



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **MAY 17 2013** Office: VERMONT SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 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 South Carolina corporation, established in August 2009, stating that it is engaged in the convenience store and retail sales industry. It claims to be an affiliate of [REDACTED] located in India. The petitioner seeks to extend the beneficiary's status for two additional years in the position of the Chief Executive Officer.¹

The director denied the petition, concluding that the petitioner had not established that the beneficiary was employed in a managerial or executive capacity. The director reasoned that the petitioner had insufficient subordinate employees to support the petitioner's operations and concluded that it was likely that the beneficiary was not primarily performing qualifying managerial or executive duties, but non-qualifying day-to-day operational duties. Further, the director found that the record was not sufficient to show that the beneficiary was supervising and controlling the work of other supervisory, professional and managerial 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 director erred in interpreting the record and maintains that the beneficiary will indeed act primarily in a managerial or executive capacity. Counsel contends that the director mistakenly ignored the employees of [REDACTED] a client company of the petitioner, that the petitioner claims it can use supplement its operations. The petitioner asserts that the beneficiary does not perform day-to-day operational duties, but delegates these duties to other managerial, supervisory and professional personnel. Further, the petitioner maintains that the beneficiary acts as an executive based on the provided "Management Agreement" in place with [REDACTED] for which the beneficiary provides professional managerial services.

¹ The beneficiary was originally approved for L-1A status as an L-1A nonimmigrant intracompany transferee for the petitioner [REDACTED] from January 30, 2009 through January 29, 2009. The petitioner was approved as a "new office" in the United States for one year. The petitioner, a corporation established in South Carolina by the beneficiary in August 2009, now requests a two year extension of the beneficiary's status in the United States. However, the petitioner directly states on the record that the beneficiary is no longer employed by [REDACTED] and has no duties or responsibilities related to this company, which operates separately from the petitioner. The petitioner is submitted as an already existing business in the United States owning and operating the [REDACTED] convenience store in [REDACTED] SC. Further, the petitioner asserts that it executed a "Management Agreement" with an unaffiliated company, [REDACTED] for which the beneficiary will provide "management services" necessary to assure the continued operation of the [REDACTED] SC for the petitioner's client. In short, the petitioner is not eligible to extend the originally approved new office petition since it was not a party to this approval and the beneficiary no longer works for [REDACTED]. As such, the petition will be adjudicated as a new petition using regular evidentiary standards and not those applicable to a new office or the extension of a new office petition.

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 concluding that the petitioner failed to establish that the beneficiary would be primarily employed in a managerial or executive capacity as defined by the Act.

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.

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). In support of the I-129 Petition for a Nonimmigrant Worker, the petitioner submitted the following job duty description for the beneficiary:

[The beneficiary] will continue to work as CEO of [the petitioner] during the period of his US assignment. In this position, [the beneficiary] will implement and establish policies and objectives of [the foreign employer] in the United States. He will search potential businesses to invest in, set up a marketing plan for the Parent Company's services to attract US clients, and conduct all activities necessary for the successful start-up of the businesses. He will direct and coordinate business contracts in the entire operations of the company's market and will develop other relevant policies and procedures implementing the overall objective of [the foreign employer]. In addition, he will manage other companies, who will pay a fee for his services.

The director requested in the Request for Evidence (RFE) that the petitioner provide a more complete description of the beneficiary's duties including a breakdown of the number of hours devoted to each job duty on a weekly basis. In response, the petitioner provided the following description:

[The beneficiary] will plan, develop, and establish sales policies and promotional marketing for the U.S. company. He will also direct and supervise all new business contracts and develop other relevant policies and procedures as needed by the parent company. Moreover, the beneficiary will research small business investments relevant to the company and ensure that the company's inventory levels are proper. With regards to management decisions, the beneficiary possesses all rights to execute all the managerial decisions of the company, hiring, firing, and promotion of employees, purchasing goods and equipment, and assessing employee performance. A general approximation of the percentage of time spent on executive/managerial duties by the beneficiary as part of his job will consist of, but are not limited to:

- Sales Management (25%): Establish procedures for the U.S. subsidiary, including personnel policies, business plans, and marketing plans.
- Contracts (30%): [The beneficiary] will be negotiating services contracts as needed and working with the parent company overseas to ensure availability of inventory and fulfillment of contracts. She [sic] will also liaise with the CPA's, attorneys and bank officers on behalf of the U.S. entity.
- Personnel (25%): [The beneficiary] will hire, train, and conduct performance evaluations for the sales employees in addition to establishing work schedules.
- Finances (20%): Determine budgetary needs and economic forecasts of the U.S. subsidiary and prepare budget requests accordingly.

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. Portions of the duty description are so overly vague that they provide little or no probative value as to the beneficiary's actual day-to-day activities, such as establishing sales and personnel policies for the U.S. company; establishing marketing and business plans; negotiating and/or supervising contracts; and liaising with independent contractors such as CPA's and attorneys. At no point in the record is any detail or specificity provided to give the aforementioned general duties more credibility, such as actual policies, plans and procedures to be implemented; contracts to be negotiated and supervised; or issues to be resolved with independent professionals. In fact, the duties set forth above could be the duties of any manager or executive with any company and questionably make little reference to the petitioner's specific business. In sum, the lack of specificity, and supporting documentation, surrounding these offered duties calls into question their credibility. Further, the duties reference the beneficiary setting up a marketing plan for the foreign employer's services to attract clients in the United States and mentions close liaison with the foreign employer to institute the foreign employer's objectives. However, it is stated elsewhere on the record that the foreign employer conducts business related to the trading of gas accessories in India, as opposed to the operation of convenience stores and other retail stores, leaving questionable the assertion that the

beneficiary will be working to market the foreign employer's goods in the United States. Also, the petitioner states that the beneficiary is the owner and sole proprietor of the foreign employer thereby leaving doubtful the claimed close liaison with the foreign employer management regarding objectives and policies. 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. at 1108, *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. *Id.*

The beneficiary's duties also include many day-to-day operational duties, casting doubt on the petitioner's assertion that the beneficiary only performs managerial or executive duties. For instance, the duty descriptions mention the beneficiary performing various non-qualifying operational duties such as monitoring inventory levels, purchasing goods and equipment, monitoring contract compliance, setting work schedules, training employees, and preparing budget requests. Indeed, the most detail provided regarding the beneficiary's duties relates to his performance of non-qualifying day-to-day functions suggesting that this encompasses the majority of his duties. 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).

Additionally, the petitioner has not established that it employs sufficient employees to support his managerial and executive role directly with the petitioner. The director noted that petitioner operated the convenience store in Monday through Saturday from 8:00 am to 8:00 pm, and assuming that two employees were required to operate the store, that this would require a minimum of 144 man hours per week to operate the store. The director reasoned that the record indicated that the beneficiary would have to provide day-to-day operational coverage at the store, as even with all employees working their maximum allotted hours, the petitioner employee work hours would only account for 118 hours of coverage. The petitioner acknowledges the director's work hour calculations on appeal and contends that the director failed to consider that the petitioner could supplement its manpower with employers from an independent third party company. The AAO does not find counsel's argument persuasive. The management agreement executed by and between the petitioner and does not provide for the petitioner's use of this third party company's employees for purposes independent of operating the company's. The agreement only provides for management services on the part of the beneficiary for. Further, the petitioner has not provided any documentation to support a conclusion that's employees can be, or have been, used for the petitioner's purposes. Additionally, the petitioner's sole managerial employee, the General Manager Ms. is the beneficiary's wife and no supporting evidence, such as supporting payroll documentation, has been provided on the record to support her employment in a managerial capacity with the petitioner. In fact, a submitted IRS Form 941 for the 4th quarter of 2009 shows that the beneficiary has only two employees, presumably the beneficiary and store clerk for which supporting payroll documentation is provided. Going on record without supporting documentary evidence

is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Again, 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). Therefore, the lack of supporting documentation with respect to the claimed General Manager casts further doubt on whether the petitioner has sufficient employees to allow the beneficiary to primarily perform managerial or executive duties for the petitioner, and in turn, that he has managerial, supervisory and professional employees to delegate operational duties to within the petitioner.

A litany of other discrepancies on the record that cast doubt on the petitioner's operations, including that of the former petitioner [REDACTED] leave questionable the assertion that the beneficiary spends a majority of his time performing managerial or executive duties for the petitioner. Consistent with the regulations, the beneficiary must be primarily employed in a qualifying managerial or executive capacity with the petitioner. A petitioner's role performing managerial or executive duties for a third party is not determinative of qualifying a beneficiary as acting primarily in a managerial or executive role for the petitioner. Further, as noted above, the petitioner has not shown to have sufficient subordinate employees to support the petitioner's operations, suggesting the beneficiary's performance of operational duties will be required. Indeed, the duties themselves prominently list many day-to-day operational duties. However, the beneficiary is alternatively offered as managing a completely separate business asserted as including seven subordinate employees. With such varying responsibilities, it is questionable that the beneficiary would be able to spend a majority of his time performing managerial or executive tasks for the petitioner. In fact, the petitioner claims these tasks include the petitioner's expansion through the opening of the [REDACTED]

But, little supporting documentation is provided to confirm the viability of this enterprise. For instance, the record does not indicate when this store will open, how many employees it will include, or the financials needed to start-up the store. In fact, the petitioner has provided bank accounts for this business that have negative balances and a lease for the premises at [REDACTED] that states that the petitioner shall use the premises expressly for the purpose of an [REDACTED],

Further, the beneficiary's abandonment of his role with the previous new office and discrepancies on the record related to this role, for which original L-1A status was provided, casts further doubt on the viability of the current petition. The L-1A nonimmigrant visa is not an entrepreneurial visa classification allowing an alien a prolonged stay in the United States in a non-managerial or non-executive capacity to continuously start-up new businesses. The regulations allow for a one-year period for a U.S. petitioner to commence doing business and develop to the point that it will support a managerial or executive position. By allowing multiple petitions under the more lenient standard, USCIS would in effect allow foreign entities to create under-funded, under-staffed or even inactive companies in the United States, with the expectation that they could receive multiple extensions of their L-1 status without primarily engaging in managerial or executive duties. Further, by allowing a petitioner to reconstitute itself as another entity and endlessly seek new ventures, the new office regulations would likewise be circumvented and frustrated. In the current matter, the record indicates that the beneficiary largely abandoned his role with the original petitioner [REDACTED] during the period of the new office period. As noted, the beneficiary

established the petitioner in August 2009 approximately halfway through his originally granted period of stay, devoting most of his efforts to establishing this new entity. Indeed, the petitioner stated directly on the record that, in response to the director's RFE, that the [REDACTED] (originally claimed to own and operate the [REDACTED] convenience store) is no longer conducting business operations. In stark contradiction, the petitioner provides on appeal that the [REDACTED] is still operating and submits IRS W-2 payroll documentation and paystubs claiming 22 employees; bank account statements, and various purchase invoices for 2009. Additionally, the beneficiary is offered as only earning \$10,000 from [REDACTED] in 2009, less than the federal minimum wage for a full time employee, casting doubt as to whether he was ever intended to work for [REDACTED] as a manager or executive as originally attested to the USCIS. The beneficiary's reassignment to the current petitioner is also left doubtful since the beneficiary is offered as owning and controlling all of the entities in question. As noted, the L-1A nonimmigrant visa is not an entrepreneurial visa classification allowing an alien a prolonged stay in the United States in a non-managerial or non-executive capacity to continuously start-up new businesses. In sum, the beneficiary's apparent abandonment of the previously attested to business venture for which it originally received L-1A status and the discrepancies on the record related thereto, cast further doubt on the credibility of the currently provided managerial or executive role with the petitioner.

On appeal, the petitioner also maintains that the beneficiary acts a personnel manager, delegating operational duties to other managerial, supervisory and professional personnel. 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). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3). 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'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Here, the petitioner has not established that the beneficiary will direct subordinate managers, supervisors, or professionals. See § 101(a)(44)(A)(ii) and Section 101(a)(44)(B) of the Act. As previously discussed, the petitioner claims to have only one subordinate managerial employee, the General Manager. However, the petitioner has not provided any payroll or tax documentation for this employee to confirm her employment in the offered managerial role, despite her being claimed as working in a fulltime capacity, and this documentation being provided for all other petitioner employees. Further, no evidence related to the General Manager's educational background is provided on the record to determine whether this employee could be established as a professional consistent with the Act. The petitioner does also maintain that the beneficiary has two managerial subordinates, a Manager and Assistant Manager, through his claimed independent contractor role with [REDACTED]. The beneficiary's performance of managerial or executive duties for a third party, even if for the petitioner's benefit, is not relevant to whether the beneficiary primarily performs executive or managerial duties for the petitioner. No precedent exists to find that a beneficiary could be found a personnel manager through the provision of professional managerial

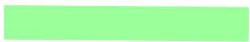
services to a third party company. Further, even if accepted as relevant, the petitioner has submitted little other than an organizational chart and titles for these managers within [REDACTED] to establish them as managers. In fact, IRS Form W-2 documentation submitted for [REDACTED] does not support that the claimed Manager and Assistant Manager are acting in managerial or supervisory roles due to the low level of their salaries, and the limited wages paid to subordinate employees necessary to establish them as managers. For instance, the two claimed managers are offered as making only \$2,609.95 and \$1,299.40 in all of 2009 respectively, while none of their five subordinates are shown to have not made more than \$551 in all of 2009. In sum, the evidence provided with respect to [REDACTED] or the [REDACTED] does not support a conclusion that this business maintains two subordinate managerial employees reporting to the beneficiary, even if found relevant to establishing the beneficiary's managerial or executive role with the petitioner. Indeed, the apparent lack of subordinate man hours to operate the [REDACTED] only further indicates that the beneficiary is likely primarily engaged in non-qualifying day-to-day operational duties. As such, the petitioner has not established that the beneficiary will have managerial, supervisory, or professional subordinates necessary to qualify as a personnel manager.

Lastly, the petitioner maintains that the beneficiary's role providing professional managerial services for [REDACTED] establishes 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 established that the beneficiary acts primarily as an executive as defined by the Act. The petitioner has submitted vague duties for the beneficiary, which do not describe specifically any goals and policies established, or to be established by the beneficiary. In fact, the petitioner's duties prominently include the performance of specific day-to-day operational duties and the absence of sufficient subordinate employees to allow the beneficiary to be engaged in executive tasks. Also, the beneficiary has not established with sufficient evidence that the beneficiary has any subordinate managerial subordinates, let alone a level of managers to allow him to primarily focus on broad goals and policies and other qualifying executive duties. In short, the beneficiary has not established with sufficient evidence that the beneficiary is an executive, as the petitioner has done little other than assert an executive title for the beneficiary and that he directs the enterprise as the owner or sole managerial employee, which is not alone sufficient to establish the beneficiary as an executive as defined by the Act.

In conclusion, and for the various stated reasons above, the beneficiary is not established as primarily acting in a managerial or executive capacity for the petitioner. For this reason, the appeal must be dismissed.

III. Conclusion

(b)(6)



Page 10

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.