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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



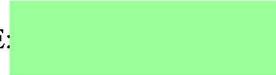
U.S. Citizenship  
and Immigration  
Services



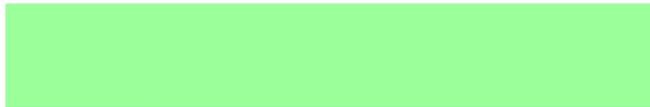
DATE: **JUN 30 2014**

OFFICE: CALIFORNIA SERVICE CENTER

FILE:

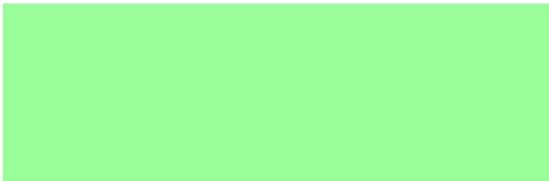


IN RE: Petitioner:  
Beneficiary:



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

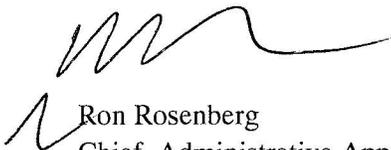
ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

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 AAO will withdraw the director's decision and remand the matter to the service center for further review and issuance of a new decision.

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, a California corporation established in June 2013, states that it operates an international forwarding and logistics business. The petitioner claims to be a subsidiary of [REDACTED] located in [REDACTED] China. The petitioner seeks to employ the beneficiary as the president of its new office in the United States.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary was employed in a qualifying managerial or executive capacity at the foreign entity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner contends that the director's decision is erroneous in that she misinterpreted the facts and misapplied the law. Counsel submits a brief and additional evidence in support of the appeal.

#### I. THE LAW

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) further provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
  - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
  - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
  - (3) The organizational structure of the foreign entity.

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. THE ISSUE ON APPEAL

The sole issue addressed by the director is whether the petitioner has established that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

On the Form I-129, Petition for a Nonimmigrant Worker, where asked to describe the beneficiary's duties abroad for the three years preceding the filing of the petition, the petitioner briefly stated that the beneficiary reports to the board of directors, manages the company's operation, sets the goals and policies, and manages the budget.

In support of the petition, the petitioner submitted a "statement regarding [the beneficiary's] job and her responsibilities" abroad from [REDACTED] the chairman of the board of directors of the foreign entity. The chairman's statement described the beneficiary's position at the foreign entity by stating that she is responsible for developing the strategies, approaches and policies of the foreign entity, developing operation plan, internal structure and protocols of the foreign entity, and coordinating their implementation through Vice General Manager [REDACTED]. The chairman also stated that the beneficiary regularly attends meetings where the managers of her departments report their operations and current issues. She also attends the board of director's yearly meeting to report the profit and loss of the previous year and propose the current year's financial plan, including bonuses to be paid out to her subordinate managers and their lower-level employees.

The petitioner submitted an organizational chart for the foreign entity depicting the beneficiary as general manager, reporting to the board of directors. According to the chart, the beneficiary directly supervises the deputy general manager, [REDACTED]. The deputy general manager, in turn, supervises a secretary, [REDACTED], an accounting manager, [REDACTED], an export and import manager, [REDACTED], a customs manager, [REDACTED], and a warehouse manager, [REDACTED]. The organizational chart does not list any subordinates to the deputy general manager's subordinate positions.

The petitioner also submitted a document listing all of the foreign entity's employees and brief responsibilities for their positions.

The director issued a request for additional evidence ("RFE") on September 16, 2013, instructing the petitioner to submit evidence that the beneficiary's position abroad was in a managerial or executive capacity.

The petitioner submitted a second "statement regarding [the beneficiary's] position and her duties (revised)" abroad from [REDACTED] the chairman of the board of directors of the foreign entity. The revised statement describes the beneficiary's position abroad almost identical to the previous statement and adds percentages of time spent on specific duties. The petitioner also submitted the same organizational chart and list of employees for the foreign entity.

The director denied the petition on October 4, 2013, concluding that the petitioner failed to establish that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity. In denying the petition, the director found that the duties described are more indicative of an employee who will be performing the necessary tasks to provide a service or produce a product. The director further found that, based on the organizational structure and job descriptions for the beneficiary and her subordinates provided, the petitioner failed to establish that the beneficiary's position abroad is primarily not assisting in the performance of the day to day non-supervisory duties of the business and that the performance of those tasks precludes the beneficiary from being considered a manager or executive.

On appeal, counsel for the petitioner states that the beneficiary is atop the foreign entity's organizational chart, supervising a vice general manager, who, in turn, supervises five managers, who then supervise 20 first-line workers. Counsel further states that the petitioner is employed in an executive capacity abroad and references the same organizational chart and list of employees, including their duties, as previously submitted with the petition and again in response to the RFE. Counsel contends that the director's statements about the beneficiary's duties relating to attending meetings and reading and listening to reports are erroneous as someone performing those tasks must hold an executive position within the company. Counsel further contends that the beneficiary is not providing a service or producing a product of the foreign entity as none of her tasks relate to the actual day to day activities of the foreign entity, nor would someone at the lower level of providing a service or producing a product perform the duties described for the beneficiary. Counsel submits a new letter from [REDACTED] the chairman of the board of directors of the foreign entity, listing the lower level employees subordinate to the manager of the import and export department, manager of the custom department, manager of the warehouse, and the manager of the accounting department.

Upon review, counsel's assertions are persuasive. The AAO finds sufficient evidence to establish that the beneficiary has been primarily performing the duties of a manager or executive with the foreign entity.

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). Contrary to the director's observations, the petitioner has provided a comprehensive description of the beneficiary's duties with the foreign entity, as well as those of her subordinates, sufficient to establish that her duties are primarily related to the management of the petitioner's business, and not to producing a product, providing a service, or performing other non-managerial functions. The evidence submitted also establishes that the beneficiary supervises and controls the work of subordinate managerial or supervisory professional employees and

exercises authority to hire and fire employees under her supervision. *See* sections 101(a)(44)(A)(ii) and (iii) of the Act.

Furthermore, the AAO disagrees with the director's conclusion that the beneficiary's job duties – specifically those listed in the denial – are not consistent with those typically performed by someone in a managerial or executive position. Counsel addresses this issue on appeal and sufficiently explains that the department managers report information to the beneficiary, as the general manager, and the beneficiary evaluates the information and makes decisions on policies and goals for each department based on that information.

While the beneficiary will undoubtedly be required to apply her expertise to perform some high-level operational duties, the AAO is persuaded that the beneficiary's subordinates at the foreign entity carry out the majority of the day-to-day non-qualifying tasks required to operate the business. The petitioner need only establish that the beneficiary devotes more than half of her time to managerial or executive duties for the foreign entity. The petitioner has met that burden, and the AAO will withdraw the director's decision with respect to this issue.

### III. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

Although the director's decision will be withdrawn, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity within one year of approval of the new office petition.

On the Form I-129, where asked to describe the beneficiary's proposed duties in the United States, the petitioner stated the following:

[The beneficiary] will be in charge of the company's all corporate and management matters, including budgeting, cash flows, marketing, operation and hiring. [The beneficiary] will make the strategies, polices [*sic*] and goals for the company and oversees them to be implemented.

[The beneficiary] will report to the board of directors of [the petitioner], which is, in turn, controlled by the board of directors of [the foreign entity]. All other employees will report to [the beneficiary].

In support of the petition, the petitioner submitted a letter from [redacted] secretary of the U.S. company, describing the beneficiary's proposed position in the United States identical to the description provided on the Form I-129. The petitioner submitted a resolution of the board of directors of the foreign entity, dated May 20, 2013, naming the beneficiary as the "director and president" of its subsidiary U.S. company.

The petitioner also submitted a business plan with a proposed organizational chart depicting the beneficiary as president supervising a secretary, and what appear to be three departments: office, operations, and sales. Within the office department, there is an "HR & Admin" position; within the operations department, there is a "domestic trading," "international trading," and "logistics" position; and there are no positions listed under the sales department. The business plan also provides an "operation plan" with an embedded staffing plan. It appears that the petitioner plans to hire a secretary in the first six months, a salesperson, an operations person,

and an administrator within the following six months, two salespersons and 1-2 customer service persons the following six months, and two operations persons and the rental of a warehouse the following six months. The same business plan includes a chart with an estimated number of employees for the first two years of the U.S. company, showing a president and secretary the first six months, the addition of a salesperson the following six months, the addition of an operations person the next six months, and the addition of a second salesperson, and administrator, and a customer service person the following six months.

The petitioner did not submit any additional information about the beneficiary's proposed position in the United States.

Upon review, and for the reasons stated herein, the petitioner has not established that it would employ the beneficiary in a qualifying managerial or executive capacity within one year of commencing operations in the United States.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by U.S. Citizenship and Immigration Services (USCIS) regulation that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of low-level activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed in that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(1)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

On review, the petitioner's brief description of the beneficiary's duties fails to establish that the beneficiary will be engaged in either a primarily managerial or primarily executive position. The description provided on the Form I-129 is broad and vague and does not paint a clear picture of the beneficiary's duties that will elevate her to a position that is managerial or executive in nature. The petitioner did not provide any further description of the beneficiary's duties or that of her planned subordinates to demonstrate that she will be relieved from performing primarily non-qualifying duties within one year of the commencement of operations. 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 his 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).

Overall, the position description alone is insufficient to establish that the beneficiary's duties will be primarily in a managerial or an executive capacity, particularly in the case of a new office petition where much is dependent on factors such as the petitioner's business and hiring plans and evidence that the business will grow sufficiently to support the beneficiary in the intended managerial or executive capacity. The petitioner has the burden to establish that the U.S. company will realistically develop to the point where it will require the beneficiary to perform duties that are primarily managerial or executive in nature within one year. Accordingly, the totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period.

In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. The petitioner is required to describe the nature of the office, the anticipated scope of the entity, its proposed organizational structure and its financial goals. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements. In its business plan, the petitioner provided information on its staffing plan for the U.S. company in two separate sections. However, the two brief descriptions of the staffing plans are not consistent with each other. As such, it is impossible to determine, based on the inconsistent staffing plan, the lack of position descriptions or job duties for each of the beneficiary's subordinates, and the vague and brief description of the beneficiary's proposed position, that the beneficiary would be relieved from performing non-qualifying duties within one year of commencing operations. The regulations require the petitioner to present a credible picture of where the company will stand in one year, and to provide sufficient supporting evidence in support of its claim that the company will grow to a point where it can support a managerial or executive position. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary will perform the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary will *primarily* perform these specified responsibilities and will 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 owns and 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").

Based on the evidentiary deficiencies addressed above, the AAO cannot conclude that the beneficiary will be employed in a qualifying managerial or executive capacity within one year of the approval of the new office petition. For this reason, the petition cannot be approved.

#### IV. CONCLUSION

At this time, the AAO takes no position on whether the beneficiary qualifies for the classification sought. The director must make the initial determinations on this issue. So far, the director has not done so. Therefore, the AAO will remand this matter to the director for a new decision. The director should request any additional evidence deemed warranted and allow the petitioner to submit such evidence within a reasonable period of time. 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 petitioner has not met that burden.

**ORDER:** The director's decision dated October 4, 2013 is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing discussion and entry of a new decision, which, if adverse to the petitioner, shall be certified to the Administrative Appeals Office for review.