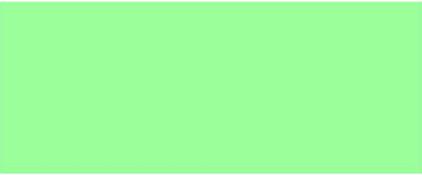


(b)(6)

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



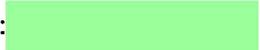
U.S. Citizenship
and Immigration
Services



DATE: FEB 06 2013

Office: VERMONT SERVICE CENTER

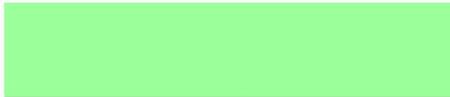
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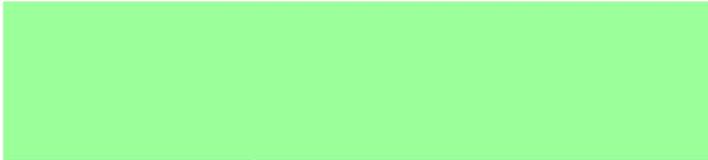
Petitioner:

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 filed this nonimmigrant petition seeking to grant the beneficiary 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).¹ The petitioner, a New Jersey corporation established in 2006, states it is engaged in the import, export and sale of electronic components and parts. It claims to be a wholly owned subsidiary of [REDACTED] a company located in Egypt. The petitioner seeks to employ the beneficiary as its Operations Manager for a period of three years.

The director denied the petition, concluding that the petitioner had failed to establish that the beneficiary would be employed in qualifying managerial or executive capacity. The director reasoned that the preponderance of the evidence did not demonstrate that the beneficiary's job duties would be complex enough to qualify the beneficiary as a professional. Further, the director found, given size and nature of the petitioner's business, that it was unlikely that the beneficiary would be relieved from primarily performing non-qualifying duties. Lastly, the director concluded that the petitioner had not shown that the petitioner met the regulatory definition of an employer of the beneficiary.

On appeal, counsel asserts that the director erred in applying those portions of the Act and regulations applicable to the H-1B nonimmigrant classification, relevant to specialty workers, rather than those applicable to the L-1A classification. Counsel points to the director's focus on analyzing whether the beneficiary's duties were complex enough to qualify him as a professional and whether an employer-employee relationship exists between the petitioner and the foreign employer. Counsel maintains that, when applying the appropriate L-1A portions of the Act and applicable regulations, the beneficiary qualifies as a manager and executive. Counsel reiterates the duties of the beneficiary both with the petitioner and foreign employer and contends these are the duties of a manager and executive under the Act. More pointedly, counsel asserts that the beneficiary's various independent contractor subordinates allow him to act in a managerial or executive role, despite there only being two full-time employees with the petitioner.

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:

¹ The beneficiary entered the United States as a B-2 nonimmigrant visitor on July 28, 2010.

- (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.

II. Analysis:

As stated, the director denied the petition finding that the petitioner failed to establish that the beneficiary was employed in the United States primarily in an executive or managerial capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity under the extended petition.

The AAO concurs, in part, with counsel's assertion that the director misapplied the law. As previously noted, the director primarily based his decision on the following: (1) that the petitioner had not established that the beneficiary's duties were complex enough to raise the beneficiary to the level of a professional; and (2) that an employer-employee relationship did not exist between the petitioner and the foreign employer. However, as noted by counsel, analysis of the aforementioned elements is not typically relevant to determining whether a beneficiary qualifies for L-1A non-immigrant classification, but the H-1B specialty occupation classification. For instance, although managers and executives under the Act are typically professionals, they are not required to qualify as a professionals as defined by the Act to qualify for the L-1A classification. Further, although a petitioner and a beneficiary must have an employer-employee relationship, the nexus of analysis in the case of the L-1A classification typically does not turn on this point, but those listed explicitly in the statutory language. As such, the director should have applied those portions of the Act and regulations relevant to the L-1A non-immigrant classification to the facts of this case, and this law specific to the L-1A classification will be applied in this decision.

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 provided the following description of the beneficiary's duties, including hours in a typical work week the beneficiary spends on various tasks:

- Develop strategic plans to advance the Company's Mission objectives and operations, and to promote revenue, profitability, and growth (**throughout the day**).
- Oversee Green Windows' operations to ensure production efficiency, quality, service and cost-effective management of resources (**4 hours**).
- Plan, develop, and implement strategies for generating the Company's new resources and/or revenues (**2 hours**).

- Identify acquisition and merger opportunities and direct implementation activities (**1 hour**).
- Approve the Company's operational procedures, policies, and standards. Review activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plans in accordance with current Company conditions (**2 hours**).
- Evaluate performance of executives for compliance with established policies and objectives of the foreign parent company and contributions in attaining objectives (**2 hours**).
- Represent the Company at technical sessions, committee meetings, and at formal functions and promote Company to local, regional, national and international constituencies (**1.5 hour**).
- Present the Company's report at virtual Company meetings (**1.5 hour**).
- Oversee foreign operations to include evaluating operating and financial performance (**1 hour**).

The petitioner also maintains that the beneficiary will not be responsible for performing any non-managerial functions, and to the extent they do arise, that they will amount to less than 1% of his time. Further, the petitioner offers a litany of other claimed managerial or executive duties for the beneficiary, for which no hourly estimates are provided; such as developing pricing strategies, managing business development, evaluating the financial aspects of the business as it relates to business development, negotiating contracts with vendors and customers, developing project implementation strategies, amongst other additional duties. The petitioner also states the following with respect to the beneficiary's duties: "In order to perform his duties, the Beneficiary will be required to travel periodically to the country where the client is located and spend a minimum of one week to manage each project." The petitioner proceeds to provide a detailed explanation of potential duties the beneficiary would provide on these periodic foreign business trips.

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 petitioner has provided a duty description for the beneficiary that includes unexplained inconsistencies that cast doubt on whether the beneficiary primarily performs managerial or executive duties for the petitioner. For instance, the petitioner offers the job duty description, including hours spent "based on a 40 hour work week," but the allotted hours only amount to 15 hours despite directly mentioning that the beneficiary's duties regularly amount to more than 40 hours a week. Further, the petitioner vaguely offers that the beneficiary "periodically" travels aboard to manage projects which appear related to his still continuing duties with the foreign employer. But, the record does not clarify the frequency of these trips, or specify the amount of time he allocates to duties related to his foreign employer position. Indeed, the record suggests that the beneficiary will continue to act in his foreign employer position while acting as a manager or executive with the petitioner. For instance, the petitioner notes directly in the duty description that the beneficiary will continue to oversee the foreign operations while working as a manager or executive

with the petitioner, maintain certain foreign direct reports, and offers foreign duties (in lieu of actual petitioner duties) to illustrate the type of duties he will perform with the petitioner. The petitioner also provides a litany of additional duties with the petitioner, as listed above, not included in the main duty description and not given more relevance and credibility through the allotment of hours spent on these tasks. 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). In sum, the inconsistencies and lack of clarity related to the beneficiary's duty description and its focus on foreign endeavors casts doubt on whether the beneficiary will be spending a majority of his time performing managerial or executive duties for the petitioner.

Additionally, the number of subordinates reporting to the beneficiary casts further doubt on whether the petitioner can support the claimed managerial or executive role. The petitioner submits on the record an organizational chart that includes only two full-time employees working directly for the petitioner, a General Manager of Purchasing and Logistics and an employee devoted to Human Resources and Financial Management. Also within the petitioner organizational chart, the petitioner provides additional claimed subordinates; including three foreign employer branch managers and seven other claimed independent contractors from companies such as [REDACTED] and [REDACTED].

Counsel asserts that the identified independent contractors should qualify as subordinates of the beneficiary citing an unpublished decision as precedent. However, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Regardless, the AAO concurs that in certain cases independent contractors may be found to be subordinates of a beneficiary if it is found that the beneficiary has a sufficient level of control over the contractors; primarily manages and directs them; could hire or fire them at his/her discretion and recommend other such personnel action. However, the petitioner has not provided any evidence that the beneficiary manages, directs, or controls the claimed independent contractors. 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)). In fact, evidence on the record suggests that the beneficiary has little managerial control over of the listed independent contractors as they are submitted as managers at other major corporations, leaving much doubt as to whether the beneficiary manages, directs, and controls these individuals. Indeed, the record establishes that the beneficiary has arm's length dealings with these parties, based on the distributor agreements the foreign employer has in place with these entities. As such, the preponderance of the evidence shows that the claimed seven independent contractors are simply business associates of the beneficiary and/or the petitioner; mostly located in other countries and not working directly for the petitioner or the beneficiary. It would be absurd to think that customers or suppliers of a petitioner, or business associates of a beneficiary, would qualify as subordinates of a beneficiary; otherwise qualifying as

an L-1A manager or executive would be simply be a matter of listing all of a petitioner's or beneficiary's suppliers and business associates.

Further, the three foreign branch managers listed in the petitioner's organizational chart cannot be accepted as subordinates of the beneficiary pursuant to his role with the petitioner, as the petitioner has provided no explanation of their involvement with the petitioner. In fact, the petitioner provides very detailed job descriptions for the aforementioned employees in their roles with the foreign employer, and these descriptions provide no duties directly relating to the petitioner's business. Also, these claimed petitioner employees are performing their functions in three separate cities in Egypt with no apparent relation to the petitioner. The petitioner also maintains that it will soon be hiring two additional positions, a Warehouse Operations Manager and a Marketing Associate. But, these prospective positions cannot be considered in determining whether the beneficiary will act as a manager or executive as of the day of the filing of the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Altogether, the petitioner's rather substantial organizational chart includes only two subordinates to the beneficiary, both in claimed managerial roles. But, the offered General Manager of Purchasing & Logistics and employee focused on Human Resources and Financial Management appear to have no subordinates of their own, leaving much question as to who is performing the day-to-day operations of the petitioner; what human resources are being managed by the beneficiary's subordinate focused on this function; and whether the beneficiary will primarily perform managerial or executive duties with the petitioner. Again, 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).

The petitioner also stresses the beneficiary's managerial functions throughout the record suggesting he will function as a personnel manager with the petitioner. 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 must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. 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). Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

Here, the petitioner has not established that the beneficiary will direct subordinate managers, supervisors, or professionals as required of a personnel manager. See § 101(a)(44)(A)(ii) and Section 101(a)(44)(B) of the Act. As noted previously, the petitioner has only established that the beneficiary has two subordinates with

the petitioner, and these two subordinates cannot be found as managers or supervisors based on the evidence presented. For instance, the employee focusing on Human Resources and Financial Management is not provided as having any subordinates of her own; while the submitted General Manager of Purchasing and Logistics is vaguely described as managing various independent contractor companies such as Unishippers, UPS, DHL, and FedEx. It is not sufficient to simply list independent companies or suppliers of a petitioner in order to establish a beneficiary subordinate as a manager or supervisor. At minimum, claimed managerial or supervisory subordinates of a beneficiary must at least be shown to have subordinates of their own. Further, it cannot be concluded that either of the beneficiary's subordinates are professionals, as no information regarding their educational credentials is provided and it is not asserted that either position requires a professional as defined by the Act. As noted above, a professional is one with higher 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. As such, without any educational information related to the beneficiary's subordinates, it is not possible to determine that they are professionals according to the Act. Therefore, the petitioner has not established that his subordinates are managers, supervisors or professionals to qualify him as a personnel manager consistent with the Act.

On appeal, counsel also maintains in the submitted brief that the beneficiary qualifies as an executive. 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 submitted evidence fails to establish that the beneficiary will primarily perform executive duties. In fact, as discussed above, the record clearly shows that the beneficiary will be primarily supervising subordinates who are not managers, supervisors or professionals in their own right. Additionally, the petitioner has not shown sufficient employees to perform the day-to-day operational duties of the enterprise, casting doubt on the assertion that the beneficiary performs almost no non-executive duties. Therefore, given that the beneficiary's duties are comprised almost entirely of supervising non-professional employees and that the petitioner does not have sufficient subordinates to perform operational duties, it can be reasonably concluded that beneficiary is not primarily focused on the day-to-day operations of the enterprise and focusing on the organization's broad goals and policies. Further, the petitioner has not established that the beneficiary dictates to subordinate managerial employees within a complex organizational hierarchy. In fact, as stated, the petitioner has not established a complex organizational hierarchy, but only two subordinate employees that are not supervisors, managers, or professionals. 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. 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.). While the AAO does not doubt that the beneficiary exercises authority over the company as its Operational Manager, and requisite executive authority with the foreign employer, the petitioner has not established that he will perform primarily executive duties for the petitioner as defined by the Act.

In conclusion, the petitioner has not established that the beneficiary qualifies as a manager or executive consistent with the Act due to inconsistencies in the beneficiary's duty descriptions and a the failure to show sufficient subordinate employees with the petitioner necessary to support the beneficiary's claimed role. For this reason, the appeal will 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.