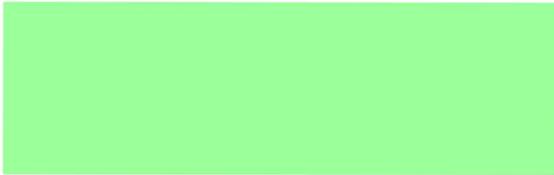


(b)(6)

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

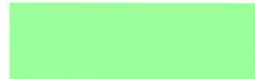


JUN 11 2014

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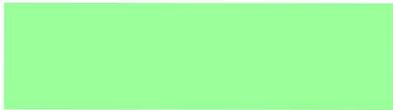
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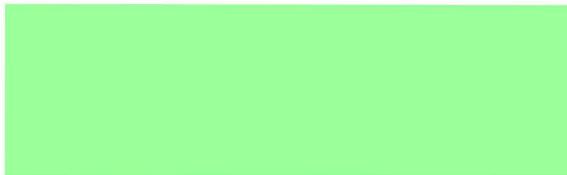
Petitioner:

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

www.uscis.gov

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 is a California limited liability company that operates as a retail coffee shop. The record shows that the petitioner is an affiliate of [REDACTED] Ltd., located in Nepal. The petitioner has now filed this nonimmigrant visa petition seeking to extend the beneficiary's employment in the position of chief executive officer (CEO) for an additional two years 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 director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a managerial or an 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.

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.

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. FACTS AND PROCEDURAL HISTORY

The record shows that the petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on September 23, 2013. Included among the petitioner's supporting evidence was a statement, dated September 20, 2013, signed by the beneficiary in his capacity as the petitioner's CEO. The statement indicated that the beneficiary would be employed in an executive capacity and included the following list of what the petitioner deemed to be the beneficiary's daily executive functions:

- Continue to setup [sic] U[.]S[.] Operations and achieve expanded business objectives[.]
- Handle Business Development and provide strategic business directions to the organization[.]
- Hiring, Firing, Supervision, leave Approvals of Executive and Managers[.]
- Meet the organizations [sic] business and financial goals and objectives[.]
- Lead, Oversee, Direct and Supervise development of new business, maintaining existing business.
- Coordinate and supervise submission of business proposals/presentations, [sic] bidding new business[.]
- Conducting review meetings, status meetings and updating the progress to clients.
- Supervising business development and setting organization/department goals.
- Performance review and appraisals of the Senior Management.
- Oversee, direct and supervise the U[.]S[.] Operations, Market Research and rapidly developing the company's operations.
- Lead the U[.]S[.] Operations and be exclusively responsible for the functional management and leadership of all the sales and business development activities of the business while reporting directly to the Board of Directors.

The petitioner also provided the following percentage breakdown depicting the beneficiary's proposed role within the petitioning organization:

Policy Making, Review and Planning of Strategy (20%):

- Review company's product lines per competitor's market, [sic]
- Develop future sales growth activities and identify common trends for improvement; [sic]
- Develop Annual Sales Plan[.]

- Develop Long Term and Short Term Business Development Policy and objectives of the Marketing[.]
- Plan sales, market and customer strategies; [sic]
- Plan and identify critical gaps, sales growth for upcoming years and implement strategies, processes and changes required to remedy the situation; [sic]
- Develop and implement Business Processes for both entities.

Department Meetings and Interaction with Managers and Executives (20%):

- Decision making Meetings and Interactions with COO, CFO, and Senior Management; [sic]
- Direct, Supervise and Interact with Senior Management on [a] periodic basis.

Networking (10%):

- Attend industry seminars; participate in industry trade shows and symposia and Network with potential business growth.
- Network and common industry providers to analyse [sic] and execute market-industry trends, competitors and lead sales strategies; [sic]

Management Reporting (20%):

- Participate in Board meetings, High Level company meetings, and policy level meetings for reporting to the Board of Director[s]; [sic]
- Presentation and discussion of [the] Company's Annual Business Plans and Policies, Business Development Processes, Annual Performance & Financial Metrics with Senior Management and formulate strategies.

Supervising (15%):

- Supervising the COO, CFO and Senior Management and executives, time tracking, leave approvals, etc.

Hiring and Firing (15%):

- Hiring and firing Managers and Executives etc.

The petitioner's supporting statement also included a copy of its organizational chart for 2013, depicting the beneficiary at the top of the staffing hierarchy with the chief operations officer (COO) as his immediate subordinate. The chart further showed a store manager as the COO's direct subordinate, and four baristas, at the bottom tier of the hierarchy, as the store manager's subordinates.

Lastly, in the concluding paragraph of the supporting statement, the petitioner indicated that the beneficiary's executive functions would include heading and managing marketing and sales activities, managing all staff at the U.S. and Nepal retail locations, managing the petitioner's finances, approving sales orders and "any

special requirements related to sales orders," and informing the board of the petitioner's growth as well as any "fund raising initiatives for product division."

On October 4, 2013, the director informed the petitioner that the record lacked sufficient evidence to establish that it and the beneficiary were eligible for the nonimmigrant visa petition sought herein. The director specifically pointed to the previously provided job description as one of the deficiencies. Accordingly, the director issued a request for evidence (RFE) asking the petitioner to submit, in part, a supplemental job description pertaining to the beneficiary's proposed employment in the United States. The director also instructed the petitioner to provide evidence of the wages paid to its employees during the beneficiary's employment in a qualifying managerial or executive capacity.

The petitioner's response to the RFE included a statement from counsel, dated October 10, 2013, in which counsel reiterated the list of the beneficiary's daily executive functions and percentage breakdown, which were identical in content to the information that was previously included in the petitioner's initial supporting statement. Counsel also addressed the petitioner's organizational hierarchy, stating that the petitioner's COO resigned on September 30, 2013, approximately one week after the petition was filed. Counsel indicated that the petitioner was in the process of hiring a new COO and adding an operations and a marketing manager to its organizational hierarchy. Counsel also provided a job description for the petitioner's store manager and concluded the statement by emphasizing the petitioner's relatively short period of operation in the United States and its continued effort to add more retail stores to its operation.

Additionally, the petitioner also provided an updated organizational chart, showing an organizational hierarchy that consisted of six employees since the departure of the petitioner's COO. Lastly, the petitioner provided a copy of its 2013 third quarterly tax return, which shows that the petitioner employed, at most, five employees during the entire third quarter, which included September 2013 when the petition was filed.

On October 23, 2013, the director issued a decision denying the petition based on the finding that the petitioner failed to provide sufficient evidence to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The director pointed out that the petitioner provided two identical job descriptions in support of the petition and in response to the RFE, respectively, despite the RFE's finding that the original job description was insufficient to warrant approval of the petition. The director also found that several of the beneficiary's job duties were not consistent with the statutory criteria for managerial or executive capacity. Lastly, the director determined that the store manager, whom the beneficiary was directly overseeing at the time of the RFE response, was not a professional employee, thus indicating that the beneficiary was overseeing the work of a non-professional subordinate, which is inconsistent with the statutory criteria for managerial capacity.

On November 12, 2013, U.S. Citizenship and Immigration Services (USCIS) received the petitioner's appeal disputing the director's decision. In a supplemental appellate brief, counsel for the petitioner asserts that the petitioner continues to expand its U.S. operation, despite the various vacancies within its organizational hierarchy and the recent resignation of its chief operations officer, whom the petitioner is seeking to replace.

Upon review, and for the reasons stated below, we find that the petitioner has failed to establish that the beneficiary will be employed in a primarily managerial or an executive capacity.

III. THE ISSUE ON APPEAL

The sole issue addressed by the director is whether the petitioner established that it will employ the beneficiary in a managerial or an 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 petitioner's description must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* 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. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Beyond the required description of the job duties, we review the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that may contribute to a complete understanding of the beneficiary's actual job duties and role in a business.

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

We also note that the statutory definition of the term "executive capacity" focuses on a person's elevated position within an organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

While the definition of "executive capacity" does not require the petitioner to establish that the beneficiary supervises a subordinate staff comprised of managers, supervisors and professionals, it is the petitioner's burden to establish that someone other than the beneficiary carries out the day-to-day, non-executive

functions of the organization. Here, the beneficiary has not been shown to be employed in a primarily executive capacity. Despite the petitioner's claims, the petitioner failed to demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than on its day-to-day operations. As discussed above, while the petitioner listed various executive tasks in the beneficiary's job description, the petitioner was overly vague and failed to explain how the beneficiary would carry out certain executive tasks with the staffing composition that was in place at the time the petition was filed. 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.).

In the instant matter, the petitioner's responses to the RFE and to the denial have included the same job description that the petitioner originally submitted in support of the petition and which the director previously deemed to be insufficient when reviewing it prior to the issuance of the RFE. While the petitioner broadly lists job duties that appear to fit the definition of managerial or executive capacity, several portions of the job description are overly generalized and are seemingly inconsistent with the petitioner's staffing and with the type of business the petitioner operates. For instance, in the section discussing department meetings and interaction with managers and executives and the section with the heading "supervision," which cumulatively comprise 35% of the beneficiary's time, the petitioner indicated that beneficiary would interact with and oversee the work of the "COO, CFO, and Senior Management" and executives. However, looking at the staffing structure depicted in the petitioner's organizational chart, the organization did not employ a CFO, nor does the chart clarify which of the remaining employees would be deemed "senior management" or an executive. Although the record shows that the petitioner has consistently employed a store manager to oversee the baristas who serve the café customers, it is not clear that a store manager is considered to be a "senior management" or "executive."

The petitioner also made a vague reference to the beneficiary's responsibility to hire and fire "Managers and Executives[,] etc." There is no evidence, however, that the beneficiary has, in fact, allocated 15% of his time to this responsibility as claimed. At the time the petition was filed, the petitioner's organizational chart showed that the petitioner was staffed with the beneficiary in the position of CEO, a COO, a store manager, and four baristas. This staffing composition remained until the COO resigned only one week after the petition was filed. Despite the beneficiary's desire to expand the organization and hire additional staff, as is indicated in the organizational chart submitted with the appeal, that same chart shows that the petitioner still lacked a COO at the time of the appeal and was still looking to fill four other management positions, including a human resources/administrative manager, an operations manager, and a sales and marketing manager. The fact that these positions remained vacant and certainly had not been filled at the time the petition was filed indicates that the petitioner had no basis upon which to claim that 15% of the beneficiary's time would be devoted to hiring and firing managerial or executive employees. Moreover, it is unclear who, other than the beneficiary himself, was available to carry out the operational tasks that would otherwise have been assigned to a human resources/administrative manager, an operations manager, and a sales and marketing manager if those positions had been filled when the petition was filed.

While no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988). In the present matter, significant portions of the beneficiary's job description contain vague statements without any clear discussion of how the beneficiary would supervise and oversee individuals and non-qualifying job duties with a staff which, at the time of filing, consisted of the beneficiary, a COO who resigned one week after the petition was filed, one store manager, and four baristas. Based on this staffing composition, it appears inevitable that the beneficiary has and would continue to perform non-qualifying operational tasks in order to ensure the successful operation of the petitioner's business.

Furthermore, in reviewing the petitioner's staffing, the record contains inconsistent evidence. Specifically, while the Form I-129 and corresponding organizational chart, which the petitioner submitted in support of the petition, show that the petitioner claimed to have seven employees at the time of filing, the petitioner's 2013 third quarterly federal tax return shows that the petitioner employed no more than five people at any time during that entire quarter. The record contains no follow-up evidence to establish precisely which positions were filled by, at most, five employees. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In addition, the petitioner claimed that part of the beneficiary's policy- and strategy-making role is to "plan sales, market and customer strategies." In a brief list of the beneficiary's daily executive functions, the petitioner also stated that the beneficiary would oversee and direct market research, which is an operational task. However, the record does not indicate that the petitioner employed any marketing employees to actually conduct the market research at the time the petition was filed. In the absence of employees to fulfill the petitioner's marketing needs, it is reasonable to assume that the beneficiary himself would conduct the market research and perform any other marketing tasks as may be necessary.

Further, while the beneficiary's current management of a managerial employee – the café manager who oversees the work of other subordinates – relieves the petitioner from having to establish that the beneficiary's direct subordinate is also a professional employee, contrary to the director's finding, it is not clear that a single store manager would provide the support needed to allow the beneficiary to focus his time primarily on the performance of non-qualifying operational tasks. Section 101(a)(44)(A)(ii) of the Act. The record contains no information as to the café operating hours. However, in order for the beneficiary to be relieved from having to assume the role as store manager and oversee the work of nonprofessional employees, the current manager would have to be present not only during all times when the café is open for business, but also during the preparation stage, directly prior to the café's daily opening, and during the clean-up stage, after the store closes for the day. The record does not contain sufficient evidence to establish that the petitioner was adequately staffed at the time of filing, or following the date of filing, to relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying tasks.

Despite evidence in the record, which indicates that the petitioner plans to expand its current one-store operation by opening a second store at another location, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248

(Reg. Comm. 1978). As such, neither the prospective positions that the petitioner is looking to fill within its organizational hierarchy, or the additional café the petitioner seeks to purchase can be considered in determining whether the petitioner and the beneficiary were eligible at the time of filing.

As discussed above, due to the extremely vague position descriptions provided for the beneficiary and the lack of a supplemental job description delineating the beneficiary's specific executive tasks within the context of its business model and staffing at the time of filing, it remains unclear whether the beneficiary would be relieved from performing non-qualifying administrative and operational duties. The petitioner has not established that a single café operation has a reasonable need for a chief executive officer.

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

IV. 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 appeal is dismissed.