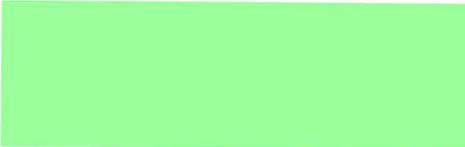


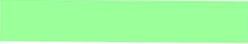
(b)(6)

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



U.S. Citizenship  
and Immigration  
Services



Date: **MAY 09 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)

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

4 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 beneficiary's employment 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 Missouri, claims to be the subsidiary of [REDACTED] located in [REDACTED] India. The petitioner states it is engaged in the manufacture and export of flexible laminate products. It seeks to continue the employment of the beneficiary as its deputy general 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, Notice of Appeal or Motion, counsel contends that the director's decision goes against the weight of the evidence, was arbitrary and capricious, and is estopped based on detrimental reliance. In support of these contentions, counsel submitted an addendum further outlining the reasons for the appeal.

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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

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 August 1, 2012, indicated that the petitioner was formed in 2011 but failed to provide any information regarding its current number of employees or its estimated gross or net annual income. A letter of support from counsel dated July 30, 2012 also provided minimal details regarding the petitioner's business and the beneficiary's role therein.

An undated letter from the foreign entity included with the petition outlined the proposed duties of the beneficiary in the U.S. position. Specifically, the petitioner stated that his duties as deputy general manager would include the following:

- o Developing a vision and strategic plan to guide the organization.
- o Develop an operational plan which incorporates goals and objectives that work towards the strategic direction of the organization.
- o Ensure that the operation of the organization meets the expectations of its clients.
- o Oversee the efficient and effective day-to-day operation of the organization.
- o Oversee the planning, implementation and evaluation of the Company's programs and services.
- o Monitor day-to-day delivery of the programs and services of the organization to maintain or improve quality.
- o Determine staffing requirements for organizational management and program delivery.
- o Work with team to prepare a comprehensive budgetary estimates and monitoring thereof.
- o Ensure that business procedures are implemented and followed.
- o Administer the funds of the organization according to the approved budget and monitor the monthly cash flow of the organization.

The petitioner also submitted a copy of the beneficiary's resume which provided an overview of his work abroad, as well as corporate documents, an organizational chart for both the petitioner and the foreign parent, and a letter detailing the duties performed by the beneficiary while employed abroad with the foreign entity. The petitioner's organizational chart depicted four employees subordinate to the beneficiary including a production manager, an assistant production manager, an operating officer, and a coordinator.

On August 27, 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.

In a letter dated September 7, 2012, counsel for the petitioner responded to the director's request. The petitioner provided a more detailed overview of its employment structure, including an updated organizational chart, and provided specific details regarding each of its employees. Regarding the beneficiary's position and duties, counsel restated the previously-submitted list of duties in chart form, adding the percentage of time the beneficiary devoted to each such duty. Specifically, the chart indicated that the breakdown of duties was as follows:

<b>Duties</b>	<b>% of Time Spent</b>
Developing a vision and strategic plan to guide the organization.	5%
Develop an operational plan which incorporates goals and objectives that work towards the strategic direction of the organization.	10%
Ensure that the operation of the organization meets the expectations of its clients.	15%
Oversee the efficient and effective day-to-day operation of the organization.	20%
Oversee the Quality Control Management System & Procedures	15%
Oversee the planning, implementation and evaluation of the Company's programs and services.	5%
Monitor day-to-day delivery of the programs and services of the organization to maintain or improve quality.	5%
Determine staffing requirements for organizational management and program delivery.	5%
Work with team to prepare a comprehensive budgetary estimates and monitoring thereof.	5%
Ensure that business procedures are implemented and followed.	5%
Administer the funds of the organization according to the approved budget and monitor the monthly cash flow of the organization.	10%

Additionally, the petitioner submitted details regarding the beneficiary's coworkers and subordinates along with their hours of employment. An updated organizational chart submitted demonstrated that the

beneficiary, as deputy general manager, would directly oversee two employees; specifically, an operating officer and a production manager. According to the chart, the production manager in turn would supervise four additional employees, namely a press/laminator operator; a slitter operator; a fork lift driver & shipping clerk; and a press helper. The chart also indicated that a chief executive and a general manager oversaw the beneficiary, and that a marketing manager was also employed laterally to the beneficiary. The petitioner, through counsel, also submitted copies of its quarterly tax returns for the first two quarters of 2012.

On October 30, 2013, 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 petitioner's non-professional staff. Moreover, the director noted that the evidence of record demonstrated that the beneficiary would be engaged in the performance of non-qualifying duties.

On appeal, counsel contends that the director erred in issuing the denial, and claims that the beneficiary's duties meet each of the four criteria listed in the regulatory definition of managerial capacity. No additional documentation aside from counsel's addendum to the Form I-290B was submitted in support of the appeal.

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

The petitioner claims that it is a manufacturer and exporter of flexible laminates. 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 virtually identical and extremely vague descriptions of the beneficiary's duties. With the initial petition, the petitioner merely claimed that he would have overall control of the goals and policies of the company, and simply summarized the duties outlined in the regulations. For example, the stated list of duties includes tasks such as "oversee the efficient and effective day-to-day operation of the organization" and "ensure that business procedures are implemented and followed." 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 simply restated this list of duties and added the percentage of time devoted to each task, as well as one additional task, i.e., "Oversee the Quality Control Management System & Procedures." The addition of the percentage of time devoted to each duty revealed that the majority of his time would be devoted, as stated above, to "oversee[ing] the efficient and effective day-to-day operation of the organization." The petitioner also indicated that a large portion of his time would be devoted to quality control, meeting client expectations, and developing an operational plan. However, no additional detail clarifying the exact nature of these duties was submitted. 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).

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 submitted an organizational chart indicating that the beneficiary directly supervised two individuals: [REDACTED] Operating Officer; and [REDACTED] Production Manager. The chart also indicated that Mr. [REDACTED] as Production Manager, oversaw the following four individuals:

- [REDACTED] Press/Laminator Operator
- [REDACTED] Slitter Operator
- [REDACTED] Fork Lift Driver & Shipping Clerk
- [REDACTED] Press Helper

As noted by the director in the denial, however, out of the four employees listed above, only [REDACTED] were listed as active employees on the State quarterly tax returns. In addition, while [REDACTED] was listed as an employee for both quarters, [REDACTED] only appears on the employee listed for the second quarter of 2012.

In addition, the director noted additional discrepancies. Specifically, the director noted that five employees listed on the organizational chart were not listed on the quarterly tax returns, and that three employees listed on the payroll register were not listed on the organizational chart. The director acknowledged the petitioner's claim, in response to the RFE, that [REDACTED] recently commenced employment with the petitioner, thus explaining their absence from the payroll tax records. The director, however, found that the petitioner failed to supplement the record with documentary evidence in support of this claim.

Further review of the record reveals that two of the three employees listed on the payroll tax records, namely, [REDACTED] were previously listed on the first organizational chart submitted with the petition. It appears that [REDACTED] held the position of Operating Officer for the first quarter of 2012, which was assumed by Carrie Raya in the second quarter of 2012. However, Bonnie McBratney continues to appear on the payroll tax records along with [REDACTED] therefore raising the question of what position Ms. [REDACTED] held while [REDACTED] assumed the role of Operating Officer. As for [REDACTED] there is no explanation as to why his position of Assistant Production Manager is not included on the updated organizational chart despite his continued presence on the payroll records. Finally, there is no explanation with regard to the position held by the employee identified as [REDACTED].

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). Although the petitioner provided details regarding the duties performed by each individual

listed on the updated organizational chart, it failed to explain the discrepancies in the staff listing on the payroll tax records, and further failed to provide documentary evidence of the hiring of two subordinate employees. Despite the director's citation of these discrepancies in the denial, counsel for the petitioner does not acknowledge these issues on appeal. Therefore, the AAO is precluded from finding that the beneficiary is relieved from performing non-qualifying duties because the actual organizational structure and staffing of the petitioner has not been sufficiently established and supported by documentary evidence.

Although the record contains evidence that there are in fact some employees under the supervision of the beneficiary, the record also fails to establish that these employees are supervisory, professional, or managerial. Specifically, if it is claimed that the beneficiary will work in a managerial capacity because his 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.

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 production manager, who is the only direct subordinate of the beneficiary.

Moreover, while the organizational chart indicates that [REDACTED] is a production manager supervising four employees, the organizational structure surrounding the production department is unclear. As previously stated, two of the four production employees are not listed on the petitioner's payroll tax records, and insufficient evidence has been established to demonstrate that these additional employees have actually been hired. Absent such evidence, the AAO must conclude that the duties of these individuals (slitter operator and press helper) are being performed by other individuals currently on the petitioner's payroll.

To establish that the petitioner has staffed the new operation in the previous year, the petitioner must submit a description of staffing, including the number of employees and the types of positions, as well as evidence of the wages paid to the employees. 8 C.F.R. § 214.2(l)(14)(ii)(D). The omission of relevant documentary evidence, coupled with the additional unresolved discrepancies regarding additional staff members and the actual duties they perform, renders it impossible to determine whether the beneficiary is actually supervising a subordinate managerial or supervisory employee, or whether Mr. [REDACTED] is actually engaged in the production duties necessary to produce the petitioner's products. Moreover, although the duties attributed to Mr. [REDACTED]

include quality control, the petitioner also claims that the beneficiary is responsible for quality control, thereby making it more difficult to distinguish between the managerial and non-managerial tasks of both the beneficiary and Mr. [REDACTED]. Based on these discrepancies, the petitioner has failed to demonstrate that the beneficiary supervises a managerial or supervisory employee who oversees subordinate staff.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

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 has been doing business as required by the regulations.

The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii). There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

The record contains two invoices for the sale of goods, dated October 10, 2011 and October 13, 2011 to domestic companies located in Texas and South Carolina. The record, however, is devoid of any additional evidence that the petitioner has been doing business as contemplated by the regulations. It is further noted that these invoices, along with the Asset Purchase Agreement with for the purchase of various machinery and equipment, are dated in October 2011, two months prior to the granting of the initial new office petition. The record as it currently stands contains no evidence that the petitioner has been conducting business in the last year.

Moreover, the petitioner claims that in addition to manufacturing, it will also be engaged in the export of flexible laminates. In the course of examining whether a petitioning company has been doing business as an import and export firm, it is reasonable to request that the company produce copies of documents that are required in the daily operation of the enterprise due to routine regulatory oversight, such as various customs documents. Finally, the petitioner has failed to provide evidence of the financial status of the company, as required by 8 C.F.R. § 214.2(l)(14)(ii)(E). The petitioner did not provide its gross and net annual income where requested on the Form I-129, and the record contains no corporate tax returns, bank statements or

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financial statements. This lack of documentation with respect to the petitioner's business activities and financial status for its first year of operations mandates denial of the petition on these additional grounds as well.

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).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.