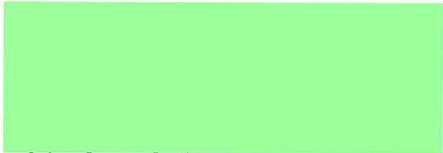


(b)(6)



U.S. Citizenship  
and Immigration  
Services



DATE: **MAR 29 2013**

Office: VERMONT SERVICE CENTER

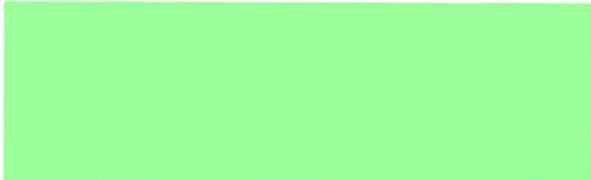
FILE: 

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)

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, 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 seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a Georgia corporation established in 2008 that is in the retail food and fuel business. It claims to be a wholly owned subsidiary of [REDACTED] located in India. The petitioner seeks to employ the beneficiary as its chief executive for a period of two years.

The director denied the petition, concluding that the petitioner had failed to establish that it had, or would, employ the beneficiary primarily in a managerial or executive capacity. The director reasoned that the beneficiary's duties were overly vague and not reflective of the beneficiary's actual day-to-day duties, suggesting the beneficiary was primarily performing non-qualifying operational duties. Further, the director pointed to certain discrepancies on the record related to the number of employees the petitioner claimed to employ; the petitioner's failure to provide adequate photographs of the petitioner's business and its claimed employees; and uncustomary salaries paid to claimed managerial and professional employees.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the beneficiary does not perform operational duties as found by the director, but that such duties are clearly executive and managerial in nature. Counsel stresses the beneficiary's focus on growth and profitability of the company and his ability to bind the company. Further, counsel maintains that the discrepancy related to the number of employees employed by the petitioner was due to a timing issue and the result of certain employees leaving the company's employ. Lastly, counsel cites a certain precedent case to assert that the director improperly considered the size of the petitioner in his decision.

## I. The Law

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (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.

## II. Analysis:

As stated, the director denied the petition based on a finding that the petitioner failed to establish that the beneficiary was, and would be, employed in the United States in a qualifying executive or managerial capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary will primarily perform executive or managerial duties with the petitioner as required by the Act.

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).

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 offered the following explanation of the beneficiary's duties in support of the I-129 Petition for a Nonimmigrant Worker, including hours spent on each task weekly:

- Analyze and develop corporate financial goals and objectives funds: 5 hours per week
- Company representative on all tax and legal matters, procure and invest corporate funds: 5 hours per week
- Analyze the market for gasoline and commodities costs, manage inventory, availability and demand, set sales and profit goals: 8 hours per week
- Review cost analysis, markets survey, and other reports prepared by accountant: 5 hours per week
- Authorize expenditures for costs: 5 hours per week
- Negotiate, execute contracts and purchases: 2 hours per week
- Oversee Managerial and subordinate staff: 2 hours per week
- Plan and direct marketing, promotional and public relations activities, represent business to the public: 5 hours per week
- Research and develop new business opportunities: 5 hours per week
- Enforce safety, health and security rules: 2 hours per week

Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has provided no specifics as to how the beneficiary will carry out many of the general tasks and goals listed above as a part of his daily duties. In fact, portions of the duty description are so overly vague that they provide little

or no probative value as to the beneficiary's day-to-day activities, such as analyzing and developing corporate financial goals and objectives; procuring and investing corporate funds; planning and directing marketing; and researching and developing new business opportunities. At no time on the record has the petitioner provided examples, or supporting documentation related to, financial goals or objectives developed and/or carried out; funds invested; inventory managed or sales and profit goals set; cost analysis or market surveys completed by the claimed accountant on staff; contracts negotiated and executed; marketing, promotional or public relations activities undertaken; or new business plans researched or developed. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

On appeal, counsel asserts that the beneficiary does not perform any day-to-day operational duties and acts as the senior most executive of the company thereby qualifying him as an executive consistent with the Act. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

The petitioner has not submitted sufficient evidence to conclude that the petitioner primarily performs executive tasks as defined by the Act. For instance, the petitioner has not provided detailed explanations of the duties of his subordinate employees, or other such supporting documentation, to confirm that these employees are indeed performing all of the operational duties of the enterprise. Indeed, the director was aware of this insufficiency when he requested in the Request for Evidence (RFE) that the petitioner provide complete position descriptions for each of the beneficiary's subordinates; a breakdown of the hours devoted to each task; and the educational credentials of these subordinates. However, the petitioner provided little or no description of the duties of his subordinates and only vaguely identifies them as Assistant Manager, Accountant, Security Officer, Cashier, Counter Helper, and Store Helper. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Indeed, without sufficient evidence on the petitioner's subordinates it is not possible to conclude with any certainty that the beneficiary primarily directs only the broad goals and policies of the organization; or that he directs a subordinate level of managerial employees, as required of an executive.

Further, certain unexplained discrepancies on the record cast additional doubt on the petitioner's assertion that the beneficiary would be performing primarily qualifying duties. For example, in a response letter dated April 24, 2012 the beneficiary is offered as spending approximately 30 hours per week on "development and adherences or financial matters." But, the beneficiary's job duty description, denoting 34 hours of work per week, does not reflect 30 hours per week devoted only to financial matters. Also, doubt is cast on the duties of the claimed accountant subordinate to the beneficiary when the petitioner claims that the beneficiary spends 30 hours per week on financial matters, and acts as the company representative on *all* tax matters, particularly since the petitioner has provided no explanation of the accountant's duties. Additionally, the petitioner submits two conflicting organizational charts on the record without any explanation, the first oddly reflecting a more tiered and complex organizational structure than the latter. Lastly, the beneficiary is offered on the record as completing Underground Storage Tank Operator Training, suggesting his performance of at least some day-to-day operational duties for the petitioner. Granted, the performance of some operational duties would not alone make the beneficiary ineligible as an executive; but serious doubt is cast on the petitioner's claim that the beneficiary performs *only* executive duties given the petitioner's level of operations and failure to provide sufficient evidence regarding the duties of his subordinates. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In sum, given the limited evidence presented and considering the totality of the circumstances, the record does not sufficiently support that the beneficiary is primarily performing executive or managerial duties.

Counsel cites *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988) to stand for the proposition that the small size of a petitioner will not, by itself, undermine a finding that a beneficiary acts primarily in a managerial or executive capacity. First, the AAO notes that counsel has furnished little evidence to establish that the facts of the instant petition are analogous to those in *Mars Jewelers, Inc.*, where the district court found in favor of the plaintiff, beyond noting that the petitioner was a small retail store with few employees much like the petitioner. With respect to *Mars Jewelers*, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Even in applying *Mars Jewelers, Inc.*, the AAO does not find counsel's argument persuasive. In *Mars Jewelers, Inc.*, the court emphasized that the former INS should not place undue emphasis on the size of a petitioner's business operations in its review of an alien's claimed managerial or executive capacity. The AAO concurs with this assessment, and has long interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. However, the AAO notes that it is appropriate for 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, e.g. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *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 and fails to believe that the facts asserted are true. *See Systronics*, 153 F. Supp. 2d at 15. Beyond this, the other findings in *Mars Jewelers, Inc.* relate to the former INS' misapplication of certain "new" regulatory guidelines published in 1987, as opposed to less restrictive regulations published in 1983, which the court found applicable in the case. For instance, the court noted that the INS improperly applied a 1987 regulatory requirement that a petitioner must establish that a manager spends a majority of their time performing managerial tasks. However, this is of little bearing in the instant case, since the 1987 regulations have long since been applicable; and in turn, are applied in this case. More specifically and as previously mentioned in this case, the petitioner has not met its burden of showing that the beneficiary primarily performs managerial or executive duties due to the beneficiary's vague and unsupported duties; the petitioner's failure to properly respond to the director's proper and relevant RFE; and unexplained discrepancies on the record. In short, we emphasize that our holding is not primarily based on the on the size of the petitioning entity but on the conclusion that the record does not support that the beneficiary is primarily performing executive or managerial duties. Accordingly, the appeal must be dismissed.

### III. Conclusion

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.