



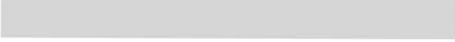
U.S. Citizenship  
and Immigration  
Services

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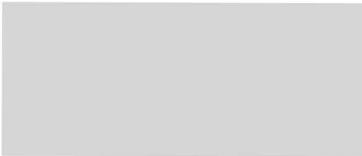
DATE: **AUG 21 2015**

PETITION RECEIPT #: 

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:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page ([www.uscis.gov/i-290b](http://www.uscis.gov/i-290b)) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, initially approved the petition for a nonimmigrant visa. On further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with a notice of her intention to revoke (NOIR) the approval of the petition, and her reasons therefore. The director ultimately revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Delaware limited liability company that is engaged in the retail and wholesale of men's clothing. The petitioner seeks to employ the beneficiary in the position of clothing and customer service manager. Therefore, the petitioner filed this nonimmigrant petition seeking to employ 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 record shows that the petition was approved on April 17, 2014.

Notwithstanding the approval of the petition, the director issued an NOIR and ultimately revoked the petition's approval on November 24, 2014 based on findings from a site visit, which resulted in the director's conclusion that the petitioner failed to establish that the beneficiary's position with the U.S. entity would be in a qualifying managerial or executive capacity.

### **I. Basis for Revocation**

We turn first to the basis for the director's revocation, and whether this basis provided the director with sufficient grounds for revoking the L-1A petition on notice under the language at 8 C.F.R. § 214.2(l)(9)(iii)(A).

Under U.S. Citizenship and Immigration Services (USCIS) regulations, the approval of an L-1A petition may be revoked on notice under six specific circumstances. 8 C.F.R. § 214.2(l)(9)(iii)(A). To properly revoke the approval of a petition, the director must issue a notice of intent to revoke that contains a detailed statement of the grounds for the revocation and the time period allowed for rebuttal. 8 C.F.R. § 214.2(l)(9)(iii)(B).

In the present matter, the director provided a detailed statement of the grounds for the revocation. The director reviewed the rebuttal evidence submitted by the petitioner and its counsel and concluded that the petitioner had not established that the beneficiary was employed in a primarily managerial capacity. The director revoked the approval under 8 C.F.R. § 214.2(l)(9)(iii)(A)(2), noting that the beneficiary is no longer eligible under section 101(a)(15)(L).

Upon review, we find that the basis specified for the revocation action in the instant matter is a proper ground for such action. The director's statements in the NOIR regarding the evidence indicating that the beneficiary is not employed in the capacity specified in the Form I-129 were adequate to notify the petitioner of the intent to revoke the approval of the petition in accordance with the provision at 8 C.F.R. § 214.2(l)(9)(iii)(A)(2).

As will be evident in the discussion below, we find that, fully considered in the context of the entire record of proceedings, the petitioner has not credibly established that the beneficiary is employed by the petitioner in a primarily managerial capacity. The documents submitted in response to the NOIR and on appeal fail to effectively rebut and overcome the basis for revocation specified at 8 C.F.R. § 214.2(l)(9)(iii)(A)(2). Accordingly, the appeal will be dismissed, and approval of the petition will be revoked.

## II. 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.

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.

In addition, 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.

### III. Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on April 7, 2014. In support of the petition, the petitioner provided two statements, both dated April 4, 2014, as well as ten supporting exhibits pertaining to the beneficiary's foreign and U.S. employers and the beneficiary's respective positions therein. Exhibit 5 contains the petitioner's organizational chart, which depicts the entity's hierarchy at or around the time the petition was filed. The chart shows a chief financial officer heading an administration department and a store manager overseeing three other departments: clothing, retail, and bespoke. The beneficiary is depicted as the clothing department's clothing and stock specials manager. The chart does not show any employees, other than the beneficiary, in the clothing department.

USCIS records indicate that the petition was approved on April 17, 2014.

On September 15, 2014, the director issued an NOIR, informing the petitioner of the observations made during a USCIS administrative site visit and the adverse findings that resulted therefrom. Namely, the director reiterated information that the beneficiary and the petitioner's vice president provided during the site visit with regard to the beneficiary's job duties. Based on the site inspector's observations of the beneficiary's tasks, the site inspector concluded that the proposed employment would not be primarily within a qualifying managerial or executive capacity.

The petitioner responded by submitting a statement, dated September 29, 2014, addressing the issues raised in the NOIR. The petitioner also provided an updated organizational chart showing that two additional employees – a clothing/bespoke assistant and a stock control employee – had been hired since the filing of the petition.

On November 24, 2014, the director issued a decision revoking the previously issued approval of the petition. The director determined that the petitioner had not submitted sufficient evidence to overcome the adverse findings based on the site inspector's visit to the petitioner's store, thus concluding that the beneficiary's U.S. employment would not be in a qualifying managerial or executive capacity.

The petitioner filed an appeal seeking to overturn the director's decision.

Based on our own comprehensive review of the record and for the reasons provided in our discussion below, we find that the petitioner has failed to overcome the chief basis for denial. While we have considered all evidence that has been submitted into the record, we will specifically reference only those submissions that are relevant to the beneficiary's proposed position with the U.S. entity.

#### **IV. The Issue on Appeal**

As indicated above, the primary issue to be addressed in this decision is whether the beneficiary's current position with the petitioning U.S. entity is in a qualifying managerial or executive capacity.

As a threshold matter, we note that USCIS regulations allow the director to revoke the approval of an L-1A petition at any time, even after the petition expires. 8 C.F.R. § 214.2(l)(9)(i). Further, the regulations stated that the petition may be revoked on notice if the director determines that the alien is no longer eligible under section 101(a)(15)(L) of the Act. 8 C.F.R. § 214.2(l)(9)(iii)(A)(2). To properly revoke the approval of a petition, the director must issue a notice of intent to revoke that contains a detailed statement of the grounds for the revocation and the time period allowed for rebuttal. 8 C.F.R. § 214.2(l)(9)(iii)(B). As indicated above, the director complied with the regulatory requirements prior to issuing a final notice of revocation.

Next we will address the merits of the director's decision and the supporting evidence the petitioner submitted with regard to the nature of the beneficiary's employment in the United States.

We generally commence our analysis of the beneficiary's U.S. employment by looking first to the petitioner's description of the beneficiary's job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The job description

must clearly describe the job duties to be performed and indicate whether such duties are in either an executive or a managerial capacity. *Id.* Published case law has determined that the duties themselves will reveal 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). We then consider the beneficiary's job description within the context of other relevant factors, including the petitioner's organizational structure and the existence of in-house or contractual support personnel capable of relieving the beneficiary from having to allocate his time to primarily non-qualifying operational tasks. These factors contribute to a comprehensive understanding of the beneficiary's daily tasks and his prospective role within the petitioning organization.

Turning first to the job description contained within the petitioner's initial supporting statement, we note that the petitioner stated that the beneficiary would be responsible for marketing and retail activities as well as customer service and relations. While the petitioner claimed that these various responsibilities constitute an essential function, no further information was provided to establish the specific tasks the beneficiary would carry out in meeting his responsibilities and who would actually carry out the underlying marketing and customer service-related tasks associated with maintaining "responsibility" over these broad categories. The petitioner further stated that the beneficiary "will continue to oversee the day-to-day operations of the Clothing Department and the general operations of the flagship store." However, a review of the petitioner's organizational chart, which was also submitted at the time of filing, shows that the petitioner had a general store manager to whom the beneficiary, as the petitioner's clothing department manager, would be subordinate. In other words, it is seemingly inconsistent to say that the beneficiary would have general oversight of the flagship store when the organizational chart expressly indicates that there was already a manager at a higher level within the petitioner's organizational hierarchy, who was depicted as broadly overseeing the store, while the beneficiary's position was depicted as pertaining more specifically to the activities within the clothing department.

Although the petitioner provided a more detailed job description in its NOIR response, which contains an hourly breakdown of the beneficiary's position, the information provided does not establish that the beneficiary allocates his time primarily to qualifying tasks that are indicative of managing a function. Namely, the hourly breakdown provided by the petitioner indicates that the beneficiary allocates approximately 6.5 out of nine hours, or 72% of his time, to dealing with store customers and resolving complaints, preparing and presenting sales reports, and overseeing a staff of sales people and other unspecified staff, whom the evidence of record does not establish as being supervisory, managerial, or professional employees. In addition, the petitioner stated that the beneficiary's marketing-related responsibilities involve conducting product knowledge seminars to sales personnel at various high-end department stores.

With regard to the adverse findings made as a result of the USCIS site inspection, the petitioner explained that "[t]he confusion of duties" resulted from a store employee mistakenly telling the site inspector that the beneficiary was located in the bespoke department coupled with the fact that the beneficiary's work desk shares its location with bespoke, which has its own manager, [REDACTED] whose job duties are entirely separate from the job duties of the beneficiary, who manages a different department. The petitioner further claimed that the beneficiary only helps out on the sales floor during busy times, as is

common in "any small retail operation," and that he spends the majority of his time "deal[ing] with problem orders" and using his discretionary authority to resolve those problems. Lastly, the petitioner pointed to its updated organizational chart, which included the two additional employees – one sales assistant and one stock control employee – whom the petitioner hired after filing the petition.

On appeal, the petitioner continues to assert that the beneficiary is and has been employed in a qualifying managerial or executive capacity. The petitioner points to statements offered by Ms. [REDACTED] who indicated that in addition to being responsible for the petitioner's marketing and retail activities, managing customer service and relations, and overseeing the store's daily operations, the beneficiary also monitors the store's inventory and supplies and assists in the coordination and maintenance of store displays. As previously indicated, these broad statements do not provide sufficient insight into the beneficiary's actual day-to-day job duties and they likewise do not overcome the factual account of the USCIS site inspector as to the events witnessed during the time of the site visit. The petitioner further emphasizes that the circumstances on the date of the site inspection were unique in that the store was busier than usual due to a summer sale, which resulted in an "unusually heavy" demand on the beneficiary's time. The petitioner did not, however, submit evidence to corroborate the claims it made as to the reasons why the beneficiary had to carry out sales-related tasks, nor did the petitioner distinguish between the sales-based tasks the beneficiary performed on the day of the claimed summer sale and the job duties that were part of the beneficiary's previously submitted job descriptions, which indicated that dealing with store customers and resolving complaints is a standard part of the beneficiary's position with the petitioning entity. 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)).

Next on appeal, the petitioner points to a typographical error that appeared on page two of the NOIR, wherein the director referred to the petitioner as an online journalism company. We note, however, that the director subsequently spotted the error, as apparent by the fact that she referred to the petitioner's proper business purpose on the third page of the notice of revocation, subsection "Terms and Conditions of the Approved Petition."

With regard to the beneficiary's daily job duties, the petitioner repeated the time and percentage breakdown of job duties as previously provided in the NOIR response statement, pointing out that only 37.5% of the beneficiary's time is spent overseeing and assisting sales persons, thus establishing that these job duties do not constitute the beneficiary's primary function. While the petitioner is correct in reasoning that no single component of the beneficiary's job should serve as the basis for an adverse finding, we must consider the totality of the evidence, which means taking into account the total amount of time the beneficiary allocates to the non-qualifying tasks, rather than considering each job duty independently of all other assigned duties. In other words, while 37.5% may not be the majority of the beneficiary's time, we must take into account any other non-qualifying tasks that are incorporated into the beneficiary's daily list of tasks. It is the petitioner's burden to establish that the beneficiary's total time spent carrying out non-qualifying operational and/or administrative tasks is not greater than the time allocated to tasks within a qualifying managerial or executive capacity. As discussed above, we find that the job

description provided in this instance falls short of establishing that the beneficiary allocates his time primarily to performing tasks within a qualifying capacity.

Further, if a petitioner claims that the beneficiary is managing an essential function, as the petitioner does in the matter at hand, that petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *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)).

As indicated in the analysis provided above, we find that the petitioner has not provided sufficient evidence to establish that the underlying duties of the function the beneficiary manages have been carried out by someone other than the beneficiary himself. While the NOIR response contains an updated organizational chart showing the petitioner's two recently hired employees, whose positions are depicted as being directly subordinate to the beneficiary, this evidence is not relevant to the issue of whether the beneficiary was eligible for this nonimmigrant visa at the time the petition was filed, as these employees were not part of the petitioner's organization at the time of filing. 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). Therefore, notwithstanding the beneficiary's discretionary authority and his top placement within the clothing department of the petitioner's organization, we find that the petitioner has not provided sufficient evidence to overcome the site inspector's adverse determinations.

Furthermore, we find that, independent of the site inspector's determinations, the evidence of record indicates that the beneficiary's position with the petitioning entity focuses heavily on the beneficiary's customer relations and requires the beneficiary to make "himself available on a daily basis to customers as needed."<sup>1</sup> The record also indicates that the beneficiary performs other non-qualifying operational tasks as discussed above. When we consider the cumulative effect of this information, we can only conclude that the beneficiary allocates his time primarily to performing tasks that are outside the realm of what is deemed to be within a qualifying managerial or executive capacity and on the basis of this conclusion we find that the approval of this petition was properly revoked.

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<sup>1</sup> Appeal Brief, p. 5.



**V. 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. The approval of the petition remains revoked.