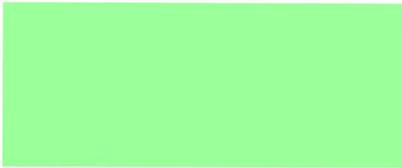


(b)(6)

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

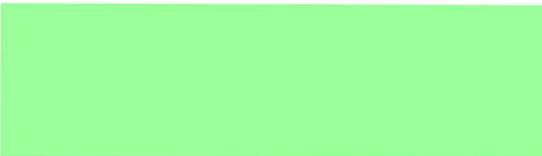


DATE: **NOV 29 2013** Office: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as a 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 California corporation, is self-described as consulting firm for the operation and management of retail stores. It claims to be a subsidiary of [REDACTED] the beneficiary's foreign employer in Japan. The beneficiary was previously granted one year in L-1A classification in order to open a new office and the petitioner seeks to extend her status so that she may continue to serve as its Operations Manager.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the evidence of record establishes that the beneficiary will function in a qualifying managerial capacity. Counsel submits a brief and additional evidence in support of the appeal.

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.

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.

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.

II. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity under the extended petition. The petitioner has consistently stated that the beneficiary will be employed in a managerial capacity.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on November 9, 2012. The petitioner indicated that it is consulting firm for the operation and management of retail stores, with eight employees and a gross annual income of \$55,505. In a letter submitted in support of the initial petition, the petitioner explained that its primary business is the management and operation of [REDACTED] cellular phone retail stores. The petitioner states that it currently operates three mobile retail stores location in [REDACTED]. The petitioner indicated that it intends to assume operations of two additional locations and also branch into offering travel services and operating a franchise [REDACTED].

The petitioner stated that, the beneficiary, as its Operations Manager, is responsible for developing and implementing the organizational strategies, policies, and practices related to the operations of the mobile retail stores and the expansion of the business. The petitioner further described the beneficiary's duties as follows:

- 1.) Establish and achieve financial objectives by preparing annual budgets and scheduling expenditures- 25%
- 2.) Establish customer service standards and policies, prepare training manuals and conduct training- 25%
- 3.) Make routine visits to the retail store that [the petitioner] directly operates to ensure that high quality services are maintained- 15%
- 4.) Establish human resource policies; exercise the authority of hiring, firing, promotion and demotion of employees- 15%
- 5.) Plan, create and implement employee incentive programs to improve productivity- 10%
- 6.) Conduct product training to sales representatives of the retail stores operated by [REDACTED] authorized dealer for sales of "au by [REDACTED] - 10%

In addition to the above listed duties, the petitioner indicated that the beneficiary would also be responsible for inspecting potential new locations and making suggestions for improvement. Based on her market research, she will prepare profit and loss projections and establish sales targets for the store. The petitioner stated that the beneficiary currently supervises six employees.

In support of the petition, the petitioner provided copies of the sublease and retail store management agreements for the [REDACTED] location, a sublease for the [REDACTED] location, a cooperative business referral agreement, and a consulting services agreement. The petitioner did not provide any information for the [REDACTED] CA location. Under the retail store management agreement, the services to be provided by the petitioner were as follows:

- 1) counting and managing sales and inventory
- 2) planning, implementing and conducting all sales promotions;
- 3) providing [REDACTED] support, including but not limited to responding to [REDACTED] inquiries;

- 4) preparing any and all necessary marketing, sales, inventory reports and any other similar reports for [REDACTED]
- 5) Provide daily sales reports, for [REDACTED] goods and services; and
- 6) Any other services that the [REDACTED] may request from time to time, provided that they are necessary for the proper operation of the [REDACTED]

The services to be provided under the consulting services agreement included: establishing the operation policy of the third party mobile shop, creating round check sheet, customer service training, round-check, and "au" product training.

The petitioner provided an organizational chart showing the beneficiary as Operations Manager. Reporting to the beneficiary were two sales representatives at the [REDACTED] location, two sales representatives at the [REDACTED] location, and three sales representatives at the [REDACTED] location. The chart showed two sales representatives at the three new start-up locations: [REDACTED]. The beneficiary is shown reporting to the Vice President.

The director issued a request for additional evidence ("RFE") in which he instructed the petitioner to submit, *inter alia*, the following: (1) a more detailed description of the beneficiary's duties in the United States including percentage of time required to perform the duties; (2) a copy of the petitioner's organizational chart including the name, job title, summary of duties, educational level, and salary for the beneficiary's subordinates; and (2) a copy of the U.S. company's State Quarterly Wage Report for the 3rd quarter of 2012.

The petitioner submitted a letter in response, stating that as Operations Manager, the beneficiary "directs and coordinates the operations of all the cellular phone retail stores [the petitioner] operates. Her specific duties are as follows:

1. Financial Management- 35 to 50%
2. Employee Training- 10%
3. Effective Practice- 35 to 40% (includes routine store visits, incident reporting system, and employee incentive program)
4. Human Resources Management- 15%
5. Other responsibilities as Required (includes overseeing the transition of stores, overseeing the opening of new retail stores, provide product training, and inspection of retail stores for future operation)

The petitioner provided the name, title, job description, wage, and education for all employees under the beneficiary's supervision. All employees were identified as sales representatives and their duties were listed as "[s]ales of cellular phones and services." The petitioner also provided the requested organizational chart showing the beneficiary as Operations Manager reporting to the Vice President. Reporting to the beneficiary were two sales representatives as the [REDACTED] location, three sales representatives at the [REDACTED] location, and three sales representatives employed by [REDACTED] at the [REDACTED] location. The petitioner also projected an additional seven sales representatives at three new locations in the future. The petitioner provided the requested quarterly wage reports.

The director denied the petition finding that the petitioner had not established that the beneficiary will be employed in a managerial or executive capacity. The director noted that the beneficiary's duties as described do not appear to be those typically performed by someone in a managerial or executive position and are more indicative of an employee who will be performing the tasks necessary to provide a service or to produce a product. The director also determined that based on the organizational structure described, the beneficiary would be assisting in the day-to-day non-supervisory duties of the business as well as acting as a first-line supervisor of non-professional employees. Finally, the director determined that the beneficiary cannot be considered a functional manager as she is primarily involved in the routine operational activities of the entity.

On appeal, counsel asserts that the beneficiary's position is primarily managerial in nature. Specifically, counsel states that the beneficiary occupies a "high level managerial position that both manages generation of significant revenue as well as supervises other professionals." Counsel asserts that first-line supervisors qualify as managers and cites to two non-precedent AAO decisions in support of his assertion. Furthermore, counsel states that the beneficiary does is not involved in the provision of day-to-day services or production of a product, but rather performs duties associated with management. The petitioner includes copies of degrees for three of the beneficiary's subordinates.

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

As a preliminary matter, counsel refers to two unpublished decision in which, according to counsel, the AAO determined that the beneficiary met the requirements for L-1A classification as a first-line supervisor.¹ Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. While 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 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 time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary manages a business or a component of 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 beneficiary's job descriptions submitted in the initial petition and in response to the RFE are insufficient to establish that the beneficiary will be primarily performing managerial duties. Specifically, the beneficiary appears to be performing the tasks necessary to provide the services of the organization. Under the retail store management agreement, the petitioner is tasked with providing the following services: counting and managing sales and inventory; planning, implementing, and conducting sales promotions;

¹ In one of the referenced non-precedent AAO decisions, the beneficiary managed professional level employees. In the second case the beneficiary managed subordinate managerial employees and was not, in fact, a first-line supervisor.

preparing all marketing, sales, and inventory reports; and providing daily sales reports. Furthermore, under the consulting services agreement, the petitioner's services included establishing the operation policy of the third party mobile shop, customer service training, round-check, and au product training.

The beneficiary's duties, as stated by the petitioner, consist of providing the client services outlined in its management and consulting services agreements. The beneficiary's duties as stated in the initial petition and in response to the RFE included preparing annual budgets and scheduling expenditures, preparing training manuals and conducting training, making routine visits to the retail store that the petitioner directly operates to ensure that high quality services are maintained, and conducting au product training. While the beneficiary may be responsible for setting sales and operations policies for the stores the petitioner manages, the petitioner has not provided evidence that such duties require a significant of her time. Rather, the evidence indicates that the beneficiary spends the majority of her time performing non-qualifying operational, administrative, financial and first-line supervisory duties associated with operating retail stores. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

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). 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).

Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

The petitioner's organizational chart shows the beneficiary directly supervising five employees listed as "Sales Representatives." The job description for the employees given in response to the RFE was "[s]ales of cellular phones and services." This job description does not support a finding that the positions are professional level in nature. On appeal, counsel for the petitioner states that a number of the subordinates hold professional level degrees. 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'r 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 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 provided evidence that three of the sales representatives have obtained bachelor's degrees in the fields of kinesiology, behavioral science and law, respectively. In the instant case, the petitioner has not, in fact, established that a bachelor's degree in any of these diverse fields is actually necessary to perform the sales work of the beneficiary's subordinates.

When examining the managerial or executive capacity of a beneficiary, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

In the present matter, the totality of the record does not support a conclusion that the beneficiary will manage a function or manage subordinates who are supervisors, managers, or professionals. Instead, the record indicates that the beneficiary and her subordinates will perform the actual day-to-day tasks of providing the petitioning company's retail consulting services. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. Pursuant to section 101(a)(44)(A)(iv) of the Act, the beneficiary's position does not qualify as primarily managerial under the statutory definitions.

Based on the foregoing discussion, the petitioner has failed to establish that it will employ the beneficiary in a managerial or executive capacity and the appeal will be dismissed.

The appeal will be dismissed for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.