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

(b)(6)

[redacted]

DATE: **MAY 16 2013** Office: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

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 classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a District of Columbia limited liability company established in December 2001, states that it operates an herbal supplements business. The petitioner claims to be an affiliate of [redacted] Nigeria. The petitioner seeks to employ the beneficiary as its manager for a period of three years.

The director denied the petition on two alternative grounds, concluding that the petitioner: (1) failed to establish that the U.S. and foreign entities are currently doing business; and (2) failed to establish that the beneficiary will be employed in a 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 for review. On appeal, counsel asserts that the petitioner is currently doing business in the United States and that it will employ the beneficiary in a managerial capacity, specifically, as a function manager. Counsel submits a brief and additional evidence on appeal.

Upon review, the AAO finds sufficient evidence to establish that the petitioner and foreign entity are doing business as defined in the regulations. While the petitioner's financial statements and tax returns show that it has been operating at a small volume, the company has reported substantial expenditures for advertising and marketing which support the petitioner's claims that it has been operating primarily as a "marketing arm" for the foreign entity's products in the U.S. market. Therefore, the AAO will withdraw the director's determination that the petitioner and foreign entity are not qualifying organizations.

However, for the reasons discussed below, the AAO will affirm the director's determination that the petitioner has not established that it will employ the beneficiary in a primarily managerial or executive capacity, and the appeal will be dismissed.

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.

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. MANAGERIAL OR EXECUTIVE CAPACITY

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

In a letter submitted in support of the Form I-129, Petition for a Nonimmigrant Worker, the petitioner described the beneficiary's proposed duties as follows:

> [The petitioner] oversees and coordinates all marketing activities for the products of [the foreign entity] including resource planning, project planning, project scheduling, project sizing, cost estimation, and project execution. [The petitioner] has enlisted the services of [redacted] in order to assist in the company's marketing activities.
>
> * * *
>
> 1. [The beneficiary] will manage and oversee the strategy for marketing, developing and expansion of the current line of [the petitioner].
>
> Serving as Manager, [the beneficiary] will manage and direct production, development and enhancements of the Herbal products. He will meet with and review supplier and manufacturing company representatives and negotiate or renegotiate terms for current and future contracts. He will oversee and coordinate all marketing activities including resource planning, project planning, project scheduling, project sizing, cost estimation, and project execution. In addition, he will review and determine the number of employees to be hired to expand the operation and meet its growth forecasts. He will monitor employee performance, establish company policy and identify areas of improvement for the overall success of the company in marketing its products to U.S. companies and consumers.
>
> He will work to determine the demand for the company's product or service and attempt to identify the target market. He will focus on increasing brand awareness, bringing in new customers, and coordinating public relations efforts. He will develop a pricing strategy in order to help the company obtain the most profits while also making sure customers are satisfied. Working collaboratively with product development specialists, sales, and other, [the beneficiary] will monitor trends in order to determine when new products should be introduced. He will be responsible for working with promotion companies and advertising companies in order to help promote the product and to attract new customers.
>
> 2. [The beneficiary] will be responsible for the financials of [the petitioner].
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> [The beneficiary] will analyze cash flow, cost controls, and expenses, manage accounting processes and ensure full compliance with the Generally Accepted Accounting Procedures,

> coordinate preparation of financial reports, analyses, and information reports, establish, maintain, and strengthen appropriate internal control safeguards, review and approve simple work-for-hire agreements to complex license, alliances, and acquisition agreements, choosing and working with attorneys and accountants.
>
> [The beneficiary] will exercise complete discretion over the day to day activities involved and will report his findings and recommendations to the stockholders. [The beneficiary] will have sole responsibility to make all decisions concerning marketing, development and budgets.

The director issued a request for evidence (RFE) in which he instructed the petitioner to submit, *inter alia*, the following: (1) additional evidence to establish that the beneficiary will be employed in a managerial capacity, and (2) a breakdown of the number of hours devoted to each of the beneficiary's proposed job duties on a weekly basis.

The petitioner submitted a letter explaining the beneficiary's job duties as follows:

> 1. [The beneficiary] will manage and oversee the strategy for marketing, developing and expansion of the current line of [the petitioner]. His job duties are broken down in terms of percentage of time allocated to each duty.
>
> - He will manage and direct production, development and enhancements of the Herbal products. He will meet with and review supplier and manufacturing company representatives and negotiate or renegotiate terms for current and future contracts. He will oversee and coordinate all marketing activities including resource planning, project planning, project scheduling, project sizing, cost estimation, and project execution. He will monitor employee performance, establish company policy and identify areas of improvement for the overall success of the company in marketing its products to U.S. companies and consumers. Determine the demand for the company's product or service and attempt to identify the target market. 75%
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> - He will review and determine the number of employees to be hired to expand the operation and meet its growth forecasts. 5%
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> - He will focus on increasing brand awareness, bringing in new customers, and coordinating public relations efforts. He will develop a pricing strategy in order to help the company obtain the most profits while also making sure customers are satisfied. Working collaboratively with product development specialists, sales, and other, [the beneficiary] will monitor trends in order to determine when new products should be introduced. He will be responsible for working with promotion companies and advertising companies in order to help promote the product and to attract new customers. 10%
>
> - He will analyze cash flow, cost controls, and expenses, manage accounting processes and ensure full compliance with the Generally Accepted Accounting Procedures,

> coordinate preparation of financial reports, analyses, and information reports; establish, maintain, and strengthen appropriate internal control safeguards, review and approve simple work-for-hire agreements to complex license, alliances, and acquisition agreements, choosing and working with attorneys and accountants. 10%
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> [The beneficiary] will exercise complete discretion over the day to day activities involved and will report his findings and recommendations to the stockholders. [The beneficiary] will have sole responsibility to make all decisions concerning marketing, development and budgets.
>
> 2. [The beneficiary] is a functional manager, rather than supervising manager.
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> Decided by the marketing nature of the company, [the beneficiary] works mainly as a functional manager for the marketing company, rather than a supervising manager with personnel responsibilities.
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> [The beneficiary's] transfer is a direct result of the increasing globalization of our markets. In order to take full advantage of the current market conditions, [the beneficiary's] full time physical presence is needed in the U.S. to move the company forward, improve the profitability of the company, and take advantage of the numerous opportunities yet to be explored in the herbal products industry. It has become necessary for [the beneficiary] to be transferred to the U.S. to carry on the job duties listed above in a more efficient manner, set new goals for the company, and make all necessary decisions related to marketing of the herbal products that will make [the petitioner] and [the foreign entity] more profitable. [The beneficiary's] presence in the U.S. will allow him to make more effective decisions regarding marketing and follow up with and evaluate other marketing decisions that were previously made overseas to determine if changes should be made.
>
> [The beneficiary's] job duties do not involve any customer contact. At all times, [the beneficiary] operates at a senior level within the organizational hierarchy and exercises discretion over the day to day operations involving marketing. His strategic decisions will have a significant impact and the operations for the company. His decisions and high-level contract negotiations will ultimately determine the success of the company.

The petitioner submitted a business plan for the foreign entity and U.S. company combined. The business plan lists the beneficiary as "executive director" and lists his two duties as: "develops marketing plan in conjunction with design/management of the company web presence"; and "coordinates the international distribution/marketing with emphasis in the United Kingdom and the United States of America."

The director denied the petition concluding, in part, that the petitioner failed to establish that the beneficiary will be employed in a managerial or executive capacity. In denying the petition, the director found that the beneficiary cannot be found to be performing an essential function within the organization because the beneficiary's position requires the management of the whole business not one function. The director further found that the evidence indicates that the beneficiary will be working in the United States to market and advertise the company's product, not to perform in a managerial or executive capacity.

On appeal, counsel for the petitioner emphasizes that the beneficiary's role in the U.S. company is that of a functional manager. Counsel provides the same description of the beneficiary's duties previously provided by the petitioner.

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary will be employed in a primarily executive or managerial capacity.

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's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The AAO does not doubt that the beneficiary will have discretionary authority over the petitioner's business. However, 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 show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day operational functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns or manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

In the instant matter, counsel and the petitioner describe the beneficiary's proposed position in very broad terms, noting he will allocate 75% of his time to a cluster of duties, most of which are not related to managing the essential function of marketing, such as "manage and direct production, development and enhancements of the Herbal products," "meet with and review supplier and manufacturing company representatives and negotiate or renegotiate terms for current and future contracts," "monitor employee performance, establish company policy, and identify areas of improvement for the overall success of the company," and "determine the demand for the company's product or service and attempt to identify the target market." Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner clusters several individual duties into one large percentage of the beneficiary's time and fails to document exactly what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. In allocating 75% of the beneficiary's time to such a cluster of duties, the petitioner lists both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on each of them. This failure of documentation is important because several of the beneficiary's daily tasks, such as those listed above, do not fall directly under traditional managerial duties as defined in the statute. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial or (b)(6)

executive, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). 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 actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(*2*).

The petitioner has not established that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees. The petitioner states that the U.S. company was created solely to oversee and coordinate all marketing activities for the products of the foreign entity. While the petitioner has provided that it utilizes the services of marketing consultants, there is insufficient evidence that these contracted employees would be providing services to the petitioner on a day-to-day basis, and the record reflects that the petitioner has no other employees at present.

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a position description that describes the duties to be performed in managing the essential function, i.e. identifies the function with specificity, articulates the essential nature of the function, and establishes the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function.

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

Here, the petitioner claims that the beneficiary will manage the essential function of marketing the foreign entity's products in the United States. However, the breakdown of the beneficiary's job duties provided by the petitioner does not support such a claim. Although the petitioner provided a percentage breakdown of the beneficiary's duties, the petitioner failed to demonstrate that the beneficiary will allocate at least 51% of his time to managing the essential function of marketing. The petitioner provided evidence that it utilizes the services of consultants to perform some marketing functions; however, such evidence, when considered in totality with the petitioner's description of the beneficiary's job duties, does not establish that the beneficiary is performing an essential function of the U.S. company or that he would be relieved from performing non-qualifying duties associated with the function he is claimed to manage.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within an 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 beneficiary in this matter has not been shown to be employed in a primarily executive capacity. The petitioner failed to demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than its day-to-day operations. In fact, the majority of the beneficiary's duties listed above are non-executive in nature and it does not appear that the beneficiary will have sufficient subordinate employees to relieve him from performing non-qualifying duties.

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. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, 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).

At the time of filing, the petitioner was a nine-year-old herbal supplement company. The company has no direct employees and seeks to employ the beneficiary as its manager. The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company, and it has not established a reasonable need for an employee who performs primarily managerial duties. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Counsel further refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While the regulation at 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The AAO acknowledges the petitioner's business plan, which indicates that the company intends to hire personnel as it expands. However, at the same time, the petitioner maintains that it is not a new office and therefore must establish that it can currently support a qualifying managerial or executive position. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

The petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity or as a function manager. The AAO will uphold the director's determination that the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. Accordingly, the appeal will 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.