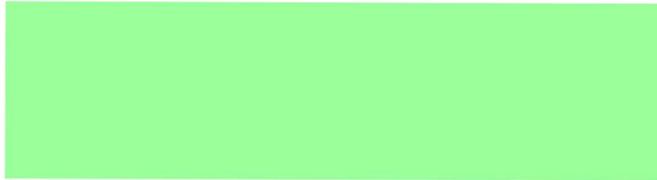




U.S. Citizenship
and Immigration
Services

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OFFICE: VERMONT SERVICE CENTER

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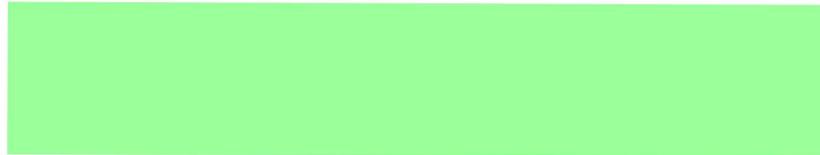
IN RE:

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, Vermont Service Center ("the director"), 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 the Form I-129, Petition for a Nonimmigrant Worker, 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 Florida corporation, is engaged in the business of furniture fabrication and sales. It claims to be an branch office of [REDACTED] the beneficiary's foreign employer in Ecuador. The petitioner is seeking to extend the beneficiary's L-1A status for an additional two years so that he may continue to serve in the position of President.

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 director denied the petitioner on January 15, 2013 for failure to respond to the director's RFE. USCIS, however, later reopened the record of proceeding after the petitioner submitted a motion to reopen showing that the petitioner had timely responded to the RFE. The director then denied the petition on February 27, 2014 on the evidence contained in both the initial submission and the petitioner's response to the director's request for additional evidence.

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 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.

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 on July 3, 2012. The petitioner indicated that it is engaged in the fabrication and sales of furniture with three employees and a gross annual income of \$250,000.

The petitioner stated that, as the President, the beneficiary is responsible for overseeing the company's development and growth by identifying and developing "tactical growth" opportunities. The beneficiary will also continue to manage the business flow, sales, and manufacturing. The petitioner provided a specific list of the beneficiary's duties as follows:

- A- **Management Planning (15%)**; Weekly meeting with the General Manager to approve staffing, operations with suppliers and external contractors and relations with banks and financial institutions. Develop company policies in the managerial area
- B- **Sales Planning of the business (10%)**; meeting monthly with sales supervisor, establishing goals, project and evaluation of processes.
- C- **Financial Projections of the company in the short, mid and long term (20%)**; follow-up of financial projects and goals.
- D- **Establish and Develop partnerships with other restaurants Distribution planning (20%)**; develop tactical growth opportunities for future investments, evaluating the market situation and convenience of material purchases, closing purchases or selling furniture.
- E- **Establish and Develop partnerships with other material suppliers (10%)**; attending furniture shows and related events to meet investors in the Ecuadorian-American community for the projects in Ecuador for the foreign partner company, traveling to Ecuador to meet foreign investors in Florida.
- F- **Member of the Board of Directors of the Foreign Partner Company, OSCAR MUEBLES LLC- (15%)**; Attend meetings with the board of directors every three months, keep informed about the company's businesses based on the review of both company's financial reports.

In support of the petition, the petitioner provided copies of its current lease, bank statements, a business plan, an organizational chart, Form 941 for 2012: Employer's Quarterly Federal Tax Return for the third quarter of 2012, and payroll documents.

The petitioner submitted an organizational chart showing the beneficiary as President. Reporting to the president is a General Manager, an Operational Manager and a Financial Manager. Reporting to the Operational Manager are a painter and a furniture seamstress. The petitioner included 2011 IRS Form W-2 Wage and Tax Statement for the beneficiary and the individual listed as the financial manager on the organizational chart. The beneficiary was paid a salary of \$15,600 and the financial manager was paid \$3,000. The petitioner also included a copy of a "1099 Summary" for 2011. The summary shows payments to four individuals totaling \$18,497. None of the individuals listed on the summary were listed on the organizational chart.

The petitioner also included copies of IRS Form 1040 including Schedule C, for the beneficiary and his wife in 2011. The form reflects \$18,600 in wages paid, consistent with the Forms W-2 issued by the petitioner. The petitioner's spouse, listed on the organizational chart as the financial director, also attached a Schedule C-EZ net profit from business showing a total of \$17,407 in profit from a housekeeping business located at [REDACTED]

The director issued a request for additional evidence ("RFE") which instructed the petitioner to submit, among other items, the following: (1) evidence supporting the number of employees; (2) a complete copy of 2011 business tax returns; (3) a list of U.S. employees identifying each employee by name, position title, and position description.

The petitioner submitted a letter in response, clarifying that the total number of employees is six. The petitioner stated that it has two employees on payroll, the beneficiary and his wife. The remaining four workers are treated as independent contractors. The store manager works on a part time basis, and three contractors work on an independent basis.

The petitioner also provided the name, title, and job description including weekly hours for the beneficiary and all employees under the beneficiary's supervision. The beneficiary is responsible for the following: supervising and controlling the work of the store manager; managing the work of the office administrator and approving budgets and spending decisions; and developing the goals and objectives of the company. The beneficiary spends 25 hours per week supervising the store manager's work; 15 hours per week reviewing productivity on a weekly basis; and 5 hours per week supervising the work of the office administrator.

The office administrator is responsible for the following: maintaining office services including preparing payroll, correspondence, filing systems, reviewing and approving supply requisitions; planning and implementing office systems and layouts; and preparing an annual budget. The store manager is responsible for supervising the work of the carpenters; researching the latest market trends; hiring and firing personnel; and giving status updates to the general manager. The carpenters are responsible for constructing, repairing, and installing woodwork and related materials.

The petitioner provided the requested tax return and IRS Forms 1099-MISC for each of the employees other than the beneficiary and his wife. The store manager was paid \$12,000 and the carpenters were paid \$1,040, \$1,970, and \$3,487 each.

The director ultimately denied the petition on February 27, 2014, finding that the petitioner had not established that the beneficiary will be employed in a managerial or executive capacity. The director determined that the petitioner did not appear to have sufficient staff to relieve the beneficiary of the day-to-day operations of the business. The director noted discrepancies in the number of employees and wages paid.

On appeal, the petitioner asserts that the beneficiary's position is primarily managerial in nature and that the director incorrectly concluded that the petition contained discrepancies in the number of employees and wages paid.

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.

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 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").

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. Duties such as responsibility for "the development of goals and objectives of the U.S. company," "supervise the store managers work," and "review and analyze the company's productivity," do not give a clear picture of what the beneficiary would actually be doing on a day-to-day basis as the General Manager of a furniture manufacturer and sales business. 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 provide any detail or explanation of the beneficiary's activities in the course of her daily routine. 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).

Furthermore, it is not clear who will be performing the actual duties associated with the claimed managerial tasks to be performed by the beneficiary. Primarily, the petitioner claims to be a furniture manufacturing and sales business, but does not appear to have anyone on payroll or otherwise to perform the sales function. Rather, it appears that the beneficiary will be tasked with performing the actual duties related to the running of the day-to-day operations of the business. 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

A critical analysis of the nature of the petitioner's business undermines counsel's assertion that the subordinate employees relieve the beneficiary from performing non-qualifying duties. Rather, it appears from the record that the only individuals available to perform the day-to-day tasks associated with running the furniture production and sales are the beneficiary, an office administrator, and a part time store manager. The petitioner claims that the office administrator works on a full-time basis, however, the employee was only paid wages of \$3,000 for the prior year, a salary not consistent with full-time work. Furthermore, the employee's tax return shows that she was also self-employed in a housekeeping business. This calls into question the full-time nature of the office administrator's employment with the petitioner. 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 (BIA 1988). Therefore, the evidence does not support a finding that the beneficiary is relieved on a full-time basis from performing the day-to-day tasks of the company.

In addition, the part-time store manager and carpenters are paid as independent contractors. The petitioner has not provided evidence of any contracts or agreements with these employees to show the nature of their services and the terms and conditions of their work for the petitioner. The petitioner has failed to show how these employees would perform the day-to-day tasks of the company and alleviate the beneficiary of non-qualifying duties. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998).

Therefore, it can only be assumed, and has not been proven otherwise, that the beneficiary is performing all other marketing functions, financials functions, sales functions, and operational functions associated with the business. Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. Again, 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. *Matter of Church Scientology International*, 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." See 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. See 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 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.

Though requested by the director, the petitioner did not provide the level of education required to perform the duties of the beneficiary's subordinate employees. Any 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). Thus, the petitioner has not established that these employees possess or require a degree, such that they could be classified as professionals. Nor has the petitioner shown that either of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. The payments made to the independent contractor for the year prior to filing seem to be for sporadic work at best. The petitioner has not demonstrated how the store manager supervises subordinate employees on a regular such that she could be considered a subordinate managerial employee. Furthermore, the store manager is only currently employed in a part-time basis. Therefore it can only be assumed that the beneficiary will supervise the carpenters when the store manager is not available. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

In addition, the job descriptions for the employees given in response to the RFE do not support a finding that the positions are professional level in nature. When evaluating whether the beneficiary manages professional employees, we 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).

The proposed position of the beneficiary is a General Manager of a furniture production and sales business that has only part-time or sporadic employees other than the beneficiary. The petitioner has not demonstrated

that the beneficiary, as a personnel manager, will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. See section 101(a)(44)(A)(ii) of the Act. Furthermore, the petitioner has not established that it will employ a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial duties.

When examining the managerial or executive capacity of a beneficiary, 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. 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 sales 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.

III. Beyond the Decision of the Director

Beyond the director's decision, the AAO observes that the petitioner did not indicate whether an export license is required, as instructed on page 5, Part 6 of the Form I-129. The instructions state, "If you do not completely fill out the form . . . you will not establish a basis for eligibility and we may deny your petition." See also 8 C.F.R. § 103.2(a)(1) (incorporating the instructions into the regulations). By completing Part 6 of the form, the petitioner certifies that it has reviewed the Export Administration Regulations and the International Traffic in Arms Regulations and determined whether it will require a U.S. Government export license to release controlled technology or technical data to the beneficiary.¹ By signing the Form I-129, the employer certifies under penalty of perjury that the information provided on the form is true and correct.

In the instant case, the petitioner failed to complete Part 6 of the Form I-129 and, thus it did not comply with the Form I-129 instructions. Accordingly, the petition was not properly filed and must be denied for this additional reason.

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).

¹ The Export Administration Regulations (15 C.F.R. § 770-774) and the International Traffic in Arms Regulations (22 C.F.R. § 120-130) require U.S. persons, including companies, to seek and receive authorization from the U.S. Government before releasing controlled technology or technical data to foreign persons in the United States. U.S. companies must seek and receive a license from the U.S. Government before releasing controlled technology or technical data to nonimmigrant workers employed as H-1B, H-1B1, L-1, or O-1A beneficiaries.

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.