

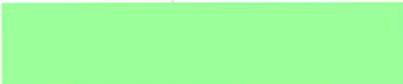


U.S. Citizenship
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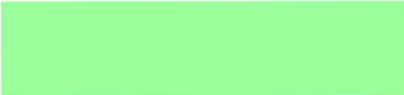
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DATE: **JUN 24 2013** Office: CALIFORNIA SERVICE CENTER

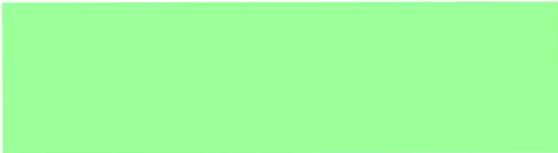


IN RE: Petitioner:
Beneficiary:



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 classify the beneficiary as an 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 Iowa corporation, states that it operates an import/export business for vodka. It claims to be a subsidiary of [REDACTED]. The petitioner has employed the beneficiary in L-1A status since October of 2004, and the now seeks an additional two years in L-1A status so that she may continue to serve in the position of President.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary has been and will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director misapplied applicable law and came to erroneous conclusions of fact in denying the petition. Counsel submits a brief 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 the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate in a managerial, executive or specialized knowledge capacity.

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (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.

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.

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

II. The Issue on Appeal

The sole issue to be addressed is whether the petitioner established that the beneficiary will be employed in the United States in an executive capacity. The petitioner does not claim that the beneficiary will be employed in a managerial capacity.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on September 25, 2009. The petitioner states that it operates a vodka import/export business with three employees and gross sales of \$201,587.

The petitioner stated the beneficiary will be employed as the President. The beneficiary has held this position since October of 2004. The petitioner provided a description of the beneficiary's duties in a letter dated September 21, 2009. The petitioner explained that the beneficiary's duties are focused "primarily on strategic goals of the company" as well as "developing concepts for expanding business activity." The beneficiary sets policies and directs "all aspects" of the petitioner's business.

Specifically, the petitioner stated that the beneficiary performs the following duties as President: serves as the sole applicant for federal and state licenses, permits, and certificates; files returns and pays taxes; fills quotation forms and price schedules; files monthly shipment reports with state liquor authorities; applies for corporate credit cards; deals with the state's Alcoholic Beverage Control Commissions and industry associations. The beneficiary is also responsible for developing marketing and promotion strategies and approving promotion and incentive programs for Alcoholic Beverage Control Commissioners and

wholesalers. The petitioner states that all "officers, directors, sales, and marketing managers" report directly to the beneficiary.

The director issued a request for additional evidence ("RFE") on September 29, 2009 in which she instructed the petitioner to submit, *inter alia*, the following: (1) a copy of the United States company's organizational chart, as well as complete position descriptions for the United States entity's employees; (2) a more detailed description of the beneficiary's duties in the U.S. including whom the beneficiary directs and the percentage of time the beneficiary will spend on each of the listed duties; (3) specific goals and policies established by the beneficiary over the past six months; (4) specific discretionary decisions the beneficiary has exercised over the past six months; (5) evidence that the higher level executives, board of directors, or stockholders require only general supervision of the beneficiary; (6) day-to-day description of the beneficiary's duties for the past six months; and (7) Quarterly Wage Reports for all company employees and IRS Forms W-2 and W-3 for the beneficiary's subordinates.

In a letter dated October 20, 2009 the petitioner submitted the requested organizational chart, position descriptions, and detailed information regarding the beneficiary's duties, decisions, and reporting structure. The organizational chart shows a Chief Operating Officer, Industrial Affairs Director, and Secretary/Treasurer/Legal position reporting to the beneficiary. Also reporting to the beneficiary are independent contractors serving as the Regional Sales Managers. No IRS Form W-2s or W-3s were submitted as the petitioner explained that all employees are either independent contractors or are Members in the LLC and are not regarded as employees for tax purposes. The petitioner also provided position descriptions for each employee reporting to the beneficiary.

The petitioner also provided a list of the beneficiary's duties including the following: establishes the company's goals and policies including annual strategic and marketing plans (25%); directs the Chief Operating Officer and Industry Affairs Director (25%); directs the Secretary and Treasurer of the company (5%); oversees all international business operations including negotiating and executing international contracts (10%); directs and controls execution and renewals of contracts, licenses, and permits (9%); directs regional sales managers (5%); and organizes and controls maintaining of accounting records by an accounting firms (5%).

In the same letter, the petitioner also provided the day-to-day duties of the beneficiary performed over the last six months including the following: updated the company's goals and policies; directed and controlled execution and renewals of contracts, licenses, and permits; directed and controlled accounting records; engaged, directed, and controlled legal activities; opened and maintained bank accounts; and directed, supervised, and controlled the company employees.

The director denied the petition on November 2, 2009, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity. In denying the petition, the director determined that the petitioner provided a vague and non-specific description of the beneficiary's duties and described duties that are indicative of an employee who is "performing the necessary tasks to provide a service or produce a product." The director also found there was a "lack of evidence presented regarding the subordinate personnel."

On appeal, counsel asserts that the evidence establishes that the beneficiary's role is in an executive capacity pursuant to section 101(a)(44)(A) of the Act and that the denial is based on a misapplication of law. Counsel concludes that the beneficiary meets the four-part definition of executive capacity under 8 U.S.C. § 1101(a)(44)(A). Specifically, counsel states that the director inappropriately relied on the staffing levels of the company for a determination of executive capacity, misinterpreted evidence of company employees, and mischaracterized the beneficiary's duties as substantive rather than executive. Furthermore, counsel contends that the director failed to apply the correct adjudication standard under "the Yates memo" by not giving deference to prior approvals of the beneficiary's L classification.

III. ANALYSIS

Upon review, and for the reasons discussed below, the petitioner has not established that the beneficiary would be employed in the United States in a primarily executive capacity.

As a preliminary matter, the petitioner noted that USCIS approved other L-1A petitions that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The definitions of executive and managerial capacity each 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 show 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 fact that the beneficiary manages a business, or part of a business, does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every

type of "manager" or "executive"). Here, the petitioner has failed to show that his actual day-to-day duties will be primarily managerial in nature.

The petitioner's initial description of the job duties included a number of duties that, without further explanation, do not appear to fall under the statutory definitions of managerial or executive capacity, and such duties do not appear to be incidental to any qualifying managerial or executive duties the beneficiary performs. For example, the petitioner states that the beneficiary will be the only employee responsible for applying for "all federal and state licenses, permits, and certificates and renewal documents." She will also file monthly shipment reports with state liquor authorities, apply for corporate credit cards, and apply for Tax Liability Bonds. Additionally, she "develops marketing and promotion strategies." The petitioner did not describe the specific tasks the beneficiary would perform or otherwise describe what this area of responsibility entails or who would perform administrative tasks associated with these compliance and marketing functions. These duties appear to relate to the actual production work of the company. An employee who primarily performs the tasks necessary to produce a product or to provide a service, rather than managerial or executive duties, is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In response to the RFE, the petitioner submits another set of job duties. According to the beneficiary's list of duties, she is responsible for tasks such as establishing the company goals and policies, evaluate and oversee organization structure, direct officers of the company, and keeping board members fully informed. 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.).

Furthermore, the beneficiary's will "organize and control" the following: accounting, intellectual property management, recruitment, and marketing development. While such responsibilities generally suggest that the beneficiary is responsible for oversight of the company, what the beneficiary organizes and controls provides little insight into how she would actually allocate her tasks on a day-to-day basis. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner failed to provide 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).

While the petitioner has submitted a revised job description on appeal, the AAO notes that it diverges significantly from the prior description provided. The initial description appeared to have the beneficiary doing more of the actual work, while the second iteration of the job has the beneficiary managing more of the actual work done in the petitioner's operation. 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. 1978).

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational

structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

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," 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 has not established that the beneficiary's position is elevated within a complex organizational hierarchy. In response to the RFE, the petitioner submits an organization chart showing three employees other than the beneficiary in the organizational structure. Of those employees, only one employee is a salaried full-time employee and two employees are hourly. The organizational chart also shows independent contractors reporting to the beneficiary that are not part of the direct company structure. An organizational structure with only one full-time company employee other than the beneficiary does not meet the requirement of a complex organizational hierarchy required to support an executive level position.

The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

Here, the record does not demonstrate that there is a subordinate level of managerial employees under the beneficiary's direction. Although the beneficiary's three subordinate employees all have managerial titles, the record does not show that they actually function in a managerial or supervisory capacity. For example, although the job description for the Chief Operating Officer, a direct subordinate of the beneficiary, states that he "recruits talent and develops employment strategies" and "manages compliance and product distribution," there is no evidence in the record that the company has distribution and logistics staff or any operations staff other than this employee. The duties of the Industry Affairs Director, the other direct subordinate of the beneficiary, include "co-develops marketing strategies" and "looks after industry affairs." Again, the record lacks any evidence that there is additional staff to assist this employee with these marketing, regulations, and pricing functions. The record does not indicate how much of these two employee's time is occupied with these marketing and distribution functions, but if they primarily performing these tasks that are necessary to produce or provide the company's products or services, they are not considered to be primarily functioning in a managerial capacity. *See Matter of Church Scientology Intl.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Furthermore, the petitioner has not met its burden of proof to show that the claimed employees actually work for the petitioner. Counsel for the petitioner contends on appeal that the three officers of the company are treated as "partners" for tax purposes. Counsel cites to a letter provided by the Director of the outside accounting firm "confirming the appropriateness of this tax treatment." A review of the letter reveals that the explanation refers to the beneficiary and "other partners of [REDACTED]." The letter does not confirm the identities of the other partners. The petitioner failed to submit any other documentation substantiating that the Chief of Operations, Industry Affairs Director, and Secretary/Treasurer/Legal have been paid a salary, paid "by hour" as stated on the organizational chart, or are partners in the LLC as claimed by counsel. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998).

Finally, although counsel states on appeal that the petitioner has contractual employees in the areas of accounting, sales, legal, and marketing services the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. Additionally, the record does not establish that the beneficiary exercises the appropriate degree of control over the claimed subordinate employees in order to consider them part of the organizational hierarchy for executive purposes. The petitioner submits with the initial petition, and in response to the RFE, copies of deposited checks to individuals claimed to be marketing and sales staff. The petitioner does not, however, submit any evidence, including contracts or statements of work, to substantiate the corporate relationship or control exercised by the petitioning entity over these subordinates. While they may be performing the day-to-day tasks of the company, the petitioner has not established that it exercises control over these individuals such that they can be considered part of the organizational hierarchy.

An employee will not be considered to be a part of the petitioner's organizational hierarchy, because he or she is arbitrarily placed on an organizational chart, or even because he or she performs daily work activities and assignments. As counsel correctly notes on appeal, the actual physical work location of the employees is not a determining factor. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. *See generally Browne v. Signal Mountain Nursery, L.P.*, 286 F.Supp.2d 904, 907 (E.D. Tenn. 2003) (cited in *Hayes v. Laroy Thomas, Inc.*, 2007 WL 128287 at *16 (E.D. Tex. Jan. 11, 2007)). Here, the petitioner failed to demonstrate that the beneficiary or petitioner exercises a significant degree of control or authority over the claimed subordinates.

The director found, in her denial, that the record failed to establish that the accounting and sales personnel "perform all of their duties on the petitioner's premises under the direct supervision of the beneficiary." Counsel for the petitioner does not refute this statement, but responds by saying the following:

Both of these statements may shed some light on managerial capacity, but have little to do with executive capacity. Nothing in the definition of 'executive capacity' requires that the executive supervise employees on company premises.

In the present matter, the AAO cannot conclude that the staffing composition the petitioner had at the time of filing warranted the employment of the beneficiary in a managerial or executive capacity. This determination is not to be confused with the petitioner's need for an employee who would head its organization. It is reasonable to conclude that any organization, regardless of its size, will require at least one employee who would assume a leadership role that would entail a high degree of decision-making authority and supervisory

oversight. However, it is not uncommon for an employee in an organization with limited staffing to meet his or her responsibilities as the organization's leader by simultaneously performing qualifying and non-qualifying tasks based on the needs of a particular entity. Therefore, the fact that an individual manages a business does not necessarily establish that the proposed employment fits the definition of managerial or executive capacity within the meaning of section 101(a)(44)(B) of the Act.

While the AAO acknowledges the varying needs from one entity to another, a petitioner's needs do not serve to override the petitioner's legal burden of having to establish that the beneficiary would primarily perform duties of a qualifying managerial or executive nature. Any petitioner that is not ready and able to employ the beneficiary in a qualifying capacity at the time the Form I-129 is filed would not merit the immigration benefit sought in the present matter. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Based on the evidence and information furnished in the present matter, the AAO cannot conclude that the petitioner met its burden of establishing that it was able to employ the beneficiary in a qualifying managerial or executive capacity at the time of filing the petition. For this reason, the petition may not be approved.

Finally, the petitioner failed to provide evidence that the positions are professional or managerial level positions as required by section 101(a)(44)(A)(ii) of the Act. The position descriptions provided by the beneficiary for the actual company employees, over whom the beneficiary allegedly exercises an appropriate degree of control, do not support a finding that the positions are professional level positions. Nor has the petitioner provided evidence, other than an organizational chart, that any of the employees supervised by the beneficiary in turn supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The petitioner has not submitted evidence on appeal to overcome the director's determination that the beneficiary will not be employed in a managerial capacity. Accordingly, the appeal will be dismissed.

IV. 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, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.