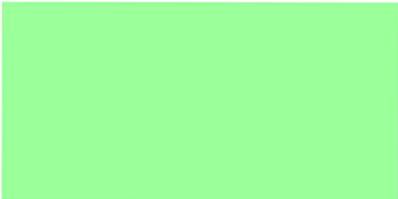




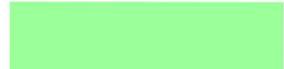
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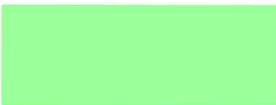


DATE: **JUN 11 2014** OFFICE: CALIFORNIA SERVICE CENTER

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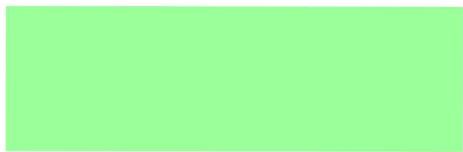


IN RE: Petitioner:  
Beneficiary:



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)

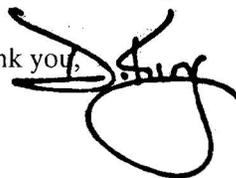
ON BEHALF OF PETITIONER:



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, 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, a California corporation, states that it operates in the United States as a fabric retailer and a commercial trucking enterprise. The petitioner is an affiliate of [REDACTED] located in India. The petitioner seeks to employ the beneficiary as its president/CEO for a period of three years.<sup>1</sup> Accordingly, 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 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. On appeal, counsel for the petitioner asserts that the director failed to consider the totality of the evidence and instead focused on the beneficiary's job description in determining that the beneficiary's proposed position with the petitioning U.S. entity would not be in a qualifying managerial or executive capacity. Counsel's brief along with other relevant supporting evidence will be considered in the discussion below.

### 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.

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<sup>1</sup> On the Form I-129 the petitioner indicated that it sought to extend the beneficiary's period of employment from June 26, 2013 until June 25, 2016, which is a term of three years. However, counsel's supporting statement, dated June 13, 2013, indicated that the petitioner sought to extend the beneficiary's status for an additional two years. As the petitioner's wishes regarding the desired period of extended stay are expressly conveyed in the petition, counsel's inconsistent claim with regard to the issue of the beneficiary's extended period of stay will not be considered.

- (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 petition was filed on June 17, 2013. The petitioner indicated on the Form I-129 that it had four employees and a negative net annual income of \$104,317.00. In support of the petition, the petitioner provided a statement, dated June 10, 2013, which included the following description of the beneficiary's proposed employment as president of the petitioning entity:

As President, [the beneficiary] remains responsible for the general administration of the entire corporation ensuring the development as set forth in the comprehensive business plan developed for [the petitioner]. It is his role to ensure that each facet of the operation is operational, and able to generate enough profit to sustain itself with the goal of eventually branching out to additional retail stores and commercial holdings mirroring our Headquarter. As the driving force for establishing our foundation, [the beneficiary] continues to develop comprehensive sales and marketing strategies based on client demand, market trends and current and future projections.

As before, he remains responsible for formulating and executing a working budget and financial analysis with the help of certified professionals, reporting directly back to the parent company in India. He continues to formulate goals and policies while overall maintaining responsibility for the smooth operation of the business. He continues to exercise sole authority to hire and discharge our employees and engage contractors as necessary and otherwise commit company resources as necessary. [The beneficiary] continues to exercise wide latitude in making decisions about the goals and management of this developing U[.]S[.] corporation.

For the trucking enterprise in particular, [the beneficiary] handles all broker negotiations, vetting opportunities and procuring orders and overseeing the company's drivers to provide load status. He remains responsible for ensuring [that the petitioner] remains in compliance

with all tax and licensing requirements. He maintains discretionary decision making authority over the day-to-day operations of the sales and marketing of both [REDACTED] and the trucking component as well as is solely responsible for verifying closing reports and deposits and the reconciliation of the company bank accounts.

The petitioner claimed to have hired a total of six employees since commencing its business operation. The petitioner further noted that the beneficiary is responsible for "managing the productivity" of a subordinate staff, which was described as "not of a professional nature."

On July 1, 2013, the director issued a request for evidence (RFE), finding that the supporting evidence the petitioner initially submitted was not sufficient to warrant approval of the petition. The director instructed the petitioner to submit, *inter alia*, a statement explaining the beneficiary's past and proposed job duties in the United States and a statement describing the petitioner's staffing. The director stated that the petitioner's previously submitted statement was insufficient due to its lack of a detailed job description.

In response, the petitioner provided a statement, dated September 11, 2013, in which the petitioner indicated that the beneficiary's role has "shifted slightly due to the hiring of an assistant, sales clerks and drivers who assist with the day to day operations of the store and trucking enterprise" and further provided the following job description of the beneficiary's proposed job duties:

. . . [the beneficiary] remains fully engaged in overseeing both [trucking and fabrics businesses] and has sole discretion to take actions directly affecting both operations. This includes formulating company goals and policies, purchasing and control of store inventory, determining the appropriateness of implementing customer promotions and sales, sets the hours for staff, reviews the company books and reports directly back to India. He reconciles accounts for the trucking operation, negotiates and contracts with freight brokers for individuals loads and trucking routes, interacts with the dispatcher and load broker as well as government entities to ensure all regulations are being followed. [The beneficiary] remains responsible for running payroll and overall responsibility for maintaining business records. As President, he continues to maintain the authority to hire and discharge employees and employ contractors where necessary. These duties are undertaken while he pursues other opportunities aimed to growing the Company.

The petitioner also provided its first quarterly wage report for 2013 showing that during the months of January, February, and March of 2013, the petitioner had three, four, and two employees, respectively.

On October 2, 2013, the director issued a decision denying the petitioner's Form I-129, concluding that the petitioner failed to provide sufficient evidence and information to support the conclusion that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The director therefore determined that an approval of the petition was not warranted.

### 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.

Although U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, the petitioner's description of the beneficiary's proposed job duties is a key focus of the review. *See* 8 C.F.R. § 214.2(l)(3)(ii). Published case law supports the emphasis placed on a detailed job description, given the crucial role of specific job duties in revealing the true nature of the beneficiary's 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). The petitioner's description of the job duties 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. *Id.* Beyond the required description of the job duties, we consider other relevant factors, 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 a beneficiary's actual duties and role within an organization.

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 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").

In the present matter, the petitioner claims that the beneficiary's proposed position will be in an executive capacity. 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.*

The job descriptions offered to support the petitioner's claim do not establish that the beneficiary would allocate his time primarily to the performance of qualifying managerial- or executive-level tasks. While the petitioner offers sufficient information to establish that the beneficiary will exercise discretionary authority over the U.S. company and assume the top-most position within the organization as its president and CEO, considerable portions of the job descriptions offered initially in support of the petition and subsequently in response to the director's RFE are comprised of vague statements that seemingly paraphrase the statutory definition of executive capacity, but fail to reveal the specific underlying tasks the beneficiary would perform. For instance, while both job descriptions stated that the beneficiary will formulate goals and policies, the petitioner does not expand on these vague statements with a list of the specific tasks that represent the beneficiary's policy- and goal-making role. The original job description also states that the beneficiary would be responsible for "the general administration of the entire corporation" and making sure that "each facet of the operation is operational, and able to generate enough profit to sustain itself." While assuming responsibility for a company's "general administration" is the role of any individual who assumes the top-most position within a company's organizational hierarchy, the underlying tasks within the category of "general administration" can vary widely company to company, depending on an organization's size and the type of business it operates. Here, the petitioner did not specify which actual daily tasks represent "general administration" within the petitioner's specific organizational hierarchy and business model. Similarly, it is every business's goal to become profitable and self-sustaining. Thus, merely indicating that the beneficiary will work to make the petitioner profitable and self-sustaining fails to establish which duties the beneficiary will perform within the context of the petitioner's specific organizational makeup to achieve this broad goal.

Next, while the petitioner indicated that the beneficiary would "develop comprehensive sales and marketing strategies," which is indicative of the beneficiary's executive role, the record lacks evidence to establish that the petitioner was, at the time of filing, equipped with a sales and marketing staff to carry out the strategies the beneficiary develops. Where a petitioning entity lacks an adequate supporting staff, it is reasonable to assume that the beneficiary would absorb the staffing deficiency by actively participating in the execution of the underlying duties that are required to implement the strategies he sets. It cannot be assumed that the beneficiary is somehow relieved from having to perform the duties associated with sales and marketing without evidence on record establishing who, other than the beneficiary, is available to carry out the underlying sales and marketing tasks. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). While the job description offered in response to the RFE somewhat continues to address the beneficiary's role in sales in marketing by stating that the beneficiary establishes "customer promotions and sales," this claim still does not clarify who, if not the beneficiary, carries out the underlying marketing and sales tasks, which would be deemed operational rather than executive or managerial in nature.

In addition, the petitioner indicated that the beneficiary's proposed position would involve the performance of non-qualifying operational tasks. Specifically, the initial job description offered in support of the petition indicated that the beneficiary would engage in negotiations with brokers, secure orders, and oversee the work of non-professional employees. Although the petitioner provided a follow-up job description in response to the RFE, it remains unclear what portion of the beneficiary's time would be allocated to these non-qualifying tasks. In fact, the latter job description indicates that the beneficiary would continue to reconcile accounts for the trucking operation, engage in contract negotiations with freight brokers, and interact with the dispatcher

and load broker, none of which have been established as fitting the criteria of qualifying tasks performed in an executive or managerial capacity.

Further, analyzing the beneficiary's job descriptions in light of the petitioner's staffing and organizational hierarchy, the qualifying capacity of the beneficiary's proposed employment is ambiguous. Due to the lack of clarity in defining the beneficiary's specific job duties, it is doubtful that the petitioner's limited staffing which, at the time of filing, consisted of only three subordinate employees, was sufficient to relieve the beneficiary from having to allocate his time primarily to the performance of non-qualifying operational tasks. Depending on a petitioner's organizational complexity and support staff, the beneficiary's tasks can vary widely from the highly specialized executive tasks, which may be the beneficiary's focus in a developed organization with an adequate support staff, to consisting primarily of daily operational tasks, which may be required of a beneficiary in the scope of a more simple organizational hierarchy where a potentially limited subordinate staff cannot offer the beneficiary the support that is necessary to enable him or her to focus their time primarily on the performance of executive or managerial tasks.

Here, as previously discussed, the petitioner failed to discuss its staffing and organizational hierarchy despite the director's RFE instructions expressly asking the petitioner to provide this highly relevant information. 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). Instead of the requested information, the only evidence the petitioner provided with regard to its staffing consists of a quarterly wage statement, which indicates that the petitioner had a total of four employees, including the beneficiary, at the time of filing. The petitioner did not include a discussion of the job duties those employees performed or the positions they assumed within the petitioner's organizational hierarchy. Thus, in considering this lack of evidence within the context of the beneficiary's deficient job description and the various non-qualifying job duties that the petitioner readily attributed to the beneficiary's proposed position, there is little evidence to support the claim that the beneficiary's proposed position with the petitioning entity would be comprised primarily of tasks within a qualifying executive capacity as claimed.

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). Even when a petitioner is able to establish that the beneficiary will perform tasks at a professional level, the petition would not warrant approval unless the beneficiary's professional tasks rise to the level of managerial or executive capacity. Where, as in the present matter, the petitioner provides a deficient description of the beneficiary's proposed employment and combines that deficiency with evidence of a minimal support staff, it cannot be concluded that the beneficiary would devote his time primarily to performing tasks within a qualifying managerial or executive capacity.

Counsel's references to our unpublished non-precedent decisions is not persuasive, given that counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. Furthermore, while 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly

binding and thus will not be treated as guiding precedent. Additionally, counsel's focus on the petitioner's reasonable needs is misplaced, as the petitioner's reasonable needs will not supersede the statutory and regulatory provisions that require the petitioner to establish that the beneficiary would primarily carry out job duties within a qualifying managerial or executive capacity. Where the reasonable needs are such that will require the beneficiary to primarily engage in the performance of non-qualifying operational tasks, the beneficiary cannot be said to meet the statutory criteria.

In addition, despite claiming that the director "misapplie[d] controlling law and facts," counsel submitted little evidence to support this assertion. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). In reviewing the director's decision, it is unclear which facts the director may have misconstrued or which laws she misapplied. While the director admittedly placed great emphasis on the beneficiary's job description, the discussion above goes into great detail not only about the specific deficiencies of the job description, but also the deficient evidence that failed to establish that the petitioner had an adequate organizational hierarchy and staffing structure to support the beneficiary in a qualifying executive capacity at the time the petition was filed. Despite counsel's claim that the petitioner remains in an early stage of development, there are no regulatory provisions that permit the petitioner longer than the initial one-year period in new office status. *See* 8 C.F.R. § 214.2(l)(1)(ii)(F). Beyond the petitioner's first year of operation, the petitioner must be ready to employ the beneficiary in a qualifying managerial or executive capacity. Having reviewed the totality of the circumstances in the matter at hand, we find that the petitioner remains in an early stage of development where its organizational hierarchy and general lacks the human resources to support the beneficiary in a primarily qualifying executive or managerial capacity. Therefore, the record supports the director's adverse conclusion and the petition cannot be approved.

Lastly, the AAO does not have jurisdiction to consider matters concerning the petitioner's request for extension of status, which was filed concurrently with the petitioner's Form I-129 petition. Therefore, this decision cannot address the director's decision to deny the request for extension of status, which was also dated October 2, 2013.

#### 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.