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

(b)(6)

U.S. Citizenship and Immigration Services

Date: MAR 29 2013 Office: VERMONT SERVICE CENTER File:

IN RE: Petitioner:
Beneficiary:

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

IN 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 petition for a nonimmigrant visa. 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 extend the employment of 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, a limited liability company organized in the State of Texas, claims to be the subsidiary of located in Kathmandu, Nepal. The petitioner operates a gas station/convenience store in the United States, and seeks to continue the employment of the beneficiary as its operations manager.

The director denied the petition, concluding that the petitioner did not establish that the beneficiary would be employed in a primarily managerial or executive capacity.

Counsel for the petitioner filed an appeal in response to the denial. On the Form I-290B, counsel contends that the director's decision was arbitrary and capricious and failed to consider the totality of the evidence. Counsel advised that a supplemental brief would be forwarded to the AAO within 30 days. However, no additional documentation has been received to date; therefore, the record will be considered complete as currently constituted.

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

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

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(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 issue before the AAO is whether the beneficiary will be employed in the United States in a primarily managerial or executive capacity. According to section 101(a)(15)(L) of the Act, 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)(ii) states that an individual petition filed on Form I-129 shall be accompanied by 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.

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.

The request for extension, filed on Form I-129 on November 16, 2011, indicated that the petitioner, formed in 2008, currently employed 5 persons and had an estimated gross annual income of $260,000. On a rider to the L Classification Supplement of Form I-129, the petitioner stated that the beneficiary would be responsible for the "development of design concept" and the "formation of corporate policy & goals," and be "concentrated on long range goals of the company."

In a letter dated October 18, 2011 that accompanied the petition, the petitioner described the beneficiary's position in the U.S. as follows:

> [The beneficiary], a proven business leader has been selected to play the key role of executive manager of the Company. She will be responsible for the development of the design concept and strategies of the new business. She will participate in the formation of the corporate policy and goals, be responsible for hiring, firing, and training of employees. She is constantly looking for new investment opportunities, and was responsible for the expansion of the business in the last year.
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> * * *
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> As Manager of Operations, she will continue to formulate and implement corporate policies and goals both executive and managerial. She will continue to concentrate on the long-range goals of the company and direct the company to the successful attainment of these goals. You will note that the beneficiary was responsible for the current expansion of the business within two [years?] of arrival in the U.S.

The petitioner also submitted numerous corporate and tax documents, including corporate documentation for According to the petitioner, is a newly-formed limited liability company of which the petitioner owns a 50% interest. According to the petitioner, the beneficiary will act as operations manager for both the petitioner, who is doing business as , as well as , which operates under the name of

On February 10, 2012, the director requested additional evidence. Specifically, the director requested documentation pertaining to the beneficiary's position and related duties, including a more definitive statement regarding his tasks, the percentage of time spent on these tasks, and a more specific overview of the organizational structure of the petitioner and the role subordinate employees played within the organizational hierarchy. Additionally, the director requested additional details regarding the petitioner's employees, including their position titles, job duties, and wages. Finally, additional documentation pertaining to the petitioner's business dealings was also requested.

In a letter dated March 3, 2012, the petitioner responded to the director's request. The petitioner provided a more detailed overview of its employment structure, and provided specific details regarding each of its employees. Regarding the beneficiary's position and duties, the petitioner stated as follows:

> [The petitioner] is company for profit hence has the perfect manager for operation. [The beneficiary] who is responsible for the day-to-day management of the business in accordance

with the overall company policy. The main focus of [the beneficiary's] job is to improve the commercial performance of the business by increasing its turnover and maximizing profitability. Achieving performance objectives require action in one of the main areas of retail activity: store operations; human resources; finance; buying; customer care; marketing; logistics; basic information technology; and administration. Major parts of the job on a day-to-day basis include managing staff, finding new ways to improve sales, and meeting customer demands. Below described the detail outline of manager-operation's job with approximate hours:

[The petitioner indicated that 16 hours a week of the beneficiary's time would be devoted to the following duties:]

- managing and motivating a team to increase sales and ensure efficiency;
- managing stock levels and making key decisions about stock control;
- managing the bank, deposit from previous day and manage cash;
- analyzing sales figures and forecasting future sales volumes to maximize profits;
- analyzing and interpreting trends to facilitate planning;
- using sales record figures and analyze data and forward planning to owners;

[The petitioner indicated that 15 hours a week of the beneficiary's time would be devoted to the following duties:]

- dealing with staffing issues; interviewing potential staff; conducting appraisals and performance reviews; and providing or organizing training and development if necessary;
- ensuring standards for quality, customer service and health and safety are met;
- resolving health and safety, legal and security issues;
- responding to customer complaints and comments;
- promoting the organization locally by liaising with local schools, newspapers and the community in general;

[The petitioner indicated that 10 hours a week of the beneficiary's time would be devoted to the following duties:]

- organizing special promotions, displays and events;
- attending and chairing meetings;
- updating colleagues on business performance, new initiatives and other pertinent issues;

[The petitioner indicated that 7 hours a week of the beneficiary's time would be devoted to the following duties:]

- touring the sales floor regularly, talking to colleagues and customers, and identifying or resolving urgent issues;
- maintaining awareness of market trends in the retail industry, understanding forthcoming customer initiatives, and monitoring what local competitors are doing;

[The petitioner indicated that 4 hours a week of the beneficiary's time would be devoted to the following duties:]

- initiating changes to improve the business, revising opening hours to ensure the store can compete effectively in the local market;
- dealing with sales, as and when required.

Additionally, the petitioner submitted details regarding the beneficiary's coworkers along with their hours of employment. An organizational chart submitted demonstrated that the beneficiary would oversee the petitioner's operations at , and would supervise the following individuals:

- Manager (45 hours per week)
- Cashier (39 hours per week)
- Cashier (45 hours per week)
- , Cashier (18 hours per week)
- Clerks (names not specified – part time as needed, approximately 20 hours per week)

According to the petitioner, cashier , who worked 45 hours per week for the petitioner, also worked for . In addition, the petitioner claimed that two clerks worked on an as-needed basis for the petitioner. The petitioner also claimed that the beneficiary would oversee a manager, two cashiers, and a clerk for .

The petitioner also submitted numerous tax documents, including copies of its 2011 Forms W-2, Wage and Tax Statements, for the beneficiary and its four other employees. Specifically, these forms demonstrated that the beneficiary earned an annual salary of $39,600 and the store's manager, earned an annual income of $24,000. The petitioner also submitted a W-2 form for and , both of whom earned annual wages in the amount of $6,000, as well as a W-2 form for , who earned annual wages of $8,000. It is unclear if is the same person as cashier listed on the organizational chart.

On August 31, 2012, the director denied the petition, finding that the petitioner failed to establish that the beneficiary would be employed in a qualifying capacity. Specifically, the director found that the beneficiary would not be acting primarily as a manager but instead would serve as a first-line supervisor of the staff of the petitioner. Moreover, the director noted that the organizational structure of the petitioner, coupled with the amount of gross sales set forth on its 2011 federal income tax return, suggested that the beneficiary would be engaged in the performance of non-qualifying sales duties.

On appeal, counsel contends that the director erred in issuing the denial, and focuses on the director's disregard of the documentation pertaining to which is doing business as . Counsel asserts that the beneficiary manages both entities, thereby further establishing her managerial role in the United States. Although counsel contended that a brief and additional evidence would be submitted to the AAO in support of these contentions, no such documentation has been received to date.

Upon review, the AAO concurs with the director's findings.

The AAO will first address counsel's assertions regarding the beneficiary's management of and the director's disregard of evidence pertaining to this issue. According to the Form I-129 filed on November 16, 2011, the petitioner in this matter is . Furthermore, according to the statements set forth in Part 5 of the petition, the beneficiary will work onsite for the petitioner at its location at Drive in Dallas, Texas. However, the petitioner submits documentation pertaining to the recent organization of another limited liability company, , whose business address is in Irving, Texas, and claims that the beneficiary will simultaneously serve as operations manager for this entity. In support of this contention, the petitioner submits copies of operating agreement, demonstrating that the petitioner owns a 50% interest in this company.

A corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm'r 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm'r 1980). The fact that the petitioner may have an interest in a newly-formed U.S. company, which is a separate legal entity, is irrelevant to these proceedings. The petitioner in this matter requests an extension of the beneficiary's employment authorization as operations manager for located in Dallas, Texas, and not , which is a separate legal entity and is not included in the petitioning entity.

Turning back to the evidence submitted regarding the petitioner, the minimal information submitted with regard to the beneficiary's position, coupled with the contradictory claims with regard to staffing, suggests that the beneficiary performs most of the day-to-day duties required to operate the company. Thus, he could not be considered to be working in a primarily managerial or executive capacity. The AAO will begin by examining the stated duties of the beneficiary in relation to the nature of the company.

The record contains documentation demonstrating that the petitioner is operating a grocery/convenience store combined with a gas station. With this established, a review of the stated duties of the beneficiary do not seem to compliment the structure of the petitioner's business. 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 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 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).

In both the initial letter of support and in response to the request for evidence, the petitioner provided an extremely vague description of the beneficiary's duties. With the initial petition, the petitioner merely claimed that she would have overall control of the goals and policies of the company, and simply summarized the duties outlined in the regulations. When asked for a more specific overview of the beneficiary's duties, including a breakdown of the percentage of time devoted to each duty, the petitioner provided a generic overview of the beneficiary's alleged managerial duties, and claimed that the majority of her time would be devoted to managing bank deposits, motivating a team to increase sales efficiency, and analyzing market trends. The petitioner also indicated that a large portion of her time would be devoted to interviewing

potential staff, responding to customer complaints and concerns, and promoting the organization in local markets. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to clarify what the beneficiary would primarily do on a daily basis. 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).

In response to the RFE, the petitioner claimed that the beneficiary is responsible for action in the main areas of retail activity, including buying. The extensive copies of receipts and invoices submitted into the record, coupled with the claims that the beneficiary is responsible for buying as well as managing stock levels and finding ways to meet customer demands, suggest that the beneficiary herself is responsible for providing the goods and services of the company, since she appears to be the person ordering and receiving the products which are sold in the store.

Moreover, in addition to invoices from wholesalers and gasoline providers, most of which designate the beneficiary as the contact person, the record contains receipts from warehouse clubs such as Sam's Club for the purchase of cigarettes. If the beneficiary is the sole authorized purchaser of these goods, then the record demonstrates that the beneficiary must personally be making shopping trips to these warehouses and wholesalers to purchase the products the petitioner will sell in its store. Such duties, by definition, are not managerial or executive in nature. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Although a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive, it is appropriate for United States Citizenship and Immigration Services (USCIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). *See also, e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record, such as those noted above, and fails to believe that the facts asserted are true. *Id.*

The record as it currently stands contains insufficient evidence to demonstrate that the beneficiary would be relieved from performing non-qualifying duties. Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. At the time of filing, the petitioner indicated on Form I-129 that it employed only five persons. The petitioner's W-2 forms for 2011 indicated that the petitioner employed a store manager who earned $24,000 per year, along with three cashiers, who earned $8,000, $6,000 and $6,000, respectively. The cashier earning an annual salary of $8,000 also worked at , thereby raising questions regarding the actual amount of time he devoted to cashier duties for

the petitioner. The petitioner presumably operates seven days a week for extended hours, as is normal for gas station/convenience stores. The cashiers are barely employed on a part-time basis giving the low wages represented on the W-2 forms. Therefore, in order to achieve gross sales in excess of $2 million, as set forth on the petitioner's federal tax return for 2011, it appears that the beneficiary, contrary to the contentions of the petitioner, has been and will continue to be directly engaged in the day-to-day operations of the company.

Based on the low wages set forth on the W-2 forms, coupled with the nature of the petitioner's business which mandates operation beyond that of a typical forty-hour workweek, the AAO cannot conclude that the petitioner had a subordinate staff of employees in place at the time of filing the petition to relieve the beneficiary from performing non-qualifying duties. 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 claims that it also employs "clerks" on a part-time basis to assist the cashiers when there is high customer flow. However, while the petitioner did submit copies of its 2011 Forms 1099, Miscellaneous Income, which demonstrates compensation paid to contractual employees, the wages paid to the contractors are likewise so low that they cannot be deemed persuasive evidence that the petitioner employed a staff sufficient to relieve the beneficiary from performing non-qualifying duties.

Since a convenience store/gas station is typically open seven days a week for at least fourteen to sixteen hours per day, the discrepancy in staffing, coupled with the vague and overly broad description of the beneficiary's duties, raises questions regarding the credibility of the claimed staffing of the petitioner. The description of duties on record prior to adjudication fails to specifically state the exact nature of the beneficiary's duties. More importantly, the petitioner fails to provide credible evidence of the staffing of the petitioner at the time of filing the petition. This lack of documentation makes it appear that the beneficiary has not been and will not be employed in a primarily managerial or executive capacity given the nature of the petitioner's business.

Finally, the director noted that the manager named on the organizational chart appears to possess a bachelor's degree in business administration, thus suggesting that the beneficiary might employ a subordinate staff of professionals. If it is claimed that the beneficiary will work in a managerial capacity because her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. The nature of the employment of the claimed subordinates has not been shown to be supervisory, professional, or managerial.

The petitioner claims that its manager, [redacted] holds a bachelor's degree in business administration. The petitioner failed to submit evidence to support this claim, such as a resume or diploma. 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)). Although the record is devoid of evidence to support this claim, the AAO notes that, as stated by the director, in evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. 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 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. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. The petitioner has not established that a bachelor's degree is actually necessary to perform the services of the petitioner's manager. Therefore, the petitioner has failed to demonstrate that the beneficiary supervises a managerial or supervisory employee who oversees subordinate staff.

For the reasons set forth above, it is concluded that petitioner will not employ the beneficiary in a predominantly managerial or executive position. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not demonstrated that it maintains a qualifying relationship with the foreign entity.

The documentation submitted into the record suggests that the petitioner is a subsidiary of the foreign entity. The petitioner, however, submitted a copy of a U.S. Income Tax Return for an S Corporation (Form 1120S). To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any foreign corporate shareholders. *See* Internal Revenue Code, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a *foreign corporation* owns it in any part. Accordingly, since the petitioner would not be eligible to elect S-corporation status with a foreign parent corporation, it appears that the U.S. entity is owned by one or more individuals residing within the United States rather than by a foreign entity.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003). 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.