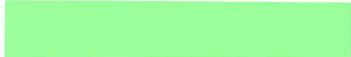


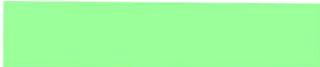
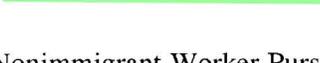


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JAN 16 2014 Office: CALIFORNIA SERVICE CENTER 

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:

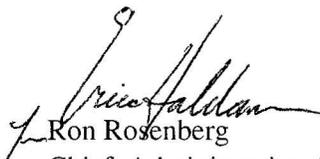


INSTRUCTIONS:

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 Administrative Appeals Office (AAO) subsequently rejected the petitioner's appeal. The matter is now before the AAO on a motion to reconsider. The AAO will grant the motion in order to reconsider the petitioner's appeal and the petition will remain denied.

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 is a California corporation, established in 2009, that is engaged in the sale and distribution of sporting goods and stationery products. The petitioner states it is a subsidiary of [REDACTED] located in China. The petitioner seeks to employ the beneficiary as its deputy general manager for a period of two years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary would be employed in a qualifying managerial or executive capacity.

The petitioner subsequently filed an appeal, which the AAO rejected as untimely filed. On motion, counsel asserts that the appeal should have been accepted as timely filed. Further, counsel contends that the petition was improperly denied because the petitioner established that the beneficiary will perform primarily managerial or executive duties.

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

In denying the petition, the director noted that the beneficiary's duty description was indicative of an employee performing primarily non-qualifying tasks related to providing goods or services. Further, the director stated that the petitioner had failed to substantiate the beneficiary's placement within its organizational structure and did not demonstrate that the business had sufficient employees to elevate the beneficiary to a position beyond that of a first-line supervisor of non-professional employees.

In the appeal and current motion, counsel emphasizes the beneficiary's managerial and executive experience abroad and his education. Counsel states that the beneficiary will supervise a subordinate who will conduct activities related to the operation of the business, including negotiations with customers, the administration and implementation of customer contracts, and other business transactions with key customers. Counsel contends that the director placed undue emphasis on the size of the petitioner's business and failed to take into account its reasonable needs and current stage of development. Finally, counsel suggests that the director failed to consider whether the beneficiary qualifies as a function manager.

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity.

A. Facts

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on September 18, 2012. The petitioner indicated on the Form I-129 that it has five employees. In a letter dated August 20, 2012, the petitioner described the beneficiary's proposed duties as Deputy General Manager as follows:

Sales and marketing:

[The beneficiary] will continue to spend 80% of his working time on establishing and developing [the petitioner's] sales channels and sales network in the United States, and marketing activities developed during this important 2nd year of operation. He will focus more of his attention on East coast market and put more energy in marketing and developing those big superstores, [redacted] are all his potential customers. He will spend more time in market research analysis the market trend and bring more and more valuable market information for our new products development program for the incoming 2013. Apart from this he will also takes steps in building up the relations with buyers of these stores and enable us to provide our products to these stores. Attending trade shows, meeting customers, collecting market information, going to difference places to meet buyers and customers, that will most [sic] part of his time. At the mean time will [he] will continue to be responsible for implementation and review of the company's sales to be responsible for implementation and review of the company's sales plans [sic], goals, and policies and marketing strategies. [The beneficiary] will continue to be responsible for creating business promotion programs and market development plans. He will continue to be responsible for managing and supervising internal and external market research and development, including feasibility studies and promotion of the company's core competitive products, overseeing and managing purchase orders. Managing activities of contractual

proceedings, including business and contract negotiation, administration and implementation of various contracts and related business transactions with key customers. [The beneficiary] will continue to negotiate and administer business contracts with many existing and new U.S. companies for office and school supply. Last but not least he will continue to be responsible for achieving and implementing all goals which are indicated above. . . .

* * *

Corporate:

[The beneficiary] will spend 10% of his working time on developing, establishing, and updating [the petitioner's] annual business policies, goals, plans and strategies. He will oversee and supervise financial and budget planning, market research, contract negotiation and business transactions. [The beneficiary] will be responsible for building business relationship with key customers and clients, suppliers, and logistics service companie[s], attending business meetings and conferences on U.S. government laws and regulations, [the beneficiary] will be responsible for managing and coordinating business operations with the headquarters in China in connection with import and export . . . and other related business activities. . . .

Finance:

[The beneficiary] will spend 5% of his working time on company's finance administration and financial investment programs, and will be participating for establishing short and long-range trading and financial investment plans and goals. [The beneficiary] will be participating for overseeing and managing banking, taxation and accounting activities, developing and implementing [the petitioner's] annual budget; overseeing and managing the company's cost and expenditures, preparing the annual business summary for the board of directors, adjusting and developing pricing schedules for office and school supplies and parts/components from vendors and supervising [the petitioner's] purchases from its headquarters or from other vendors.

Personnel Administration:

[The beneficiary] will spend 5% of his working time on personnel administration affairs, including hiring, firing, employee compensation and insurance issues. He will be responsible for directing and managing all company employees, including managerial, professional and support staff in the U.S. subsidiary, as well as contract sales representatives and other independent contractors.

The petitioner submitted a copy of its organizational chart, which depicts the beneficiary as Deputy General Manager, reporting to the company's General Manager. The chart identifies a sales manager, a customer service employee and a shipping & receiving employee who would report to the beneficiary. Finally, the

chart depicts positions for an Accounting Manager, “Big Ac. Manager” and Purchasing Manager as “to be hired.” The petitioner provided a copy of its Internal Revenue Service (IRS) Form 941, Employer’s Quarterly Federal Tax Return and California quarterly wage report for the second quarter of 2012 to corroborate the employment of the individuals identified in the chart.

The director issued a request for evidence (RFE) on September 24, 2012. The director asked that the petitioner provide a more detailed organizational chart along with the names, job titles, job duties, educational level and salary of all employees subordinate to the beneficiary.

In response, the petitioner provided an expanded organizational chart. The chart depicts the beneficiary as deputy general manager and briefly describes his duties as: “Sales and marketing; Supervise business performance, big customer exploring; Purchasing, quality control; Corporate management; personnel hiring, training and management; Financial Management.” The petitioner indicated that the beneficiary directly supervises the sales manager, customer service employee and a warehouse control employee (previously identified as “shipping & receiving.” The chart shows a “big account manager” and an accounting manager as “to be hired.” The final tier of employees includes: eight outside sales employees with different assigned geographic areas, who are described as 1099 employees; two warehouse staff also described as 1099 workers; and a tax filing accountant paid as a 1099 contractor. The chart includes a total of sixteen employees and contractors.

With respect to the beneficiary’s subordinates, the petitioner brief described their duties as follows: (1) the sales manager is responsible for inside sales, supervising outside sales representatives, and price strategies; (2) the customer service employee is responsible for inside sales, daily order processing, and documents filing; and (3) the warehouse control employee is responsible for shipping and receiving, quality control and customized labeling.

In a letter accompanying its RFE response, the petitioner explained that the initial organizational chart was intended to provide an overview of the company’s structure. It noted that “the nature of our business is involving a lot of outside sales representatives in different regions of the country and involve extensive managerial task in coordinating with the outside sales.” The petitioner further explained the beneficiary’s role as follows:

[The beneficiary] manages big customers and making policies according to the sales report from Sales reps and sales manager. Thanks to the efforts and management of [the beneficiary] the team has established a[n] efficient sales network throughout the country within 2 years. . . . [The beneficiary] is the one to summarize the daily sales and making strategic marketing plans to the general manager. [The beneficiary] spent so much time traveling to different states in participating different trade shows and events for developing new products and new customers.

Apart from involving directly in sales and marketing, [the beneficiary] also reviews and guide[s] the purchasing plan of the company. He keeps following up the company’s sales and giving advice in quality control. Buying smart is what he always kept in his mind. His

supervision to the finance and human resources also offered great help to the General Manager.

The director denied the petition on November 2, 2012, concluding that the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity. In denying the petition, the director determined that, based on the submitted job description and organizational chart, the beneficiary's role is comprised of non-qualifying duties associated with the sales and marketing of the company's products, as well as assisting in other day-to-day non-supervisory duties of the business. The director further determined that the beneficiary could not qualify for the benefit sought as a function manager because "the beneficiary is primarily involved in the performance of routine operational activities of the entity rather than in the management of a function."

In an appellate brief, counsel submitted the following additional explanation with respect to the beneficiary's duties in the United States:

To be more specific, through supervising the sales coordinator, [REDACTED], [the beneficiary] will continue to focus on establishing and developing [the petitioner's] sales channels and sales network in the United States as well as marketing activities developed during the 3rd year of operation. As mentioned earlier, [the beneficiary] has nurtured good business relationships with many important purchasers in American Market in his early business operation in China. He will spend much of his time to make policies to build up and develop close and long-run cooperation with big retailers and wholesalers on the East Coast Market such as [REDACTED] etc., to position the company's product direction.

Through supervising company market coordinator, [REDACTED], [the beneficiary] will macro-control and examine the implementation and review of the company's sales policies and plans, create business promotion programs and market development plans. [The beneficiary] will be responsible, by supervising [REDACTED] to conduct activities of contractual proceedings, including business and contract negotiation, for the administration and implementation of various contracts and related business transactions with key customers.

B. Analysis

Upon review, the petitioner has not established that the beneficiary will employed in a qualifying managerial or executive 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 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).

The petitioner has submitted two conflicting duty descriptions for the beneficiary thereby leaving question as to the type of duties the beneficiary will primarily perform. The petitioner submitted a lengthy description of the beneficiary's duties at the time of filing which indicated that 80% of his time would be allocated to sales and marketing responsibilities, the majority of which were described in terms that are non-supervisory and non-managerial in nature. For instance, the duty description states that the beneficiary will be engaged in, "attending trade shows, meeting customers, collecting market information, going to difference [*sic*] places to meet buyers and customers, that will [take up the] most part of his time." The petitioner further stated that the beneficiary will be performing market research and market data collection, and performing other duties associated with sales and marketing. While the petitioner submitted an organizational chart indicating that the company employs a sales manager, her duties were described simply as "Inside sales, Supervise outside sales representatives for their performance; Price strategies."

However, in the duty description submitted on appeal, the petitioner states that the beneficiary will delegate several non-qualifying sales and marketing functions to the sales manager (who is also referred to as "sales coordinator" or "marketing coordinator"). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Due to this material discrepancy between the two duty descriptions, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager or executive. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Further, the petitioner did not attribute any marketing, purchasing, quality control or day-to-day financial administration tasks to any subordinate employees, despite indicating that the beneficiary would supervise these areas of the company.

Finally, many of the beneficiary's remaining duties, such as: reviewing the company's sales plans, goals, and policies and marketing strategies; developing, establishing, and updating annual business policies, goals, plans and strategies; overseeing and supervising financial and budget planning; contract negotiation and business transactions; and participating in establishing short and long-range trading and financial investment plans and goals are overly vague and provide little probative value as to the beneficiary's actual day-to-day activities. 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. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. *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). Overall, the petitioner's descriptions of the beneficiary's duties are comprised of a mix of overly general and non-qualifying duties.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company'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 business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The statutory definition of "managerial capacity" allows for both "personnel managers" and a "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).

The petitioner has provided evidence that it employs a sales manager, a warehouse or shipping/receiving employee, and a customer service employee subordinate to the beneficiary. On the petitioner's original organizational chart, none of these employees was depicted as supervising subordinate employees. Further, the petitioner has failed to submit any evidence to corroborate its claimed employment of the eleven additional contractors mentioned in response to the director's RFE, such as the petitioner's referenced IRS Forms 1099, documentation of wages paid, or other documentary evidence supporting the regular engagement of eleven contractors. Therefore, the record does not support the petitioner's claim that the beneficiary's subordinates are supervisors. 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).

In fact, the petitioner has submitted business documents bearing the names of the sales manager and customer service employee which suggest that these employees are performing operational duties, and not those consistent with supervisors, managers or professionals. Also, the beneficiary's originally submitted duties state that the beneficiary will be primarily engaged in the performance of non-qualifying sales and marketing duties. Although the beneficiary is not required to supervise personnel, if it is claimed that his or 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.

Additionally, counsel states that the beneficiary will act as a "functional manager" by leading the marketing efforts of the company. 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 written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish 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. 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).

In this matter, the petitioner has not provided sufficient evidence to establish that the beneficiary manages an essential function. First, the petitioner has not articulated with specificity the function managed by the beneficiary. Further, as noted, the evidence indicates that the beneficiary is likely to primarily perform non-qualifying operational duties associated with sale and marketing. Additionally, as previously mentioned, the petitioner has also not established that the company has sufficient operational employees necessary to relieve the beneficiary from primarily performing non-qualifying duties. Indeed, the job description submitted at the time of filing suggested that the beneficiary was primarily engaged in non-qualifying operational duties. As such, the petitioner has not established with sufficient evidence that the beneficiary qualifies as a function manager.

Counsel correctly observes that 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). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the facts asserted are true. *See Systronics*, 153 F. Supp. 2d at 15.

The director based his decision, in part, on the petitioner’s failure to establish that it had sufficient employees to relieve the beneficiary from performing operational duties. However, the director also correctly noted that the petitioner’s description of the beneficiary’s duties included primarily non-qualifying duties. As such, counsel’s assertion that USCIS has inappropriately considered the size of the petitioner’s business in reaching a conclusion is not persuasive.

As discussed, the petitioner has not provided a sufficiently detailed job description for the beneficiary, has not submitted adequate evidence to establish that the beneficiary will primarily perform executive or managerial duties, has not provided adequate evidence of subordinate managers or supervisors to relieve the beneficiary from performing non-qualifying first-line supervisory and operational duties, and has not sufficiently documented its claimed organizational structure. Therefore, the petitioner has not established that the beneficiary will be employed in an executive or managerial capacity.

While the petitioner indicates that it intends to hire additional employees in the future and submitted a business plan with profit and loss projections for the years 2013 through 2017, the petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm’r 1971).

For the foregoing reasons, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity. Accordingly, the petition cannot be approved.

III. Conclusion

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 motion to reconsider is granted. The petition is denied.