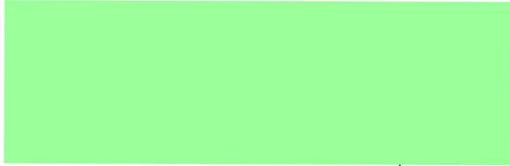
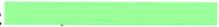


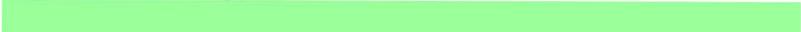
(b)(6)



U.S. Citizenship
and Immigration
Services



DATE: **MAR 29 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:

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg", written over a circular stamp.

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 seeks 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 is a Nevada corporation established in February 2010. It is engaged in the business of embroidery, printing, and promotions. The petitioner claims to be a branch of [REDACTED], based in Canada.¹ The petitioner seeks to employ the beneficiary as CEO for a period of three years.²

The director denied the petition, finding the petitioner failed to establish that it will employ the beneficiary 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 submits a brief and additional evidence. It contends that the director erred in her finding that the petitioner did not show the beneficiary will primarily perform executive-level tasks.

I. The Law

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

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

¹ The petitioner indicated on the Form I-129 that it is a branch of the foreign company. However, it submitted its articles of incorporation and those for the foreign company showing that each is separately incorporated. The petitioner states the beneficiary owns 100% of both companies, thereby describing an affiliate relationship. See 8 C.F.R. § 214.2(l)(1)(ii)(L).

² The petitioner indicated on its Form I-129 that it seeks a continuation of current employment for the beneficiary. However, USCIS records do not show a previous visa with work authorization issued to the beneficiary. The AAO will therefore consider this a petition for new employment.

- (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)(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.

II. The Issue on Appeal

In this case, the sole ground for the director's denial is the petitioner's failure to show it will employ the beneficiary in a primarily managerial or executive capacity.

The petitioner is an embroidery, printing, and promotions company located in Las Vegas, Nevada. The petitioner opened its business in April 2010 after purchasing the assets of a company called [REDACTED], which had closed in June of 2009 after the death of the owner. At the time of filing, the petitioner claimed a gross annual income of \$72,857.50 and a net annual income of -\$22,238.17. It claimed to have 2 current employees. The petitioner indicated that the beneficiary has worked for the Canadian company since May 1, 2006³ and it now seeks to hire the beneficiary as its CEO.

On its Form I-129, Petition for a Nonimmigrant Worker, the petitioner described the beneficiary's proposed duties as follows:

- Management and direct the company.
- In charge of development, project development, Technology, Manufacture, import & export

The petitioner's initial evidence included no further description of the beneficiary's proposed duties as CEO. The petitioner submitted other evidence in the form of support letters attesting to the beneficiary's exemplary character and good work ethic. It also provided 2010 and 2011 income tax returns as well as self-generated profit and loss statements these both years.

³ On the Form I-129, the petitioner indicated that the beneficiary had worked at the Canadian company from 2005.

The director issued a Request for Evidence (RFE) and requested, *inter alia*, additional evidence that the beneficiary will primarily perform the duties of a manager or executive, such as a more detailed description of the proposed duties with the amount of time required for each, a detailed organizational chart for the petitioner, and state quarterly wage reports for the first and second quarters of 2012.

In response, the petitioner submitted a letter addressing the issues raised. The petitioner listed the following as the revised duties of the beneficiary as its President and CEO:

- Building a team of staff members by hiring interested individuals with suitable skill traits. If necessary, existing staff members may be fired. [The beneficiary] ensures that all staff members cooperate well together and solve teamwork problems if any appears [*sic*].
- [The beneficiary] is responsible for setting future goals of the business as well as deciding the present actions in order to achieve the future goals. With the assistance of the staff members, [the beneficiary] will do his best to ensure the company will be profitable.
- [The beneficiary] is responsible for making the environment for the staff members to be as positive and comfortable as possible. [The beneficiary] will determine and supervise how employees will be treated under different situations such as employees wear inappropriately [*sic*], employees make an error, and the working benefits.
- [The beneficiary] will monitor and determine the budget that the company should spend on each expense. [The beneficiary] will evaluate all projects in order to arrange the budget accordingly to maximize profit.

Although specifically requested in the RFE, the petitioner did not state the percentage of time the beneficiary will spend on each task.

The petitioner submitted its organizational chart that shows four employees other than the beneficiary. The beneficiary is listed at the top of the chart as "President, CEO." Below him, the chart shows five branches with [REDACTED] under "Reception" and "Marketing," the beneficiary under "Designer" and "Accounting," and [REDACTED] as "Supervisor." Under [REDACTED] are three "Machine Operator" positions listed as [REDACTED]

The petitioner also submitted an organizational chart for the Canadian entity which shows three employees other than the beneficiary. At the top of the chart is the beneficiary as "President and CEO." Below him are five branches with [REDACTED] listed under "Reception" and "Designer,"

Lou under "Marketing," and [REDACTED] under "Supervisor" and "Accounting." Under "Supervisor," the chart shows three "Machine Operator" positions. [REDACTED] is listed as one of these and the other two positions are left blank.

In response to the RFE's request for a Quarterly Wage Report, the petitioner stated:

We don't have the Quarterly Wage Report for now. Because [the beneficiary] did not take any salary from [the petitioner] yet, before as [the beneficiary] don't [sic] have the correct status to work. Due to the fact that the company just started, the employees hired were not full time, and they don't come every working day. However, we have initially planned to let workers work by weekly or monthly basis, but now they are just contractor or part time, so we only reported **1099-MISC** at the end of year but not W2. We believe that as the business continues to grow, we will soon be able to hire more full time workers. (bold in original).

The director ultimately denied the petition, finding that the petitioner failed to demonstrate that it will employ the beneficiary in a primarily managerial or executive position. Specifically, the director found the petitioner failed to provide sufficient detail regarding the beneficiary's proposed duties. The director further stated that, based on the duties listed, the petitioner would spend his time primarily performing tasks that are not managerial or executive in nature.

The petitioner now submits a timely appeal with an accompanying brief, a new organizational chart, and a W-4 and identification documents for new employee [REDACTED]. The petitioner's brief contains a new description of the petitioner's proposed duties:

1. [The beneficiary] will be fully responsible for all the projects in the US Corporation. Examine and approve of rules and regulation such as administration, production, work attendance, etc. He will review and approve the monthly, quarterly, and annual project plans, financial goals, project budgets and investments.
2. [The beneficiary] will hire able, responsible, motivated, and valid workers that satisfy the needs of the company, especially the managers and supervisors of the sales and production departments, etc. He will establish a strong corporation and make sure the company's projects are carried out in accordance to plan.
3. [The beneficiary] will attend the related business conventions by the organizations such as Chamber of Commerce, UPIC etc., and attend the exhibits such as the ISS, PPAI, SGIA, ASD, etc. [The beneficiary] will promote the company, explore new technology and new business fields, communicate with

different industries, and make sure company [sic] can have a continuous and steady development.

4. [The beneficiary] will approve and monitor the implementation of new plans and new business projects such as the promotional products industry. In addition, he will look into investing in new equipment (such as digital printer for direct apparel printing, silk screening printing machines, etc.). [The beneficiary] will ensure the company will continue to grow and produce greater economic benefits.

Regarding the petitioner's employees and organizational structure, the petitioner states:

However, as [the petitioner] has just started, the employee structure is not yet complete. Positions such as designer (digitizing, graphic), and accountant are outsourced by now. Most of the work is done by our Canadian branch as the nature of the work is same [sic] for both companies. [The beneficiary] is not doing these non-executive job [sic] but rather to negotiate with the partner companies, make decisions, sign contracts, and arrange for those job to be done, not to complete the work himself. Due to our error, we put [the beneficiary's] name under Designer and Accounting on the chart before, and we apologize for having caused your misunderstanding. Now with this explanation, we have attached the correct one to replace the old organizational chart.

The organizational chart the petitioner submits on appeal shows the beneficiary at the top of the chart as "President, CEO." Below him is the "Vice Manager," listed as [REDACTED]. According to the petitioner, [REDACTED] handles the petitioner's daily operating tasks. The Vice Manager supervises five positions: "Reception," listed as [REDACTED], "Marketing" and "Supervisor" both listed as [REDACTED] and "Marketing" and "Accounting" positions which are outsourced. Below the "Supervisor" are two "Machine Operator" positions held by [REDACTED].

On appeal, the petitioner also submits its 2010 and 2011 income tax returns as well as self-generated profit and loss statements for both years.

III. Analysis

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).

On appeal, the petitioner seeks to assure USCIS that the beneficiary will perform only executive level duties. However, the actual duties themselves 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). 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*, *supra* at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

When examining the managerial or executive 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 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.* In addition, the definitions of executive and managerial capacity have two parts. To meet these definitions, the petitioner must first show that the beneficiary performs the high level responsibilities specified in the definitions. Second, the petitioner must prove the beneficiary will primarily perform these specified responsibilities and will not spend a majority of 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 addition, reciting vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. 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. *Id.*

In this case, the petitioner has failed to provide a description of the beneficiary's job duties with sufficient detail to demonstrate the managerial or executive nature of the proposed duties. For example, the petitioner states that the beneficiary will approve and monitor new business plans and look into the purchase of new equipment. However, the petitioner provides no evidence of the existence of business plans or intentions to create them in the future. Such a vague reference is insufficient as it fails to shed light on what the petitioner will actually do on a daily basis. Similarly, the petitioner provided no other evidence regarding its ability or intention to purchase new equipment.

The petitioner states the names of six organizations with conferences that it expects the beneficiary to attend. The petitioner mentions these organizations for the first time on appeal and provides no information to corroborate the conferences' existence or the petitioner's claim that the beneficiary will attend. The petitioner states the petitioner will also be responsible for hiring employees, "especially the managers and supervisors of the sales and production departments." However, the petitioner provided no further information about future hires, such as number of employees, the timeline for intended hiring, or evidence of the ability to pay for the salaries of future hires. In addition, the petitioner's organizational charts do not show a sales or production department.

Although the petitioner states the beneficiary will establish a strong corporation and make sure the company's projects are carried out, such a statement is vague and fails to convey what the petitioner will do on a daily basis.

Lastly, the petitioner indicates that the beneficiary will examine and approve rules dealing with administration, production, and work attendance, as well as review and approve the monthly, quarterly, and annual project plans, financial goals, project budgets and investments. The petitioner provides no explanation regarding rules of administration, production and work attendance or how they will constitute a task the beneficiary will perform regularly. In addition, the petitioner makes no other mention of the monthly, quarterly, and annual project plans, financial goals, project budgets and investments. It provided no evidence to show plans or budgets exist or will exist in the future.

Without a more concrete and specific description of the beneficiary's proposed job duties, the petitioner fails to demonstrate that it will act as a manager or executive. As stated previously, the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co.*, *supra* at 1108. In this case, the petitioner makes vague references to generic job duties. It has failed to provide sufficient information regarding what the beneficiary will do on a daily basis and therefore fails to meet its burden of proof.

Although the beneficiary is not required to supervise personnel, if it is claimed that 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 petitioner indicated on its Form I-129 that it had only two employees at the time of filing. In response to the RFE, it submitted an organizational chart showing four employees other than the petitioner. The revised chart similarly shows four employees, although two are different from the previous chart, as well as two positions that are outsourced.

The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

In this case, the petitioner presents inconsistent information about its employees. At the time of this petition's initial submission, the petitioner claimed two employees. However, the first organizational chart shows four. On appeal, the petitioner submits a "corrected" organizational chart which has four employees other than the beneficiary. In the new chart, the beneficiary is listed as "President, CEO," however, he is no longer listed as "Designer" and "Accounting," as in the former chart. These two latter functions are listed as "Outsource." In addition, the new chart has an added position of Vice

Manager held by [REDACTED] who is also listed under "Marketing" and "Supervisor" to the new Machine Operators. Both the Form I-129 and the first chart therefore conflict with the second chart. 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).

As a result of these inconsistencies and redundancies, the organizational charts are not credible and will be given minimal weight. The inconsistencies are compounded by the petitioner's statement that it does not currently have any full-time employees. The petitioner indicated that it hopes to increase its workforce as business expands. This statement seems largely inconsistent with the latest organizational chart that refers to four employees and outsourced work. The petitioner also failed to submit objective corroborating evidence regarding employment, citing as the reason for lack of quarterly wage reports.

As required by section 101(a)(44)(C) of the Act, 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. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development.

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

The Form I-129 states that the petitioner currently has two employees. In its response to the RFE, the petitioner explained that its employees work on a part-time or contractor basis. On appeal, the petitioner asserts that the beneficiary does not perform the daily tasks of the business, but that he will merely instruct and supervise other employees as they perform the tasks necessary for the company's operation. It is unclear how two part-time employees will be able to successfully perform all of the tasks necessary for the petitioner's day-to-day operations. Thus, in addition to their internal contradictions, the petitioner's claims are unbelievable. 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, supra* at 591.

When examining the managerial or executive capacity of a beneficiary, Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a beneficiary's duties

and 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.

Both charts submitted by the petitioner contain an artificial number of positions, where a single individual is listed several times. In the first chart, the beneficiary is listed as three different positions: "President, CEO," "Designer," and "Accounting." Similarly, [REDACTED] is listed as both "Reception" and "Marketing," and [REDACTED] is listed as both "Supervisor" and "Machine Operator." In the second chart, [REDACTED] is listed as "Vice Manager," "Marketing," and "Supervisor." These redundancies serve to further reduce the probative value of the organizational charts submitted.

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'r 1988). In this case, the petitioner has failed to demonstrate that it will primarily perform qualifying tasks. The petitioner did not meet its burden in describing qualifying tasks with sufficient specificity, nor did it demonstrate that it has sufficient staffing to relieve the beneficiary of non-executive level duties.

For the reasons stated, the petitioner has failed to show that it will employ the beneficiary in a managerial or executive capacity. The petitioner's appeal is therefore dismissed.

IV. Conclusion

Based on the foregoing, the petitioner has not established that the beneficiary will be employed in a managerial or executive capacity. 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.