

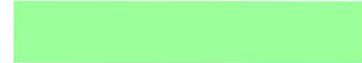


U.S. Citizenship  
and Immigration  
Services

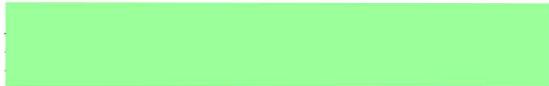
(b)(6)



DATE: JUN 29 2013 Office: VERMONT 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:

SELF-REPRESENTED

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 classify 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 was formed as a corporation under the laws of the State of Florida in 2011, and operates a sweeping management company for commercial buildings, parking lots, and streets. It claims to be a subsidiary of [REDACTED]. The petitioner is requesting approval for an initial period of one year so that the beneficiary may serve as its "Operator Manager."

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would 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. On appeal, the petitioner asserts that the evidence of record is sufficient to establish that the beneficiary will be functioning in a managerial or executive position.

### 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.

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.

## II. The Issues on Appeal

The sole issue to be addressed is whether the petitioner established that the beneficiary will be employed in the United States in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on May 11, 2011. The petitioner indicated on the Form I-129 that it operates a sweeping management company for construction, parking lots, streets/highways, and commercial facilities, and that it seeks to employ the beneficiary as its Operator Manager. The petitioner identified the company as a new business with no current employees and no reported gross or net annual income.

In a letter submitted in support of the initial petition, the petitioner further states that it will provides services "in the field of road sweeping, construction, commercial cleaning, waste collection, and vehicle route planning." The petitioner stated that the beneficiary will be responsible for developing operations in the United States as its manager. Specifically, it described his proposed duties as the following:

Plan, direct, or coordinate the operations of the US Company. Formulate policies, manage daily operations, and plan the use of materials and human resources. Determine staffing requirements, interview, hire and train new employees. Determine areas needing improvement, purchase of machines and equipment, as well as cost reduction and prices. Create mapping data, using digital maps and georeferenced data; determine work schedules; assign specific duties; vehicle route planning (balance cluster workloads based on geographic location, time/length of day, number of personnel and vehicle.)

The petitioner stated that it has rented an office, closed a service contract, and hired its first employee during its first month in operation. The petitioner submitted a copy of a Master Contract Agreement with [REDACTED] to engage the petitioner as "an independent supplier of technical services, as well as cleaning and maintenance services for commercial properties" located in [REDACTED]. The contract was signed by the beneficiary on behalf of the petitioning company and by [REDACTED].

The petitioner submitted a copy of its [REDACTED] monthly statement for March 2011, which indicated an available balance of \$8,329.33, as well as a copy of its lease agreement. The petitioner did not submit any additional information or evidence regarding the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals, or information regarding the size of the United States investment.

The director issued a request for evidence ("RFE") directing the petitioner to provide *inter alia* the following: (1) a comprehensive description of the beneficiary's duties; (2) complete position descriptions for all current and proposed employees including a breakdown of the number of hours spent performing each duty on a weekly basis; (3) evidence of all assets purchased for use by the petitioner; and (4) the petitioner's business plan.

The petitioner responded by providing a position description for the beneficiary as the General Manager. The petitioner stated that the beneficiary's duties will include the following: direct the overall activities including accounting, financial matters, and marketing (20 hours); direct and coordinate the activities of the Operations Department, Technicians and Inventory Controllers (10 hours); review financial and bank statements, sales and activity reports, and other performance data to measure productivity (4 hours); direct financial and budget activities (4 hours); determine services to be sold, set prices and credit terms based on market and forecasts of customer demand (4 hours); manage staff, review work schedules and assignments of duties prepared by the Operation Supervisor (6 hours); establish and implement policies, objectives, and procedures (6 hours); oversee and coordinate the implementation of pilot application of services (6 hours); manage the hiring of professional personnel (6 hours); plan and conduct employee orientation (4 hours); administer compensation, benefits, performance evaluation systems, and safety and recreational programs (4 hours); and report to the President of the Brazilian parent company (1 hour).

In the petitioner's business plan, the petitioner provided an organizational chart showing the beneficiary as President. A manager reports directly to the beneficiary. Reporting to the manager are a secretary, clerk, and two operations supervisors. Reporting to the operations supervisors are two technicians and an inventory controller. Reporting to the inventory controller are five drivers and five helpers. The petitioner's hiring schedule shows that by the end of the first year of operations the petitioner will have hired the secretary/receptionist, one operations supervisor, two drivers, one inventory controller, two helpers, one technician, and one customer service agent. A separate page submitted with the response shows that the employees hired as of November 2011 are the following: [REDACTED] Operations Supervisor; [REDACTED]

Driver. The petitioner provided position descriptions for all current employees and positions to be filled as stated in the business plan.

The job description for the operations supervisor stated that the employee will be responsible for directly supervising and coordinating the activities of the technicians, inventory controller, drivers, and helpers. The duties included the following tasks: preparing and establishing work scheduled and assigning specific duties to employees; perform quality control inspections; prepare daily reports related to routine completeness; enforce safety regulations and company's policies and procedures; conduct employee training; keep records of employees' attendance and hours worked.

The director denied the petition, 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 duties of the beneficiary are those of an employee who is performing the necessary task to provide a service or to produce a product. Furthermore, the director concluded that none of the beneficiary's subordinates positions require a bachelor's degree or higher.

On appeal, the petitioner asserts that the evidence establishes that the beneficiary's job duties are sufficient to find that the beneficiary does not perform the day-to-day functions of the petitioner and will be relieved from performing the non-qualifying functions by the end of the first year of operations. Furthermore, the petitioner states that the record demonstrates that the beneficiary will supervise professional level employees.

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity within one year of approval of the petition.

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's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.*

The petitioner fails to consistently describe the position offered to the beneficiary. On the Form I-129, the petitioner states that the beneficiary will be offered the position of "Operator Manager." In the letter submitted in support of the initial petition, the petitioner states the beneficiary will serve as the "General Manager." As general manager, the petitioner will be responsible for duties such as preparing and establishing work schedules, assigning specific duties to employees, and conducting employee training. These duties, however, appear to overlap with those of the operation supervisor provided in response to the RFE. In its response to the director's request for further evidence, the petitioner expanded the beneficiary's duties, adding items such as: directing financial and budget activities, directing and coordinating the activities of the operation department, determining services to be sold, and overseeing and coordinating the implementation of pilot application of services in the United States. In sum, the initial description appeared to have the beneficiary doing more of the actual operational and first-line supervisory work, while the second iteration of the job has the beneficiary managing more of the actual work done in the petitioner's operation.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978).

If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description.

Furthermore, the beneficiary's duties, as described by the petitioner in response to the RFE, included such tasks as directing the overall activities of the company, directing financial and budget activities, managing staff, establishing and implementing departmental policies and goals, and determining services to be sold. While such responsibilities generally suggest that the beneficiary is responsible for oversight of the business, the descriptions provide little insight into what specific duties he will perform or how he would actually allocate his time 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 proposed 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 definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary will perform the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs 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). The fact that the beneficiary manages 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").

On appeal, the petitioner contends that "the beneficiary's position in the US is in accordance to the US Department of Labor's description . . . of similar managerial positions in nature which is stated on the Dictionary of Occupational Titles. In addition, it matches the guidelines for similar managerial positions established by O\*Net OnLine." The petitioner submits copies of position descriptions published by the U.S. Department of Labor for the occupations of "Manager, Branch," and "Industrial Production Managers," and asserts that the similarities between these descriptions and the beneficiary's position description establish that the beneficiary's position is "incontestable managerial in nature." The petitioner's assertions are not persuasive. Generic job descriptions compiled by the U.S. Department of Labor have no bearing on an assessment of this beneficiary's duties within the context of the petitioning company's business, and the petitioner cannot satisfy its burden of proof by paraphrasing or wholly repeating such descriptions; the regulations require the petitioner to submit a detailed description of the beneficiary's actual duties. *See* 8 C.F.R. § 214.2(l)(3)(ii).

Overall, the inconsistent and vague position descriptions provided are insufficient to establish that the beneficiary's duties would be primarily in a managerial or executive capacity, particularly in the case of a new office petition where much is dependent on factors such as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity. The petitioner has the burden to establish that the U.S. company would realistically develop to the point where it would require the beneficiary to perform duties that are primarily managerial or

executive in nature within one year. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period. See generally, 8 C.F.R. § 214.2(l)(3)(v)(C).

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). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

As stated above, the beneficiary's job duties as described in the initial petition are very similar to the job duties assigned to operations supervisor in response to the RFE. It is unclear why the petitioner would require an operations supervisor as well as an "operator manager" to perform essentially the same duties based on the petitioner's current and anticipated stage of development for the first year of operations. As noted above, USCIS reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. 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.

Furthermore, the record casts doubt on whether all of the petitioner's employees are working full-time for the petitioner. The petitioner's master contractor agreement with [REDACTED] was signed on behalf of [REDACTED] in his capacity as President of that company on April 1, 2011. The petitioner, however, indicates that [REDACTED] was hired as its inventory controller in September 2011, notwithstanding the petitioner's ongoing contract to provide services to [REDACTED] under the referenced agreement. 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 (BIA 1988).

Additionally, the invoices submitted with the petition, as well as the petitioner's explanation of their services, show that the petitioner is performing sweeping services as well as cleaning, hauling, porter and other janitorial-type services. It has a number of clients who have contracted for services on a daily or near daily basis. The petitioner's organizational chart and evidence submitted in response to the RFE show that the petitioner employs only two "drivers." The job descriptions provided for the drivers do not include any duties other than driving and operating sweeping trucks. The petitioner has not otherwise demonstrated who will perform these additional services provided by the petitioner and has not indicated that any of the staff to be hired before the end of the first year of operations would be responsible for such services. The absence of employees to provide the petitioner's services therefore raises questions regarding the job titles and job descriptions submitted for the company's current staff.

The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. *See* section 101(a)(44)(A)(ii) of the Act. Furthermore, the petitioner has not established that it will employ a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial duties. Regardless of the beneficiary's position title, the record is not persuasive that the beneficiary will function at a senior level within an organizational hierarchy. Based on the foregoing discussion, the petitioner has not supported a claim that the beneficiary will be employed in a managerial or executive capacity within one year of commencement of operations. Accordingly, the appeal will be dismissed.

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.