekly basis. In response, the petitioner submitted the following updated list of duties:

Duties	Percentage of Time
Set the goals and policies of the company	10%
HR management: recruiting, hiring, setting compensation, business expansion, assigning job duties, etc.	10%
Formulate the annual budget and manage it on a regular basis	10%
Monitor cash flow to ensure solvency	10%
Liaise with suppliers to negotiate prices, payment terms, etc.	10%
Supervise the work of the store manager(s)	20%
Formulate and coordinate marketing and advertising projects	20%
Resolve any customers' complaints that cannot be resolved by the store manager	10%

According to the letter submitted by the petitioner on appeal, the beneficiary is the sole executive vested with the authority to carry out all the duties associated with a person in an executive and/or managerial position.

The petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. 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).

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). 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).

The petitioner does not allege that the beneficiary will supervise professionals. Instead, it alleges that the petitioner will oversee other supervisory employees. In its Form I-129, the petitioner stated it wanted to hire four to five full-time employees within the next year, including two managers. In the petitioner's organizational chart submitted on appeal, the petitioner indicates that it has already hired a manager/presser, a dry cleaner/spotter, and a cash register operator/tagger/item co-ordinator. It plans to hire two additional employees: a presser and a driver. According to the organizational chart, the petitioner would then have five employees subordinate to the beneficiary, one of whom is a manager.

The petitioner's list of duties states that the beneficiary will spend 20% of his time supervising the work of subordinate supervising store manager. The petitioner states that the store manager should herself be considered a supervisor in that she oversees the work of the store's other employees, educates the employees about proper treatment of different fabrics, and reports progress and problems to the beneficiary.

The petitioner fails to explain how exactly the beneficiary will supervise the store manager. His description of what this means does not shed any light on the issue, stating only that he will ensure that the manager performs her supervisory duties and will train her to monitor the company's manual and automated systems. Reciting vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job 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 actual duties themselves 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).

In its letter submitted on appeal, the petitioner states that the petitioner will work with the manager to negotiate staff salaries, process salaries via Paychex, resolve employee disputes, and ensure that employees have the necessary specialized skills to perform their jobs and are providing service at the highest standards. These tasks imply that the beneficiary will himself be involved as a first-line supervisor, and not as a manager, as that term is defined by the regulations.

In addition, given that the beneficiary will devote only 20% of his time to supervising other supervisory employees, the petitioner fails to allege that the petitioner will primarily act as a personnel manager. As a result, even if the petitioner successfully established that he would spend the alleged 20% of his time

supervising other managerial employees, this would not establish that he would be acting primarily in a supervisory role as required by the regulations.

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. § 204.5(j)(5).

The petitioner alleges that the beneficiary, as President, will manage the following functions: Financial Management, Marketing, Operations and Administration. However, on the Form I-129, the petitioner also stated:

During the first year of operations, we plan to fill four to five full time positions, including two managers. These two managers will assume the marketing, administration and operations functions, and [the beneficiary] will continue to be responsible for the financial management, with complete authority to hire and fire all individuals the company will employ.

The petitioner therefore states both that the petitioner will manage the functions of "Marketing" and "Operations and Administration," but also that these functions will be taken over by newly hired managers within one year. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In the job duties it provides for the beneficiary, the petitioner does not allege that the beneficiary will spend his time primarily managing any one essential function of the company. Regarding financial management of the company, for example, the petitioner provided only two seemingly relevant job duties: formulating and managing the annual budget (10% of his time), and managing cash flow (10% of his time). Even if the petitioner's claims in this regard were assumed true, 20% of the beneficiary's time does not constitute a majority, as required to be considered someone who primarily serves as a function manager. In addition, as discussed in more detail below, the petitioner does not establish that the petitioner will have sufficient employees such that the beneficiary will be able to spend his time primarily managing an essential function and not someone actually performing the function.

The petitioner simultaneously alleges that the petitioner will be employed in an executive capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex

organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

The petitioner states that the beneficiary will spend 10% of his time establishing the organization's goals and policies. However, it fails to indicate how the beneficiary will do this or what this means in terms of the actual tasks that the beneficiary will perform. Again, 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 has failed to provide any 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).

The petitioner states the beneficiary will use another 10% of his time on human resources management that it describes as recruiting, hiring, setting compensation, business expansion, assigning job duties, etc. The petitioner states that it already has three employees and foresees hiring an additional two. Given the small size of the petitioner, it is unrealistic to suggest that the beneficiary will be able to spend 10% of his time making executive-level decisions regarding the petitioner's employment policies. When action related to employment needs to occur, none of the petitioner's other employees are tasked with performing the physical tasks associated with hiring additional employees, such as putting up advertisements, collecting resumes, reviewing applications, and filling out administrative paperwork. The petitioner does not indicate that it will have sufficient staff to relieve the beneficiary of performing these non-executive level duties associated with the hiring and firing of employees.

The beneficiary will purportedly spend 10% of his time each on formulating and managing the annual budget as well as managing cash flow to ensure solvency. These two duties are vague and sufficiently similar that it is difficult to determine the difference between the two. Again, it is the petitioner's burden to establish eligibility for the classification sought. In order to do so, specifics are required. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). These two descriptions fail to explain what exactly the beneficiary will do in order to formulate and manage the budget and cash flow. Without more details, the petitioner has failed to establish that these duties are managerial or executive in nature.

The petitioner states the beneficiary will spend 20% of his time liaising with suppliers to negotiate prices, payment terms, etc. Acquiring the supplies needed for the petitioner to perform its services is not a task that can be considered executive in nature. Rather, this is ground level responsibility necessary for the operation of the business.

Similarly, resolving customer complaints is a ground level responsibility associated with the general provision of the petitioner's services. The 10% of the beneficiary's time spent on this duty cannot be considered time spent on an executive level function.

Lastly, the petitioner states that it will spend 20% of its time managing the advertising and marketing functions of the petitioner. The petitioner has not submitted sufficient evidence to establish that it would be primarily making executive-level decisions pertaining to advertising. The petitioner's budget shows it plans on spending a steady \$500 per month on advertising. According to the organizational chart submitted, none of the other employees will take over the actual tasks associated with advertising. As such, the petitioner has not established that the petitioner will have sufficient employees that the beneficiary will be relieved of performing the day-to-day tasks associated with advertising.

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). Based on an analysis of the job duties provided by the petitioner, it has failed to show it will employ the beneficiary in primarily managerial or executive capacity within one year.

For the foregoing reasons, the petitioner has failed to demonstrate that it will employ the beneficiary in a managerial or executive capacity within one year. The director's decision on this issue is upheld and the appeal is dismissed.

V. Conclusion

The director's finding that the petitioner did not establish the foreign affiliate employed the beneficiary in a managerial or executive capacity is withdrawn.

However, the petitioner has not established that it will employ the beneficiary in a managerial or executive capacity within one year. See 8 C.F.R. § 214.2(l)(3)(v)(C). 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.