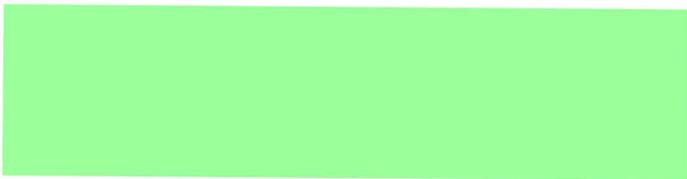


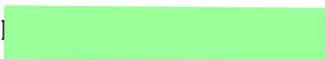


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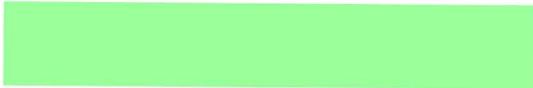
(b)(6)



DATE: **MAR 26 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 matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's status 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, is engaged in the wholesale rug business. The petitioner states it is a wholly owned subsidiary of [REDACTED] located in Pakistan. The petitioner currently employs the beneficiary in the capacity of general manager and seeks to extend his L-1A status for a period of two years.

The director denied the petition, concluding that the petitioner did not establish that it would employ the beneficiary in a qualifying managerial or 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. On appeal, counsel contends that the petitioner spends more than half of his time performing managerial duties, and as a result, acts in a qualifying managerial capacity. Counsel also asserts that the beneficiary holds specialized knowledge of the company's products and services and therefore qualifies as holding specialized knowledge as defined by 8 C.F.R. § 214.2(l)(1)(ii)(D).

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.

Finally, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

II. The Issue on Appeal

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

In denying the petition, the director found that the submitted organizational chart, and the other supporting evidence related to the petitioner's organizational structure, failed to demonstrate that the petitioner has sufficient employees to relieve the beneficiary from primarily performing non-qualifying operational duties. The director also concluded that the beneficiary did not qualify as a manager through his supervision of subordinate professionals. The director noted that the petitioner failed to submit duty descriptions and educational credentials for the beneficiary's claimed professional subordinates.

On appeal, counsel contends that the petitioner has established that the beneficiary spends a majority of his time performing managerial duties and that this is demonstrated by his detailed duty description and the beneficiary's supervision of two subordinate managers, an accountant and "four blue collar workers." Counsel also asserts that the beneficiary "manages an essential function" of the organization. Counsel requests that the beneficiary's visa be extended "to allow the company full growth potential."

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.

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). In support of the Form I-129 Petition for a Nonimmigrant Worker, the petitioner explained the beneficiary's duties as general manager as follows:

As a general manager of [the petitioner] [the beneficiary] will establish company policies and be responsible for overall management. He will oversee the day to day operations, analyze financial reports and the companies [sic] activities to maximize profit and established [sic] long term goals and direct supervise [sic] managerial staff.

The director concluded that the initial evidence submitted by the beneficiary did not demonstrate that the beneficiary would act in a qualifying managerial or executive capacity and issued a request for evidence (RFE). The director requested that the petitioner submit a more detailed description of the beneficiary's duties in the United States, including the percentage of time required to perform the duties of the position.

In response, the petitioner provided the following description of the beneficiary's duties in the United States:

1. Manages overall organization; including but not limited to
 - a. Reporting Activities to Parent Company
 - b. Final Fiscal Decision Making
 - c. Plan, Organize, Direct & Control the Organization's Major Functions by Delegating and Working Through Other Managerial/Professional Employees in the US and Abroad
 1. **25% of time**
2. Manages an essential function of the organization- Import & Export Control, which is the main focus of the Parent, as well as the Subsidiary Company
 1. **25% of time**
3. Has authority to Hire/Fire employees, and Recommend Personnel Actions, all Human Resource type activity, including Personnel contracts and disputes
 1. **15% of time**
4. Exercise discretion over daily operations of the activity or function, performing strictly on a managerial/executive function, as day laborers are to be managed by the abovementioned. (e.g. Manages Accountant, who has a professional degree in Accounting, but yet must still answer to the abovementioned)
 - a. Overseeing preparation of sales and marketing reports
 - b. Reviewing and analyzing sales data
 - c. Establishing and implementing policies to manage and achieve marketing goals
 - d. Reviewing budgets and Expense Reports
 1. **25% of time**
5. Responsible for reviewing and seeking additional retail and wholesale locations in the United States
 1. **10% of time**

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).

Upon review, the duty descriptions submitted for the beneficiary do not demonstrate that he will primarily perform qualifying managerial or executive duties.

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 duties offered by the petitioner, such as reporting activities to the parent company, having "final fiscal decision making," managing import and export control, recommending personnel actions, establishing and implementing policies to manage and achieve marketing goals, reviewing budgets and expense reports, and reviewing and seeking additional retail and wholesale locations are overly vague and provide little probative value as to the beneficiary's actual day-to-day activities. The duties and the evidence of record generally include no specific examples or documentation to substantiate the beneficiary's claimed duties. Further, the petitioner does not specifically describe any fiscal decisions made by the beneficiary, the specific duties encompassing import and export control, personnel actions undertaken by the beneficiary, policies established or implemented through the beneficiary's actions, or budgets and expense reports reviewed by the beneficiary. It is reasonable to expect that the petitioner would provide some detail regarding the actions or accomplishments of the beneficiary in the United States, particularly considering that he has been acting in this capacity since 2008. 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. Overall, the petitioner has failed to provide any detail or explanation of the beneficiary's proposed 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).

Beyond the required description of the job duties, United States Citizenship and Immigration Service (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.

In the RFE, the director requested that the petitioner submit a detailed U.S. organizational chart indicating the company's current hierarchy and staffing levels, including a listing of all employees and their names, job titles, educational levels, salaries and a summary of their duties. In response, the petitioner submitted an organizational chart reflecting that the beneficiary had the following subordinates: (1) [REDACTED]

[REDACTED] - accountant, and (4) four "blue collar workers used for deliveries, stocking, and manual labor."

The petitioner has not submitted sufficient evidence to establish that the petitioner has operational employees necessary to relieve the beneficiary from primarily performing non-qualifying operational duties. First, the director requested that the petitioner submit names, job titles, duty descriptions, and educational levels for each employee. Here, the petitioner has failed to provide duty descriptions or education levels for any of its employees, beyond noting that the accountant position requires a "professional degree in accounting." The petitioner also failed to identify the four "blue collar workers" listed in the organizational chart and did not corroborate their employment with any supporting evidence. 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). As such, although the petitioner has submitted state and federal employer tax return documentation supporting the employment of the accountant, sales manager and operations manager, the petitioner has provided no supporting evidence to demonstrate the existence of lower-level employees performing non-qualifying operational duties. Further, the petitioner also declined to submit job duty descriptions for the named subordinate workers, therefore, the AAO cannot determine whether they relieve the beneficiary from performing non-qualifying duties associated with the petitioner's day-to-day operations. 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)).

In a support letter submitted in response to the director's RFE, the petitioner stated that the beneficiary plans, directs, and controls the organization's "major functions by delegating and working through other managerial/professional employees in the US and abroad." The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(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)(ii)(B)(3).

In the instant case, the petitioner has not submitted sufficient evidence to demonstrate that the beneficiary acts as a personnel manager. First, as previously noted, the petitioner has submitted an incomplete organizational chart which does not fully indicate the names, duty descriptions, and educational levels of its employees, as requested by the director. The organizational chart also does not indicate that any of the beneficiary's subordinates have subordinates of their own. Indeed, the record reflects that the "four blue collar workers" report directly to be the beneficiary. Also, as noted, the petitioner has not provided duty descriptions for the operations manager and sales manager to corroborate whether they act as managers or supervisors other than in position title. Therefore, the petitioner has not demonstrated that the beneficiary qualifies as a personnel manager through his supervision of other managers or supervisors. Again, as stated above, 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)(ii)(B)(2).

The petitioner has also not demonstrated that the beneficiary supervises professionals, as this term is defined by the regulations. Contrary to the assertion of counsel, the director's analysis of whether the beneficiary's subordinates qualify as professionals was not "a tangent." In fact, it was the petitioner who asserted in response to the director's RFE that the beneficiary "work[ed] and delegate[ed] through other managerial/professional employees." In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Here, the petitioner merely states that the subordinate accountant "has a professional degree in accounting." The petitioner provides no explanation of the educational credentials required for each position, the specific educational credentials held by these employees, and does not submit any supporting evidence to establish the education of the beneficiary's subordinates. Again, 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

On appeal, counsel also contends that the petitioner has shown that the beneficiary manages the "essential function" of "import and export control," thereby suggesting that he qualifies as a function manager. 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 clearly describe 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988)).

In this matter, the petitioner has not demonstrated that the beneficiary will manage an essential function. The petitioner has not clearly described the nature of the essential function he will manage, or articulated its essential nature, but only vaguely stated that the beneficiary will manage "import and export control." Further, the submitted evidence does not establish that the beneficiary devotes a majority of his time to managing this essential function nor does it establish who performs the non-qualifying duties associated with this function.

Additionally, counsel states on appeal that the petitioner has not developed as envisioned "due to slow economic growth," and that the "beneficiary has not been able to extend the same duties which he had abroad." Counsel asserts that USCIS should extend the beneficiary's visa to allow the company "full growth potential." The record reflects that this is the petitioner's third request for an extension of the beneficiary's L-1A status, which was originally granted in February 2008. Therefore, the petitioner has already been afforded the opportunity to develop as necessary to support the beneficiary in a qualifying managerial or executive capacity. The record shows that the petitioner employed only the beneficiary for the first half of 2012 and only recently hired subordinate staff. USCIS is under no obligation to grant an extension of the visa based merely on the prospect of unexplained development potential of the petitioner. 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'r 1978).

Additionally, counsel cites *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472, n.5 (5th Cir. 1989), and *Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, 1573 (N.D. Ga. 1988), to stand for the proposition that the small size of a petitioner will not undermine a finding that a beneficiary will act in a primarily managerial or executive capacity. First, the AAO notes that counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *National Hand Tool Corp.*, where the Fifth Circuit Court of Appeals decided in favor of the legacy Immigration and Naturalization Service (INS), or *Mars Jewelers, Inc.*, where the district court found in favor of the plaintiff. With respect to *Mars Jewelers*, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

In both *National Hand Tool Corp.* and *Mars Jewelers, Inc.*, the courts emphasized that the former INS should not place undue emphasis on the size of a petitioner's business operations in its review of an alien's claimed managerial or executive capacity. The AAO has interpreted the regulations and statute to prohibit discrimination against small or medium-size businesses. However, consistent with both the statute and the holding of *National Hand Tool Corp.*, the AAO has required the petitioner to establish that the beneficiary's position consists of primarily managerial or executive duties and that the petitioner will have sufficient personnel to relieve the beneficiary from performing operational and/or administrative tasks. As previously discussed, the petitioner has not submitted sufficient evidence to sustain this burden. Like the court in *National Hand Tool Corp.*, we emphasize that our holding is based on the conclusion that the beneficiary is not

primarily performing managerial duties; our decision does not rest on the size of the petitioning entity. 889 F.2d at 1472, n.5.

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, supervisors, or operational employees to relieve the beneficiary from performing non-qualifying first-line supervisory and operational duties, and has not provided sufficiently documented its claimed organizational structure. Therefore, the petitioner has not established that the beneficiary will be employed in an executive or managerial capacity. For this reason, the appeal must be dismissed.

Although not previously asserted by the petitioner or addressed in the director's decision, counsel states on appeal that the petitioner has submitted sufficient documentation to establish that the beneficiary has specialized knowledge of the company's product, service, research, and equipment, thereby qualifying the beneficiary as holding specialized knowledge as defined by 8 C.F.R. § 214.2(l)(1)(ii)(D).

The petitioner's request to amend the petition from L-1A to L-1B classification on appeal will not be considered. USCIS will only consider the visa classification that the petitioner indicates on the petition. The petitioner clearly indicated that it sought an extension of the beneficiary's previously approved L-1A petition and status. The request to reconsider the original petition on appeal as a petition for L-1B specialized knowledge classification is, therefore, rejected. If the petitioner wishes to classify the beneficiary as an L-1B specialized knowledge worker, it must file a new petition with the appropriate filing fee and supporting evidence.

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 appeal is dismissed.