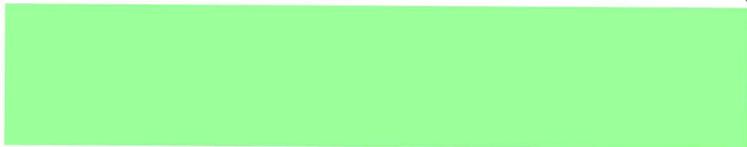


(b)(6)

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

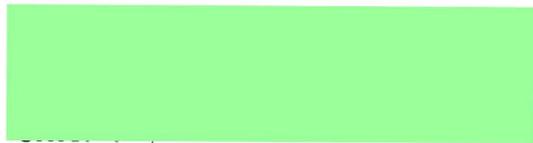


DATE: **JAN 17 2013** Office: CALIFORNIA SERVICE CENTER FILE:

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, an Illinois corporation established in 2007, states that it is involved in the buying and selling of wholesale agricultural products. It claims to be a wholly owned subsidiary of a [REDACTED] and seeks to employ the beneficiary as President for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that it would employ the beneficiary in a primarily managerial or executive capacity. The director concluded that, based on the petitioner's organizational structure, the beneficiary would be primarily assisting in the day-to-day non-supervisory duties of the business. Further, the director found that the beneficiary's proposed subordinates are not managers, supervisors or professionals, and therefore concluded that the record was not sufficient to establish the beneficiary would be more than a first-line supervisor of non-professional employees.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the director erred in not performing an "individualized analysis" of the beneficiary's duties, and that such duties are sufficient to establish the beneficiary as an executive according to the Act. Additionally, counsel contends that the record supports a finding that the beneficiary supervises professional employees, and that he qualifies as a function manager. Counsel contends that the director failed to identify the operational activities she believed the beneficiary would be performing and did not take into account the reasonable needs of the petitioner. Counsel maintains that the director failed to review all of the evidence on the record and to treat the petitioner fairly. Lastly, counsel asserts that if the AAO does not sustain the appeal that the petitioner will suffer from "extreme hardship," maintaining that without the beneficiary the company will suffer from "severe operational disruption." Counsel submits a brief and new evidence in support of the appeal.

I. The Law

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (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 based on a finding that the petitioner failed to establish that the beneficiary will be employed in the United States in a qualifying 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 the beneficiary will perform primarily executive or managerial duties with the petitioner as required by the Act.

As correctly noted by counsel, 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(1)(3)(ii). The petitioner offered the following explanation of the beneficiary's duties in response to the director's Request for Evidence (RFE) which instructed the petitioner to provide a more detailed description of the beneficiary's proposed duties, including percentages of time spent on his various duties:

1. Developing a strategic plan to advance the company's mission and objectives and to promote revenue, profitability, and growth as an organization; (20%)
2. Overseeing company operations to assure efficiency, quality, service, and cost-effective management of resources; (10%)
3. Planning, developing, and implementing strategies for generating resources and/or revenues for the company; (5%)
4. Identifying acquisition and merger opportunities and directing implementation activities; (5%)
5. Approving company operational procedures, policies or standards; (5%)
6. Reviewing routine report and financial statements from the staff to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions; (30%)
7. Exercising complete authority over hiring, promoting and termination of employees; (5%)
8. Representing the company at legislative sessions, committee meetings, and at formal functions; (2%)
9. Promoting the company to local, regional, national, and international constituencies; (3%)
10. Responsible for training employees in the field of international trade as well as special trade issues from China buyers; (5%)
11. Presenting company report at Annual Stockholder and Board of Director meetings; (5%) and

12. Identifying, exploring and developing potential export opportunities from the U.S. to China for such products as popcorn, food soybean, seafood, and meat. (5%)

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).

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 provided no specifics as to how the beneficiary will carry out the general tasks and goals listed above as a part of his daily duties. In fact, portions of the duty description are so overly vague that they provide little or no probative value as to the beneficiary's day-to-day activities, such as developing a strategic plan to advance the company's mission and objectives; overseeing company operations; identifying acquisition and merger opportunities; approving company operational procedures, policies, and standards; promoting the company to local, regional, national, and international constituencies, amongst others. At no time on the record has the petitioner provided examples of specific strategies to be undertaken, the mission or objectives of the company the beneficiary is to carry out, any explanation of merger or acquisition opportunities, or the operational procedures to be created. 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. *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.). 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. at 1108.

Further, certain inconsistencies in the beneficiary's job description cast doubt on its credibility. For instance, the petitioner offers that 30% of the beneficiary's duties involve reviewing routine reports and financial statements from the staff, but provides no evidence of staff that would create such reports. 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).

Additional discrepancies and lack of evidence on the record related to the beneficiary's subordinates casts further doubt as to whether sufficient subordinate employees exist to relieve the beneficiary from primarily performing the duties consistent with the day-to-day operation of the company. The petitioner claims that the beneficiary would have two full-time subordinate traders, along with an independent contract trader and three further traders that work with the parent company in China. However, the petitioner's submitted Form 941 for the second quarter of 2011 lists that the petitioner has six employees, while the same form filed in the very next quarter reflects that the petitioner has only three employees, neither of which match with the petitioner's claim on the Form I-129 that it had four employees as of the date of filing. Further, the petitioner's internal payroll documentation from the second quarter of 2011 does not reflect six employees

as claimed on the Form 941 for the same period. In fact, the internal payroll documentation submitted by the petitioner never reflects that the petitioner employed six employees at any time. Lastly, the petitioner's internal payroll documentation reflects the complete turnover of all employees working for the petitioner from April 2011 up until the date of the filing of the petition in November 2011, casting doubt on the number of subordinates typically working for the company and their ability to relieve the beneficiary from performing day-to-day operations. 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. 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).

Additionally, the petitioner also claims that an independent contract trader works for the petitioner as a subordinate of the beneficiary, but fails to establish the extent of this subordinate's involvement with the company other than a limited one page contract. More specifically, the record does not clarify the number of hours worked by the claimed independent contractor to determine whether he could relieve the beneficiary significantly from performing the day-to-day operations of the enterprise. Further, the same could be said for the claimed foreign traders working for the parent company, also offered as reporting to the beneficiary. 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)).

On appeal, counsel claims the beneficiary's subordinates are professionals, thereby qualifying the beneficiary as a personnel manager. 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." The AAO notes that the petitioner does not claim the beneficiary's subordinates have subordinates of their own; therefore they cannot be supervisors or managers according to the Act.

Counsel submits on appeal detailed descriptions of the job duties of the beneficiary's three subordinates, along with a job posting for the two full-time subordinate trader positions reporting to the beneficiary. The director specifically requested in the RFE that the petitioner "list all employees in the beneficiary's immediate division, department, or team name, job title, summary of duties, educational level, and salary." Although the petitioner provided the names and titles of his subordinates in response to the director's RFE, it did not submit evidence necessary to determine whether the beneficiary's subordinates were professionals

in accordance with the Act. For instance, the petitioner failed to submit detailed descriptions of the beneficiary's subordinates' job duties, their educational levels and documentary evidence related thereto, and their salaries, all as specifically requested by the director. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. As such, absent detailed duty descriptions and evidence of the education level of the beneficiary's subordinates, the subordinates cannot be deemed professionals consistent with the Act.

Counsel further claims that the record supports a finding that the beneficiary is a function manager according to the Act due to his supervision of professional employees. Counsel points specifically to a previous AAO decision that found a beneficiary was a function manager partly due to the fact that the director had failed to identify claimed operational activities being conducted by a beneficiary and had not taken into consideration the reasonable needs of the petitioner. However, counsel has not articulated specifically how this case applies in the present matter beyond vaguely mentioning that the director did not specifically note the non-qualifying duties it believed the beneficiary was performing and did not take into account the reasonable needs of the petitioner. Although the director was admittedly somewhat vague as to the non-qualifying duties she believed the beneficiary was performing in the present matter, pointing this out is not sufficient to establish the beneficiary as a function manager. Further, counsel does not explain how the petitioner's reasonable needs were not taken into consideration.

Regardless, only when the agency specifically designates a decision as precedent can it bind future decisions. 8 C.F.R. § 103.3(c). To be inconsistent and actionable, it is well established that an agency "interpretation" that serves to modify a previous interpretation must be in the form of an actual precedent decision, regulation, or other published rulemaking. *See, e.g., SBC Inc. v. Federal Communications Com'n.*, 414 F.3d 486, 498 (3rd Cir., 2005) (citing *Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d 579, 586 (D.C.Cir. 1997)). Rulemaking by "practice" does not exist. 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. As such, since the AAO decisions offered on appeal are not published precedent, they cannot be treated as binding precedent and will not be further considered. It is more relevant and appropriate to apply the current record to the Act, regulations, and binding precedent.

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 (citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)).

In the present matter, the petitioner has not shown the beneficiary to be a function manager. As noted by the director, the petitioner does not claim the beneficiary will manage a separate department, subdivision, function or component of the petitioner, but indeed runs the whole of the petitioner's organization. Additionally, the petitioner has not identified any essential function to be managed by the beneficiary, as required by law, nor provided the percentage of time he will spend on managing that specific function. Again, the petitioner only offers that the petitioner will manage the whole of the petitioner's operation. Further, the petitioner must still establish that the beneficiary will perform primarily managerial duties. However, as noted previously in this decision, the petitioner has not established that the beneficiary will perform primarily managerial duties due to the vagueness of the beneficiary's offered duties; and discrepancies and inadequacy in the evidence submitted regarding the beneficiary's subordinates. Indeed, the insufficiency of the evidence provided by the petitioner regarding the beneficiary's duties casts doubt as to whether sufficient employees exist to relieve the beneficiary of primarily performing non-qualifying duties related to the day-to-day operation of the enterprise. The fact that the beneficiary is the only manager in the company and responsible for its overall operation does not qualify him as a function manager, as such, the petitioner has not met this burden.

Additionally on appeal, counsel asserts that the beneficiary will be employed in an executive capacity and largely reiterates the statutory definition. 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.*

In the present matter, the petitioner has not submitted sufficient evidence to establish the beneficiary as an executive. As discussed, the beneficiary has not been shown to have any managerial subordinates, let alone

a level of managerial employees to direct the organization and allow the beneficiary to primarily focus on its broad goals and policies. In fact, the beneficiary's vague duties and the inconsistencies and insufficiency in the evidence submitted regarding the beneficiary's subordinates, casts serious doubt as to whether the company's employees would be able to relieve the beneficiary from performing day-to-day operational duties. Further, counsel does little other than directly recite the statutory definition of "executive capacity," without sufficient supporting documentary evidence, in support of his assertion that the beneficiary will be employed in such capacity. 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 Obaigbena*, 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). 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. *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.). Therefore, the petitioner has not provided sufficient evidence to establish the beneficiary as an executive according to the Act.

Lastly, counsel asserts that if the AAO does not sustain the appeal that the petitioner will suffer from "extreme hardship," contending that without the beneficiary the company will suffer from "severe operational disruption." Although the AAO can appreciate the practical problems the denial of a petition could create, the Act and regulations do not give any weight to such potential hardship in making a determination of whether a beneficiary qualifies as an L-1A nonimmigrant intracompany transferee. Although the AAO will dismiss the appeal, it should be noted that the denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate supporting evidence and filing fees.

In conclusion, the AAO cannot conclude the record supports the beneficiary's claimed managerial or executive capacity due to the vagueness of the beneficiary's job duty description, the petitioner's failure to adequately respond to the RFE, and the inadequacy and inconsistency in the evidence related to the beneficiary's claimed subordinates. Accordingly, 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.